No. 92918-1
Court of Appeals No. 72141-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARREN MORRIS-WOLFF,

Petitioner.

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

PETITION FOR REVIEW

SARAH M. HROBSKY
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Darren Morris-Wolff, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Morris-Wolff requests this Court grant review of the decision of the Court of Appeals, No. 72141-1-I (February 1, 2016). A copy of the decision is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The trial court instructed the jury that violation of a court order "may or may not be a 'crime against a person' depending on the facts and circumstances of the violation," for purposes of the offense of residential burglary. The Court of Appeals ruled that whether a court order violation is a crime against a person is a question of law. Does this ruling conflict with other decisions of the Court of Appeals regarding a question of law and raise an issue of substantial public interest that should be determined by this Court?

2. Mr. Morris-Wolff asserts the court's instruction that violation of a court order "may or may not be a 'crime against a person'" was an improper comment on the evidence. A court comments on the evidence when it provides jury instructions that single out and emphasize a contested issue, or that underline or buttress one party's theory of the case.

The Court of Appeals applied narrower criteria, stating "[t]he question is whether the challenged jury instruction either communicates to the jury the court's attitude toward the merits of the case or resolves a disputed factual issue." Does the Court of Appeals' adherence to the narrower criteria conflict with other decisions of this Court and the Court of Appeals regarding the proper criteria for determining whether a jury instruction is a judicial comment on the evidence, involve a significant question of law under the Washington Constitution, and raise an issue of substantial public interest that should be determined by this Court?

3. In rebuttal argument, the prosecutor argued facts not in evidence on two occasions and Mr. Morris-Wolff objected on both occasions. The trial court overruled the first objection and sustained the second objection. After the jury was sent to deliberate, Mr. Morris-Wolff requested a curative instruction, which was denied. Does the Court of Appeals ruling that the request for a curative instruction was untimely conflict with other decisions by this Court and the Court of Appeals regarding instructing the jury during deliberations, and raise an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

Darren and Lisa Morris-Wolff were married for ten years and had two children. 4/8/14 RP 2195. In July 2013, Ms. Morris-Wolff announced

she wanted a divorce. 3/27/14 RP 981; 3/31/14 RP 1242, 1244; 4/10/14 RP 2243-44, 2245; 6/10/14 RP 94. They argued, the police were called, Mr. Morris-Wolff was arrested, and Ms. Morris-Wolff obtained court orders prohibiting him from contacting her or their children or from being within 500 feet of the family home. 3/27/14 RP 988, 994, 996-97, 1010; 3/31/14 RP 1268, 1295; 4/10/14 RP 2260; 6/10/14 RP 103, 105-06; Ex. 5, 6, 7, 8, 30.

Six weeks later, Mr. Morris-Wolff repeatedly called and sent text messages to Ms. Morris-Wolff. 3/27/14 RP 1108-23; 4/10/14 RP 2354; 6/10/14 RP 134, 136. Ms. Morris-Wolff responded that the children needed him and were proud of him but asked him to stop calling or texting her because it was not the "right way to resolve this and can only get you into trouble." 7/1014 RP 134, 136, 140; 6/10/14 RP 140. Mr. Morris-Wolff interpreted this response as an invitation to discuss joint parenting issues in person. 4/10/14 RP 2354-55; 6/12/14 RP 97-98.

The following morning, Ms. Morris-Wolff saw Mr. Morris-Wolff running through the back yard. 3/31/14 RP 1155, 1157; 4/1/14 RP 1387; 6/10/14 RP 146. According to Mr. Morris-Wolff, he went to the back because he did not want neighbors to see him at the home. 4/10/14 RP 2355; 6/12/14 RP 99. He called out to Ms. Morris-Wolff but she quickly

locked the back door. 3/31/14 RP 1157; 4/10/14 RP 2356; 6/10/14 RP 147; 6/12/14 RP 100-01.

