73203-0

FILED
Nov 30, 2015
Court of Appeals
Division I
State of Washington

NO. 73203-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NATHON ALLEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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A. ISSUES

1. For the first time on appeal Allen claims that the charging information was insufficient because it did not allege ownership or occupancy of the charged dwelling. Ownership and occupancy are not elements of burglary. The information used the current statutory language in alleging that Allen had "unlawfully" entered the specified dwelling. Has Allen failed to show that the information was constitutionally deficient?

2. The victim of the charged burglary had reported another burglary to his storage locker prior to the charged burglary. Allen was not charged with the earlier burglary, but evidence of the uncharged burglary was admitted without Allen's objection. Allen used the fact that he had no access to the storage locker at the time of the uncharged burglary to argue that he had not committed the charged burglary. Given the context of the case and argument by Allen, has Allen failed to show that it was reversible error for the prosecutor in closing argument to argue that Allen was probably involved in the earlier uncharged crime but that the State had no burden to prove it?

3. The Washington Supreme Court has held that the language of WPIC 4.01 defining "reasonable doubt" provides an accurate statement of the law. The trial court gave the standard WPIC 4.01 instruction. Allen

did not object. Has Allen failed to show that it was manifest constitutional error for the trial court to have given the standard approved instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Nathon Allen was charged with: Count 1, Burglary in the Second Degree; Count 2, Theft of a Motor Vehicle; and, Count 3, Theft in the First Degree. CP 12-13. However, because of witness unavailability, before presenting any evidence the State dismissed counts two and three and proceeded only on the burglary charge. 1RP[1] 136.

The jury found Allen guilty of Burglary in the Second Degree. CP 40. Allen was sentenced to 12 months of electronic home detention. CP 63.

2. SUBSTANTIVE FACTS

In 2013, Burt Brienen rented a storage locker, unit 626, at a business called Public Storage located at 3600 East Valley Road, Renton, Washington. 2RP 252. He, his wife, and his stepson, kept household and personal items in the unit. 2RP 253-54. After discovering that his unit had been burglarized Brienen called his stepson who also came to the unit. His stepson pushed on the dividing wall between Brienen's unit and the

[1] The verbatim report of trial court proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (1/13/15, 1/14/15 & 1/20/15); 2RP (1/21/15); 3RP (1/23/15 & 2/27/15).

adjacent unit, 625, and the wall came open. 2RP 263-65. There were a few screws holding the wall together, but not the original screws. 2RP 263. Brienen and his stepson then walked out of their unit and went to the adjacent unit and saw that there was not a lock on the door. 2RP 264. They went inside and saw that unit 625 was empty. 2RP 264. Brienen called the police.

On the day of the burglary, November 27, 2013, Renton police officer Robert Ylinen responded to the reported burglary by meeting Brienen and his stepson at their storage unit. 1RP 139-41. The officer was a Navy veteran who had worked on aircraft, and he saw that the screws in the sheet metal wall between units were not the appropriate type of screws. 1RP 142-45. Ylinen concluded that the mode of entry for the reported burglary was through this sheet metal wall dividing the units. 1RP 142.

Zachary Siahpush was the district manager for Public Storage. 1RP 150. The facility was open from 6:00 a.m. to 9:00 p.m. daily. 1RP 150. Every renter has an individual gate access code. 1RP 151. The rules prohibit locker renters from living in the units. 1RP 150. If a rent payment is overdue by 45 days, the company is allowed to sell the items in the unit. 1RP 151. In preparation for that, at about day 35 or 36, a visual inventory is conducted. Id. The lock is cut and the door is opened, but

nobody enters. Id. Basic notes are made about what is visible in general categories such as, furniture, tools, "things of a more general nature and a percentage of how full it is." 1RP 151-52. A Public Storage lock is then put on the unit, a security tag is placed on the unit, and there is no further access to the unit until the owner either pays the bill in full or the contents are sold at auction. 1RP 152.

In September and October it was discovered that the renter of unit 625 had been living in the unit. 1RP 164-65. Siahpush personally told the renter that he could not live in the unit, reminded him that he was restricted to the established access hours, and took away his access code. 1RP 164. At that point the renter stopped paying rent and unit 625 went into a delinquent status. 1RP 164. Sometime between November 2nd and November 6th of 2013, Siahpush conducted the visual inspection of locker 625. He observed:

> It appeared today to be what you would consider a residence. There was a bed, a rolling shelf with hangers and clothing, a dresser, a mirror set up along the dresser, empty fast food bags, empty beer cans, coffee table, full ashtray, et cetera.

1RP 159. He noticed no "high dollar amount item." 1RP 159. There was no motorcycle, which he would have remembered. 1RP 159-60.

When managers see anything worth an estimated value of over $1000 they will often delay an auction for "a couple more months" to try

to work something out with the person in arrears. 1RP 160. There were no such "high-ticket items" in locker 625. 1RP 160. When he did his inspection of unit 625 there were no visual obstructions:

> You could see everything. It's 12 feet wide and 30 feet deep. So that is almost as far back as that wall from me, and 12 feet is a significant width. There is nothing above maybe hip height. Maybe dresser high would be the tallest thing in there. See the walls, the back, almost everything across the floor.

1RP 161.

The auction process involves interested bidders arriving at the facility and signing in. 1RP 153. Auctions are held at each storage facility on a schedule set a year in advance. District manager Siahpush described it this way:

> The bidders that arrive will sign in. We can range anywhere from -- an average day would probably be 35 to 50 bidders. We have seen higher or lower numbers. We begin at one property. We'll all go outside. We go over some basic rules and kind of the schedule of the day.
> At that stage, we will open up a storage unit. We will auction that one off. When it's done, the winning bidder will put their lock on it. They don't have access until we check them out.

1RP 153.

Unit 625 was auctioned on November 25, 2013, by Siahpush. 1RP 154. The winning bidder for unit 625 was Nathon Allen. 1RP 157. He paid $100 for the contents of the unit. 2RP 300.

Persons who purchase the contents of lockers at auction are not given gate access codes to the property. 1RP 163. They must be allowed entry by an employee on site. 1RP 163. They must have the contents of the locker removed within two days of the purchase at auction. 1RP 163.

Susan Irving was the on-site manager at the public storage facility. 2RP 192. She lived in an apartment connected to the office at the facility. 2RP 192-93. Sometime after the gates had locked at 9:00 p.m. on November 26, 2013, Nathon Allen banged on her apartment door and got her to open the gate so he could leave. 2RP 194-96. He then left in a pickup truck that was pulling a trailer. 2RP 197-98.

The next morning, November 27, 2013, another Public Storage employee, Kelly Mast, opened the gate for Allen to enter the storage facility. 2RP 211-13. He drove into the facility in a large pickup truck. 2RP 213. There was no one else with him in the truck. 2RP 214. On the video monitor in the office Mast watched Allen drive up to the locker he had bid on, unit 625. 2RP 214. After that, Mast began her rounds of lock checking the units. 2RP 214. When she was checking the lock at the adjacent unit, "another man popped out" of unit 625. 2RP 215. They startled each other. 2RP 215. The man was with Allen. 2RP 215.

Mast then went back to her office and rewound the video to when Allen had arrived at the unit. She saw him get out of his truck with two

bags and two cups of coffee from McDonalds. 2RP 216-17. Mast also then watched video from the night before, November 26th, and saw Allen and another man loading the truck and trailer with contents from the unit. 2RP 218-19. That day, the 27th, Mast saw that Allen and the other man loaded the truck and trailer with property, and she let them out through the gate. 2RP 219. Both men were in the truck. 2RP 219.

On November 27th, after discovering the burglary of his unit, Brienen completed a 3-page inventory list of missing property that had belonged to he and his wife. 2RP 266-68. Ex. 12. He did not list his stepson's missing property. 2RP 267. Brienen had reported a previous burglary of his unit that occurred sometime between September 15, 2013, and October 16, 2013. 2RP 327. On the last page of the inventory list, Exhibit 12, Brienen listed things that had been stolen during the first burglary, including a leather chair, ottoman, and recliner. 2RP 267-68. All the items on the first two pages were taken in the second burglary. 2RP 268. There were a number of items that Brienen was certain had been in his locker after the first burglary that were missing after the second burglary, including his stepson's dirt bike, two air conditioning units, and a doll collection. 2RP 257-58.

On March 7, 2014, Renton police detective Jason Renggli, along with other detectives investigating the burglary, went to Allen's home.

2RP 298. Allen stated that he had purchased the contents of a storage unit and that he still had some of the items. 2RP 300. Renggli had with him Brienen's list of stolen property, Exhibit 12, and he went down the list asking Allen if he had each item. 2RP 304. Allen was cooperative and showed Renggli, among other things, a pressure washer, a portable air conditioning unit, torches, and a pair of motorcycle racing boots. 2RP 305-08. The officers took into custody some of the property and photographed it at the police station. 2RP 308.