Mr. Morris-Wolff ran up to the door and saw Ms. Morris-Wolff on the telephone. 4/10/14 RP 2357; 6/12/14 RP 101. He realized she was calling the police and he was in "shock, disbelief" because he thought he was invited over. 4/10/14 RP 2357; 6/10/14 RP 148; 6/12/14 RP 101. Believing he would be arrested for violating the court orders, he wanted to say good-bye to his children and tell them he loved them. 4/10/14 RP 2357; 6/12/14 RP 101, 107. He grabbed a sledge hammer that was near the back door, broke the glass around the door knob, and reached inside to unlock the door. 3/31/14 RP 1162; 4/10/14 RP 2357; 6/10/14 RP 149.

In the meantime, Ms. Morris-Wolff sent the children upstairs and she ran out the front door to the middle of the street calling for help and talking to the 911 operator. 3/31/14 RP 1172-73; 4/1/14 RP 1390; 6/10/14 RP 151; 6/12/14 RP 48-49. Two neighbors came to assist. 3/31/14 RP 1173; 4/1/14 RP 1456; 4/3/14 RP 1747, 1801; 6/10/14 RP 151. Several minutes later, Mr. Morris-Wolff walked outside with the children, sat down with them in the driveway, and talked quietly with them for a few minutes until a neighbor took the children to her house. 3/31/14 RP 1173-74, 1176-77; 4/1/14 RP 1393, 1464; 4/3/14 RP 1748, 1752, 1801, 1803; 4/10/14 RP 2361; 6/10/14 RP 152, 154-55; 6/12/14 RP 46-47. Shortly

thereafter the police arrived and Mr. Morris-Wolff was arrested. 4/1/14 RP 1395; 6/10/14 RP 100.

Mr. Morris-Wolff was charged, *inter alia*, with residential burglary by entering and remaining unlawfully in the home with the intent to commit a crime against a person or property therein. CP 20. During deliberations, the jury twice inquired whether violation of a court order was a crime against a person. CP 156, 160. The jury hung. 4/14/14 RP 2638; CP 162-63, 166-70, 176, 181.

On retrial, over defense objection, the court instructed the jury that a violation of a court order "may or may not be a 'crime against a person' depending on the facts and circumstances of the violation." 6/12/14 RP 157-58; CP 249. In closing argument, Mr. Morris-Wolff argued he entered the house unlawfully but contended he did not have intent to commit a crime against a person or property inside. 6/16/14 RP 46-59. Rather, he had seen his children only once since his first arrest and he wanted to say good-bye to them before he was arrested. *Id.* In rebuttal argument, the prosecutor argued Mr. Morris-Wolff was not attending supervised visits with his children, when in fact he did not have supervised visits. 6/16/14 RP 63. Mr. Morris-Wolff objected based on facts not in evidence and was overruled. *Id.* The prosecutor immediately repeated the allegation, defense

again objected, and the second objection was sustained without explanation. 6/16/14 RP 63-65.

After the jury was sent to deliberate, Mr. Morris-Wolff requested a curative instruction regarding visits with his children, based on the prosecutor's misstatements about supervised visits. 6/16/14 RP 69-70; CP 224. The request was denied as untimely. 6/16/14 RP 71-72.

Mr. Morris-Wolff was convicted as charged.

On appeal, Mr. Morris-Wolff argued, *inter alia*, the court's instruction to the jury regarding violation of a court order was a judicial comment on the evidence, the prosecutor committed misconduct by arguing facts not in evidence, and the court erred in failing to give the jury a curative instruction. The Court of Appeals affirmed Mr. Morris-Wolff's convictions.

E. ARGUMENT

1. Whether a court order violation is a crime against a person under the circumstances of a case is a question of fact for the jury.

RCW 9A.52.025 provides:

> (1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

Over defense objection, the court instructed the jury:

> A court order violation may or may not be a "crime against a person" depending on the facts and circumstances of the violation.

6/12/14 RP 157-58; CP 249 (Instruction No. 17). This instruction was not based on a statute or a pattern instruction.