At trial, Brienen was shown Exhibit 8, Public Storage surveillance video of Allen and another man loading items from unit 625 into the truck and trailer. While watching the men load, Brienen identified a number of items of property that he knew had been in his locker after he had reported the first burglary, including: rims and specialized tires for his stepson's dirt bike, a sledge hammer with a yellow handle, his stepson's 10-speed bicycle, his stepson's circular chop saw, a "shop vac," quartz lights Brienen had used in his painting business, his wife's decorative wooden bench, the two portable air conditioners, box springs for a king size mattress, extension poles Brienen had used for his painting business. 2RP 269-76. Brienen testified that he had not given Allen or the other man seen on the video permission to enter his storage unit. 2RP 281. He

estimated the total value of the property stolen in the charged burglary to be $6000. 2RP 273.

C. ARGUMENT

1. PROOF OF OWNERSHIP OR OCCUPANCY IS NOT AN ESSENTIAL ELEMENT OF BURGLARY AND NEED NOT BE ALLEGED IN THE INFORMATION.

Allen asserts for the first time on appeal that the charging information is insufficient because it did not allege ownership or occupancy of the building, and, thereby, failed to negate Allen's right to enter the burglarized premises. Allen's argument must be rejected. Ownership or occupancy of the building is not an element of the burglary statute, and Allen was provided notice in the information that he was alleged to have "unlawfully" entered or remained in the building.

The Sixth Amendment of the United States Constitution and article 1, section 22 of our state constitution require that charging documents include all essential statutory and nonstatutory elements of a crime. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The purpose of the requirement is to give notice to the accused of the nature of the crime in order to prepare a defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005) (citing State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

When challenged for the first time on appeal, a charging document is construed liberally in favor of validity. Tandecki, 153 Wn.2d at 848-49. The information is sufficient if (1) the necessary facts appear in any form or, by fair construction can be found, in the charging document, and (2) the defendant cannot show actual prejudice from lack of notice. Id. (citing Kjorsvik, 117 Wn.2d at 105-06).

Here, the State charged Allen with second degree burglary under RCW 9A.52.030(1), which provides:

> A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

As defined by the burglary statute, "[a] person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

The information charging Allen stated in relevant part:

> [T]he defendant Nathon George Allen in King County, Washington, on or about November 27, 2013, did enter and remain unlawfully in a building, located at 3600 East Valley Road, in said county and state, with intent to commit a crime against a person or property therein;

CP 12.

This information mirrors the statute and contains all of the statutory elements of the charged crime: (1) entering or remaining

unlawfully in a building other than a vehicle or dwelling, and (2) with intent to commit a crime against a person or property therein. See State v. Brunson, 128 Wn.2d 98, 104-05, 905 P.2d 346 (1995) (listing the two elements of second degree burglary). While an allegation of ownership or occupancy of the burglarized premises may be necessary to prove that entry was unlawful, neither is an essential element of the crime. See State v. Klein, 195 Wash. 338, 80 P.2d 825 (1938) (recognizing that ownership is not an essential element of burglary and that allegation of ownership is material only: "(1) To show on the record that the building burglarized is not the property of the accused, and (2) to identify the offense to such an extent as to protect the accused from a second prosecution for the same offense"); State v. Knizek, 192 Wash. 351, 355, 73 P.2d 731 (1937) (ownership of burglarized building is not essential element of the offense); State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007) (examining whether perpetrator maintained a licensed or privileged occupancy of the premises in order to determine whether offender's presence is unlawful for purposes of burglary).

Relying almost exclusively on State v. Klein, supra, Allen argues that ownership or occupancy of the burglarized premises must be alleged in the information in order to negate the defendant's right to enter. But Allen misinterprets Klein. In Klein, two codefendants appealed their

convictions for second degree burglary, claiming the information was defective because it alleged neither ownership nor occupancy of the building. Klein, 195 Wash. at 341.

At that time, our state's criminal code defined second degree burglary as follows:

> Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years.

Klein, 195 Wash. at 340 (quoting Rem. Rev. Stat sec. 2579). The information charging the two men read as follows:

> They, the said Harry Klein and James Cole, in the county of Snohomish, state of Washington, on or about the 29th day of August, 1937, ***did wilfully, unlawfully and feloniously***, and with the intent to commit some crime therein, to-wit: larceny, break and ***enter a building***, to wit: ***The Tradewell Store building***, located at 2813 Colby avenue[sic], in the city of Everett, Washington, being ***managed by one John Bird*** of the city of Everett, Washington, said building being a building in which property was then and there kept for use, sale or deposit.