Citing *State v. Stinton*, 121 Wn. App. 569, 89 P.3d 717 (2004), and *State v. Kindell*, 181 Wn. App. 844, 326 P.3d 876 (2014), the Court of Appeals ruled whether a specific crime constitutes a crime against a person is a question of law. Opinion at 4. In *Stinson*, the court ruled that violation of a provision of a protection order that restrained the defendant from harassing contact with the protected party *could* serve as a predicate "crime against a person" for residential burglary. 121 Wn. App. at 574-77. In *Kindell*, the defendant was convicted of first degree burglary and unlawful possession of a firearm. 181 Wn. App. at 848. During deliberations, the jury inquired, "Does illegally possession a firearm constitute a crime against property?" *Id.* The trial court responded, "That is a factual determination you need to collectively decide[.]" *Id.* On appeal, the court reversed and stated, "Whether a particular crime constitutes a crime against property involves the interpretation of the burglary statute and the statute defining the predicate crime. ... [C]onstruction of a statute is a question of law. As a result, we hold that

the trial court must determine this issue as a matter of law and cannot defer this decision to the jury." *Id.* at 851. The court further stated:

> The legislature did not define what constitutes a "crime against a person or property" under RCW 9A.52.020(1) and other burglary statutes. Courts have applied a common sense analysis focusing on the statutory elements of the particular crime supporting the burglary charge to determine whether that crime is a predicate crime under the burglary statutes.

Id. at 852. The court then reviewed the unlawful possession of a firearm statute to conclude the offense was not a predicate offense for burglary because mere possession of a firearm could not cause harm to property. *Id.* at 853.

The unique nature of the offense of violation of a court order does not lend itself to a similar analysis. Mr. Morris-Wolff was convicted of misdemeanor violation of a court order, in violation of RCW 26.50.110(1), which provides in relevant part:

> (1)(a) Whenever a[] [protection] order is granted ... and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
> (ii) A provision excluding the person from a residence, workplace, school, or day care;

> (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
> (iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; ....

Each court order sets out specific prohibitions tailored to the circumstance of the parties, and a violation of one or more of those prohibitions can be committed in a myriad of ways. Thus, it is for the jury to determine whether the facts of the case establish a violation of the provisions of a court order and whether that violation constituted a crime against a person or property, or neither.

The Court of Appeals ruling that whether violation of a court order is a crime against a person conflicts with other decisions of the Court of Appeals regarding a question of law and raises an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(2) and (4), this Court should accept review.

2. The Court of Appeals applied overly narrow criteria to determine whether the court's instruction that violation of a court order "may or may not be a 'crime against a person'" was an improper judicial comment on the evidence.

Article IV, section 16 of the Washington Constitution provides:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The Court of Appeals stated, "The question is whether the challenged jury instruction either communicates to the jury the court's attitude toward the merits of the case or resolves a disputed factual issue." Opinion at 3-4. These are overly narrow criteria.

> A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (internal citations omitted).

Thus, in addition to the criteria relied upon by the Court of Appeals, a judge is prohibited from providing instructions that single out specific facts of the case when general instructions are sufficient to explain the law and allow each party to argue the theory of the case. *State v. Stone*, 24 Wn. App. 270, 273, 600 P.2d 677 (1979); *State v. Bradley*, 20 Wn. App. 340, 344, 581 P.2d 1053 (1978). The circumstances of the case "should [not] be singled out and emphasized" in jury instructions. *State v. Lewis*, 6 Wn. App. 38, 41-42, 491 P.2d 1062 (1972). Further, a court may not provide unnecessary detailed instructions that expressly or implicitly "point up," "underline," or "buttress" one party's theory of the case. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 126 (2006); *Laudermilk v.*

Carpenter, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969); *State v. Lampshire*, 74 Wn.2d 888, 891, 447 P.2d 727 (1968). A judicial comment is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

In *State v. Eaker*, the defendant was convicted of rape of a child in the first degree based on an allegation that he demanded oral sex from an 8-year-old boy. 113 Wn. App. 111, 113, 53 P.3d 37 (2002). The court instructed the jury that to convict the defendant, the jury had to find that within the charging period the defendant had intercourse with the boy "on the day that" a woman was babysitting the boy. *Id.* at 118. On appeal, the defendant argued the instruction was a comment on the evidence in that it suggested that if a juror concluded the abuse occurred while the woman was babysitting, it did not also need to find the woman was babysitting during the charging period. *Id.* The appellate court agreed, and stated:

> Because the prosecution elected a specific act and sought to identify the specific act by reference to corroborating facts, the "to convict" instruction had to be framed in a way that does not impermissibly comment on the evidence establishing these facts.

Id. at 119.

Similarly here, the instruction implicitly suggested the State proved a violation of a court order. By singling out and emphasizing the contested issue, the court implicitly bolstered the State's argument that the alleged violation of a court order established Mr. Morris-Wolff's intent to commit a crime against a person. Notably, the State did not seek an instruction that defined "crime against a person" in general terms, similar to the definitional instructions for such terms as "building," "intent," and "protection order." CP 242, 243, 246.

A court may comment on the evidence in ways other than either communicating its attitude about the merits of the case or resolving a disputed factual issue. The Court of Appeals' reliance on overly narrow criteria conflicts with other decisions of this Court and the Court of Appeals regarding the proper standard of review for the determination of whether a jury instruction is a judicial comment on the evidence, involves a significant question of law under the Washington Constitution, and raises an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (2), (3), and (4), this Court should accept review.

3. Mr. Morris-Wolff was entitled to a curative instruction to disregard the prosecutor's improper comments in rebuttal argument, even though the jury had begun deliberations.

a. The prosecutor committed misconduct in rebuttal argument.

A prosecutor commits misconduct when he or she "allude[s] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." RPC 3.4(e); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Argument intended to encourage a verdict based on facts not in evidence is improper. *State v. O'Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005).

Mr. Morris-Wolff's theory of the case was he did not enter the house with the intent to commit a crime against a person or property. Rather, he had seen his children only once in the previous six weeks and he intended to say good-bye to his children, tell them he loved them, and explain that he was not abandoning them but he was going to be arrested for violating the order protecting their mother. 6/16/14 RP 46-48, 50, 55. Even though there was no testimony regarding visitation and Mr. Morris-Wolff was prohibited by the court orders from contact with his children, in rebuttal argument at the end of the second trial, the prosecutor challenged the defense theory by alleging Mr. Morris-Wolff had not attended supervised visitation:

> [H]e certainly did not go on August 14th as defined in State's Exhibit 8, the order for protection that Lisa asked for, to the supervised visitation that was ordered with his children.

6/16/14 RP 63. Defense counsel immediately objected on the grounds the statement was misleading. *Id.* The objection was overruled. *Id.* The prosecutor quickly repeated the allegation:

> Because while Lisa followed a court process, she petitioned for a protection order, the defendant didn't show up for those hearings. He had supervised visitation.

6/16/14 RP 64. Defense counsel again objected to the rebuttal argument as misleading and the court sustained the second objection without explanation. 6/16/14 RP 65.

The prosecutor's misrepresentation of the evidence was made knowingly. In his opening statement, the prosecutor stated, "On August 14, 2013, there were multiple orders issued by King County courts prohibiting the defendant from having any contact with Lisa, the children, their home or the children's schools." 6/10/14 RP 45. In addition, throughout the trial, the prosecutor elicited testimony that Mr. Morris-Wolff could not have any contact with his children. *See* 6/10/14 RP 123-24; 6/11/14 RP 135. Accordingly, the prosecutor committed misconduct in rebuttal argument.

b. The request for a curative instruction was not untimely.

When the jury was sent to deliberate, Mr. Morris-Wolff requested a curative instruction to inform the jury that he was prevented from visiting his children because of the protection orders, or, alternatively, an instruction to disregard the State's argument regarding supervised visits. 6/16/14 RP 69, 71; CP 224. The requests were denied, on the grounds such an instruction would confuse the jury, the jury had already been informed that it would not receive any further instructions, and the case was not about visitation so the jury might give the instruction undue weight. 6/16/14 RP 71-72.

The Court of Appeals did not decide whether the prosecutor committed misconduct. Rather, it ruled the trial court did not abuse its discretion in denying Mr. Morris-Wolff's request for a curative instruction as untimely. Opinion at 11. This was in error.