Id. at 339 (emphasis added). The court held that the specific ownership of a building involved in the crime of burglary is not an essential element of the offense. Id. at 343 (citing State v. Franklin, 124 Wash. 620, 215 P. 29

(1923); State v. Burke, 124 Wash. 632, 215 P. 31 (1923)). Rather, the court held:

> In charging the crime of burglary, the ownership or occupancy of the premises alleged to have been broken into must be alleged **in some manner sufficient to negative the right of the person charged with the crime to enter the building**. In alleging ownership, **no particular form of words is necessary**.

Id. at 341 (emphasis added). Because the information at issue in Klein alleged that the building was "managed by one John Bird," indicating occupancy by someone other than the accused, the court concluded that the information was sufficient. Id. at 343-44.

Allen's argument that ownership or occupancy of the building is an essential element of burglary is simply not supported by Klein. Klein does not stand for the proposition that the identity of the legal owner or occupant is an essential element that must be included in the charging document. Rather, what is required, with no particular form of words being necessary, is an allegation that is "in some manner sufficient to negative the right of the person charged with the crime to enter the building." Id. at 341. Thus, the essential element is simply an allegation that the defendant had no right to enter the building that is the subject of the burglary. Now, under Washington's current burglary statute, one of the elements of second degree burglary—"entering or remaining

unlawfully in a building"—makes it clear that the person charged with the crime does not have a right to enter the building. RCW 9A.52.030(1); 9A.52.030(5).[2] This language appeared in the information charging Allen. CP 12. Klein requires nothing more.

To the extent that Allen may be arguing that the information was defective because Allen had an ownership interest in the charged location of the burglary, that claim fails as well. It is true that Allen had purchased the contents of a storage locker, unit 625, at the charged location of 3600 East Valley Road, and had a right to be present to remove the contents of that locker. However, it is well-established that burglary may be charged when a defendant has a right to enter or be present at a charged location but exceeds the scope of his rights and unlawfully enters an area on the premises from which he is excluded. See, e.g., State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006) (Juvenile convicted of burglary for breaking into his mother's locked bedroom because the locked door was sufficient implied notice that any permission to enter his own home did not extend to her bedroom.); State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988) (Defendant convicted of burglary in the first degree after being invited into a residence for the limited purpose of using the telephone in a specific area, and then raping and assaulting the occupant in a different part of the

[2] RCW 9A.52.030(5): "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."

house.). Here, Allen had a limited right to enter the building for a brief period of time to remove items from locker 625. Instead, he broke into a locked storage locker to which he had no claim of privilege. The information charging that he "did enter and remain unlawfully" in the building gave him sufficient notice that he was being charged with burglarizing a part of the building to which he had no privilege to enter or remain.

Here, even if this court were to find some vagueness in the charging language of the information, because Allen did not object to the sufficiency of the information before the jury verdict, to prevail on his claim he must show actual prejudice from the alleged lack of notice. Kjorsvik, 117 Wn.2d at 105-06. ("Since we have determined that all of the essential elements of robbery were contained in the charging document, we turn to the second prong of the inquiry and ask whether the defendant has shown that he was nonetheless prejudiced by any vague or inartful language in the charge." Id. at 111.) In Kjorsvik, the court looked to the facts alleged in the certificate of probable cause and determined that the appellant failed to show actual prejudice due to any vague or inartful language in the charging document. Id.

Looking to the certificate of probable cause filed with the information, it's clear that Allen cannot show any actual prejudice. The

certificate of probable cause clearly asserts that the items stolen in the burglary had been located in unit #626, a storage locker rented by Burt Brienen and Paul LaVaque. Thus, even if this court were to determine that there was some vagueness in the language of the information, Allen's claim must still be rejected because he cannot show actual prejudice.

2. ALLEN HAS FAILED TO SHOW THAT THE PROSECUTOR COMMITTED MISCONDUCT.

Allen alleges that in closing argument the prosecutor twice committed misconduct by inviting the jury to infer that he was guilty of an uncharged crime. Brienen's locker, unit 626, had been burglarized one to two months before Allen gained access to it by bidding on the contents of the adjacent unit 625. Allen was later found to possess property taken in the first burglary, but he was not charged with the burglary or with possessing stolen property. Evidence of the first burglary was feely admitted at trial without objection by Allen, which Allen then used to argue that he was not guilty of the charged crime. In closing argument, both parties argued the significance of the evidence of the first burglary. There was no misconduct by the State.

a. Relevant Facts.