A court has discretion to give further jury instructions upon request after a jury has begun deliberations. *State v. Brown,* 132 Wn.2d 529, 612, 940 P.2d 546 (1997). A court's decision regarding providing further instructions is reviewed *de novo*. *State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

The court's rationale for denying the curative instructions did not justify allowing the highly prejudicial statements to stand unchallenged. The curative instruction would not have confused the jury, but rather, it

would have clarified the confusion caused by the rebuttal argument that was contrary to the prosecutor's opening statement and the testimony of its witnesses that Mr. Morris-Wolff was prohibited from all contact with his children. The jury was informed it would not receive any more instructions only in response to its request for a more complete definition of a crime against a person. CP 229. Finally, the case was about Mr. Morris-Wolff's intent when he entered the family home and his love for his children even as his marriage was ending. The trial court's concerns did not outweigh Mr. Morris-Wolff's interest in correcting the prosecutor's knowing misrepresentation of the evidence.

The prosecutor's misconduct challenged the primary defense theory by introducing facts not in evidence. The statements were made in rebuttal argument when the defense could no longer address the jury. Significantly, the first jury was unable to reach a verdict on the charge of residential burglary and the prosecution obtained a conviction only after improper rebuttal argument on retrial.

Under these circumstances, the Court of Appeals' failure to address the issue of prosecutorial misconduct and its rulings that Mr. Morris-Wolff's request for a curative instruction was untimely and the trial court did not abuse its discretion in denying the request conflict with other decisions by this Court and the Court of Appeals regarding

prosecutorial misconduct and instructing the jury during deliberations, and raise an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(1), (2), (4), this Court should accept review.

F. CONCLUSION

The Court of Appeals erroneously ruled that the question of whether a court order violation is a crime against a person is a question of law; the jury instruction that a court order violation may or may not be a crime against a person was not an impermissible judicial comment on the evidence; and the trial court did not abuse its discretion in denying Mr. Morris-Wolff's request for a curative instruction to address prosecutorial misconduct in rebuttal argument. For the foregoing reasons, and pursuant to RAP 13.4(b)(1), (2), (3), and (4), this Court should accept review.

DATED this 2nd day of March 2016.

Respectfully submitted,

s/ Sarah M. Hrobsky

Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 72141-1-I
Respondent,	)	DIVISION ONE
v.	)	
DARREN MORRIS-WOLFF,	)	UNPUBLISHED
Appellant.	)	FILED: February 1, 2016

Cox, J. — Darren Morris-Wolff appeals his judgment and sentence for residential burglary. The trial court did not comment on the evidence when it instructed the jury that violation of a court order "may or may not" be a crime against a person, depending on the facts and circumstances of the violation. Morris-Wolff fails to establish that he can argue for the first time on appeal that the trial court erred by answering a jury question during deliberations. And the court did not abuse its discretion by denying his motion for a curative instruction made after the jury had begun to deliberate. Likewise, the denial of his motion for a new trial does not require reversal. There was no cumulative error. We affirm.

Darren and Lisa[1] Morris-Wolff were married and had two children. After an altercation, Lisa obtained a series of protection orders against him. These

[1] We adopt the State's naming convention and refer to Lisa Morris-Wolff as "Lisa" to avoid confusion.

orders prohibited Morris-Wolff from contacting either Lisa or their children and from being within 500 feet of the family home.

Subsequently, Morris-Wolff repeatedly called and sent text messages to Lisa. Lisa did not answer the calls, but she responded to a single message stating: "[Our] [k]ids do need you and [are] proud of you, too. Please stop texting and calling. It isn't the right way to resolve this and can only get you into trouble."[2]

Morris-Wolff testified at trial that he believed that Lisa's response, telling him not to contact her by phone, was an invitation to talk to her in person. Thus, he went to her home on August 14, 2013, despite the fact that a protection order prohibited him from doing so. Hoping to avoid being seen by neighbors, he parked away from the house and approached the side of the house. He saw Lisa and called out to her. She ran inside and called 911.

According to his testimony, once Morris-Wolff realized that Lisa was calling 911, he "freaked out."[3] Realizing he was likely going to jail, he decided to speak with his children. He wanted them to know that he loved them and that he was not abandoning them when he was arrested for violating the protection order against their mother. Deciding to do so immediately, he broke down the door to the house, while Lisa watched his intrusion. He went inside, and spoke to his children.

Based on this incident, the State charged Morris-Wolff with a number of offenses, including residential burglary. At his first trial, the jury found Morris-

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[2] Report of Proceedings (June 10, 2014) at 140.

[3] Report of Proceedings (June 12, 2014) at 101.

Wolff guilty of some charges, not guilty of others, and could not reach a verdict on the residential burglary charge.

The State elected to retry him on only the residential burglary charge based on the August 14, 2013 incident. At the second trial, the jury found him guilty of residential burglary.

Morris-Wolff appeals.

COMMENT ON THE EVIDENCE

Morris-Wolff argues that the court erroneously instructed the jury that violation of a court order "may or may not" be a crime against a person, depending on the facts and circumstances of the violation. He claims this was a comment on the evidence. We disagree.

Article IV, section 16 of the Washington constitution prohibits judges from commenting on the evidence. A court does so "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement."[4]

A proper jury instruction is not a comment on the evidence.[5] But if an instruction "essentially resolve[s] a contested factual issue" then it is an improper comment on the evidence.[6]

The question is whether the challenged jury instruction either communicates to the jury the court's attitude toward the merits of the case or

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[4] State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

[5] State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

[6] Id.

resolves a disputed factual issue. Notably, resolution of a disputed legal issue is not within the scope of the constitutional prohibition.

Under RCW 9A.52.025, "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling . . . ."

Whether a crime qualifies as a crime against property under this statute is a question of law.[7] Similarly, whether a crime is a crime against a person is also a question of law.[8]

Here, the challenged jury instruction states that "A court order violation ***may or may not*** be 'a crime against a person' depending on the facts and circumstances of the violation."[9] This instruction did not resolve a contested factual issue. The plain words of the instruction address the possible legal effect of a court order violation. Likewise, the instruction does not communicate the court's attitude toward the merits of the case. It is not an improper comment on the evidence.

The State's theory of the case was that Morris-Wolff intended to commit one of two crimes—assaulting Lisa or violating a no-contact order—when he unlawfully entered the home. Accordingly, the court's other instructions defined both assault and violation of a no-contact order.

We note that the State proposed the instruction at issue because the jury in the first trial had repeatedly asked the court whether a violation of a no-contact

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[7] State v. Kindell, 181 Wn. App. 844, 851, 326 P.3d 876 (2014).

[8] State v. Stinton, 121 Wn. App. 569, 574, 89 P.3d 717 (2004).

[9] Clerk's Papers at 249 (emphasis added).

order was a crime against a person. In response to the State's proposal at this trial, Morris-Wolff argued that the State's proposed instruction would be a comment on the evidence. Specifically, he claimed that it singled out one of the two crimes that the State alleged Morris-Wolff intended to commit.

Addressing Morris-Wolff's concerns, the court offered to also instruct the jury that assault qualified as a crime against a person. Additionally, the trial court noted that it was more obvious that assault was a crime against a person, compared to violation of a no-contact order, which the trial court characterized as a more "abstract" crime.

Morris-Wolff did not respond to the court's offer to instruct the jury that assault also qualified as a crime against a person. The court then gave the instruction he now challenges.

For the reasons the trial court identified, it was proper to instruct the jury on whether violation of a no-contact order was a crime against a person. Giving the instruction was designed to avoid confusion of this jury, a possibility that the first trial suggested was likely in this trial. Moreover, this instruction neither communicates the court's view of the merits of the case nor resolves a factual—as opposed to a legal—issue. In fact, it does not even resolve the legal issue: the possible effect of violation of a court order.

Morris-Wolff argues that the instruction implicitly suggests that the State proved violation of a court order. It does no such thing. Rather, it neutrally states that it "may or may not be 'a crime against a person,'" depending on the circumstances. And the court instructed the jury on the elements of violation of a

court order, indicating that that it was the jury's role to determine whether Morris-Wolff intended to violate a court order.

For these reasons, we reject this unpersuasive argument.

ANSWER TO JURY QUESTION

For the first time on appeal, Morris-Wolff argues that the court improperly answered a question from the jury during its deliberations. Specifically, he argues that the court's answer to a jury question was inconsistent with its other written instructions given before closing arguments. Because he did not preserve this claim by arguing it below, and also fails to show that he may raise this issue under RAP 2.5(a), we do not reach it.

Before answering the jury's question during deliberations, the court gave both parties the opportunity to review the proposed answer. The record shows that the State reviewed the proposed answer and concurred that it was proper. The record does not show that Morris-Wolff addressed the court's proposed answer either by way of objection or otherwise. The court then gave the proposed answer in response to the jury's question. Accordingly, there was no preservation of any objection to the proposed answer.

This court generally does not review issues first raised on appeal.[10] But an appellant may raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right under RAP 2.5(a).[11] "Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional

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[10] RAP 2.5(a).

[11] State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

terms."[12] Thus, to raise an issue for the first time on appeal, an alleged error must be both constitutional and manifest.

Under RAP 2.5(a), courts ask two "gatekeeping" questions: "(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?"[13]

A manifest error "'requires a showing of actual prejudice.'"[14] "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'"[15]

Here, Morris-Wolff does not address RAP 2.5(a) in his opening brief. And his reply brief does not fully address why his claim falls within RAP 2.5(a)'s narrow exception. Specifically, he fails to argue why this alleged error is manifest. Thus, we do not reach the merits of his unpreserved argument.

CURATIVE INSTRUCTION AND NEW TRIAL MOTION

Morris-Wolff next makes two related arguments. He first argues that the trial court erroneously denied his request for a curative instruction while the jury deliberated. He next argues that the court abused its discretion by denying his motion for a new trial following the guilty verdict. Underlying both arguments is his contention that the prosecutor committed misconduct during closing

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[12] State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992).

[13] Kalebaugh, 183 Wn.2d at 583.

[14] Id. at 584 (alteration in original) (internal quotation marks omitted) (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)).

[15] Id. (internal quotation marks omitted) (quoting O'Hara, 167 Wn.2d at 99).

argument. We hold that the court did not abuse its discretion by failing to give a curative instruction because Morris-Wolff failed to request one before the beginning of deliberations. Additionally, the court did not abuse its discretion by denying Morris-Wolff's motion for a new trial because the evidence he relied on inhered in the jury's verdict.

Curative Instruction

Morris-Wolff argues that the court abused its discretion by declining to give the jury a curative instruction. We disagree.

To prevail on a claim of prosecutorial misconduct, the defense must establish that the prosecutor's conduct was both improper and prejudicial.[16]

During closing argument, prosecutors have "wide latitude to draw and express reasonable inferences from the evidence."[17] But prosecutors may not "make prejudicial statements that are not sustained by the record."[18]

We review a trial court's ruling on alleged prosecutorial misconduct for abuse of discretion.[19]

During closing argument, Morris-Wolff argued that he did not enter the house to assault Lisa on August 14, 2013. He argued that he intended to see his children. According to his testimony, he wanted them to know that he loved them

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[16] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

[17] State v. Reed, 168 Wn. App. 553, 577, 278 P.3d 203 (2012).

[18] State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

[19] State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

and that he was not abandoning them when he was likely to be arrested for violating the protection order against their mother.

In rebuttal, the prosecutor stated:

> This isn't a circumstance where [Morris-Wolff] went to the kids' daycare, all right. He didn't go to the kids' school, all right. Although the testimony was that he was familiar with those processes, all right, he lived there and he went to the same daycare and the same school and he certainly did not go on August 14th as defined in State's Exhibit 8, the order for protection that Lisa asked for, to the supervised visitation that was ordered with his children.[20]

At this point, Morris-Wolff objected on the basis that the argument was misleading. The court overruled the objection.

The prosecutor later repeated the argument:

> Because while Lisa followed a court process, she petitioned for a protection order, the defendant didn't show up for those hearings. He had supervised visitation.[21]

Morris-Wolff objected again on the basis that the argument was misleading. This time, the court sustained the objection. Notably, Morris-Wolff did not then request any curative instruction after the court sustained the second of his two objections. The prosecutor finished his rebuttal, and the jury left the courtroom to begin its deliberations. At this time, Morris-Wolff stated that he intended to research the remedy for the prosecutor's allegedly misleading statements during closing.

After the parties returned from recess and while the jury was deliberating, Morris-Wolff asked the court to give the jury a curative instruction. He asked that

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[20] Report of Proceedings (June 16, 2014) at 63.

[21] Id. at 64.

the court "instruct the jurors that between July 5, 2013 and August 14, 2013, Mr. Morris-Wolff was not legally permitted to visit[] with his children supervised or unsupervised because of the existence of the no-contact order."[22] Morris-Wolff argued that this instruction was necessary to cure the State's misleading statements during closing about visitation. In the alternative, he asked the court to instruct the jury to disregard the State's argument on supervised visitation.

The court denied these requests for alternative curative instructions. The court stated, among other things, that such instructions would likely confuse the jury. The court determined that it would confuse the jury to receive a new instruction because the court had informed the jury that they would not receive any further instructions. The court also determined that the jury might not understand the term "supervised visitation" and that visitation was not "what this case [was] about," so the jury could give the instruction undue weight.[23] The court further noted that it would be "extremely risky" to give the jury another instruction when counsel would not be able to argue it to the jury.[24]

We conclude that the primary focus of Morris-Wolff's argument is whether the trial court properly denied his request for alternative curative instructions while the jury deliberated. He does not appear to complain that the trial court sustained only the second of his two objections to the prosecutor's allegedly misleading argument.

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[22] Id. at 69.

[23] Id. at 72.

[24] Id.

Here, it was not an abuse of discretion for the court to deny his requests for curative instructions. The record is clear that Morris-Wolff first requested curative instructions while the jury deliberated, not before.

For the reasons the trial court identified, giving the jury a curative instruction could have confused the jury. Morris-Wolff could have immediately requested curative instructions upon the court sustaining his second objection to the prosecutor's argument. But he did not do this. Instead, he waited until after the jury had begun deliberating. That was simply too late. The court did not abuse its discretion by declining to give the jury a curative instruction during its deliberations.

Motion for a New Trial

Morris-Wolff also argues that the court should have granted his post-verdict motion for a new trial based on the prosecutor's allegedly misleading closing argument. Because the evidence that he relied on inhered in the jury's verdict, we disagree.

After the verdict, Morris-Wolff moved for a new trial under CrR 7.5, arguing that the State's allegedly misleading closing argument necessitated a new trial. Morris-Wolff supported this motion with a declaration from his counsel. His counsel stated that he spoke to the jurors after trial. Several jurors indicated that they were surprised that the protection orders prohibited Morris-Wolff from attending supervised visitation with his children. And one juror "stated that the

fact that [Morris-Wolff] had not been attending the supervised visits was a "'nail in the coffin.'"[25]

We review for abuse of discretion a trial court's decision on a motion for new trial.[26] "A trial court abuses its discretion if a decision is manifestly unreasonable or based on untenable grounds or untenable reasons."[27]

"Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict."[28] Thus, evidence that inheres in the verdict cannot support a new trial.[29]

"One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him; if so, the statements cannot be considered for they inhere in the verdict and impeach it."[30] Jurors' erroneous beliefs about facts or the law inhere in the verdict.[31] "[T]he effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence" also inhere in the verdict.[32]

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[25] Clerk's Papers at 265.

[26] State v. Hawkins, 181 Wn.2d 170, 179, 332 P.3d 408 (2014).

[27] Skagit County Pub. Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1, 177 Wn.2d 718, 730, 305 P.3d 1079 (2013).

[28] Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 75 P.3d 944 (2003).

[29] Id.

[30] Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

[31] Id. at 842.

[32] Breckenridge, 150 Wn.2d at 205 (quoting Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)).

Here, when Morris-Wolff moved for a new trial, the evidence he relied on inhered in the jury's verdict. His counsel's declaration went to the jurors' beliefs about facts in the case and the effect those beliefs had on their deliberations. The court did not abuse its discretion when it denied his motion for a new trial.

CUMULATIVE ERROR

Morris-Wolff finally argues that cumulative error requires reversal. Because any errors here did not deny him a fair trial, we disagree.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial.[33]

Here, as described earlier, the court did not err or abuse its discretion. Thus, we reject this argument.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Trickey, J

[33] State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72141-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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[PAOAppellateUnitMail@kingcounty.gov]
[stephanie.guthrie@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

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PAOAppellateUnitMail@kingcounty.gov
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