Near the beginning of the State's closing argument, the prosecutor said:

> This is not about that first burglary that was reported. We're not here to prove beyond a reasonable doubt that the defendant participated in that burglary on October 16th. It may be likely, it may be probable, but it will not be one of the elements that the State must prove beyond a reasonable doubt.

3RP 352. Although this drew no objection at trial, Allen now complains it was misconduct.

Later, defense counsel objected to a portion of the State's closing argument:

> Think about that first burglary, what was reported, and think about November 27th. The first burglary we're not here to prove that the defendant was involved in. It's highly likely again because of some of that property that was found on his property, some of Burt's property --
>
> MR. EWERS: Objection, Your Honor. Objection.
>
> THE COURT: The objection is overruled. This is argument.
>
> MR. BROWN: Property from that first burglary, as Burt told you, was found on Mr. Allen's property. It's probably highly likely that somehow there was a connection, but that's not what the State has to prove in this case. That's not what has to happen. What has to happen is the State has to prove that the November burglary occurred and that Mr. Allen was a part of it.
>
> And in that first burglary, the October 16th, there's that U-Haul video that no one knows about. And then of course there's gaps. I mean, it could be anybody that was a part of that first burglary.
>
> But there's only one man that could have been a part of that second burglary. That was the man that purchased the unit at auction.

3RP 361-62.

b. Standards Of Review.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. CONST. amend. V, VI; WA CONST. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." Id. Appellate courts evaluate allegedly improper comments "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Once a defendant establishes that a prosecutor's statements are improper, whether the defendant was prejudiced is determined under one of two standards of review. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)).

If the defendant did not object at trial, 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. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). 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." Emery, 174 Wn.2d at 761 (citing State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

c. Considering The Circumstances Of The Case It Was Not Misconduct For The Prosecutor To Refer To The Uncharged Burglary.

Here, taking into consideration the context of the parties' arguments and the issues in the case, as is required, the prosecutor did not commit misconduct in either the portion of closing that Allen objected to, or the portion to which he did not object. Evidence of the first burglary was admitted without objection at trial, and both parties addressed the first burglary during closing argument. The occurrence of a burglary that took place before Allen ever had access to the storage locker was essential to his defense, and it was undoubtedly a strategic decision to have not objected to admission of that evidence at trial.

The theme of the defense was that all of the stolen property found to be in Allen's possession had been transferred from Brienen's locker into locker 625 before Allen had ever bid on the unit. According to the defense argument, the property was stolen by the nameless person or persons who had been living in unit 625 before Public Storage locked the unit and sold the contents to Allen at auction. The defense argued that Brienen, the owner of the stolen property, had not been to his locker for a significant period, thus suggesting that the theft of property could have occurred over time. The defense argued that the visual inspection of the unit by the Public Storage manager had been cursory, and thus could not be relied on to prove that the stolen items were not already in unit 625 at the time that Allen acquired the locker. In closing, defense counsel argued:

> Things were taken in September, and they went someplace. He had a lot of property taken in September. And one of the things that was taken was a cutting torch. And that cutting torch was in the unit that Nathon Allen put a bid in on because that's one of the things that was returned. Nathon was not in the video from September. John Cotton was not in the video from September. Paul Reed was not in the video from September. That cutting torch went from Mr. Brienen's unit to the unit on which Nathon put a bid, and it did so between September to the point at which this other person vacated the unit.

3RP 375-76.

Shortly thereafter, defense counsel turned to the allegedly inadequate inspection of unit 625 by the Public Storage manager:

> Do you remember what he told you? He said I do 30 to 40 of these a month. He does 30 to 40 auctions -- or does 30 to 40 appraisals a month. And did you talk to him -- or do you remember him talking to you about what that entails. Again this is about what people do, not necessarily what they say. Visual appraisal. No one is allowed in the unit. No one goes in the unit. I asked him why not go in the units? It's just not what we do. It's not part of our procedure.
>
> He said it's 30 feet long, from -- I think he said, let me get back here, from here to the end of the courtroom. And he stands there. And they open up the gate. He's got 30 to 40 of these to do a month. He does them he said two days out of the month. So he's hitting them bam, bam, bam, bam. He's got to move onto the next one. 30 to 40 a month. He take twos (sic) days out of the month to deal with it.
>
> Do you think he's really doing a major accounting of what's in there, or is he just lifting up the gate just to make sure there's not a body in there or some car?

3RP 378-79.

Shortly thereafter, Allen's attorney returned to hammer home the theme:

> We know from the evidence that there is no record of Mr. Brienen being on the property in November. We know from the district manager that he's got 30 to 40 of these to do in a month. He's doing them two days out of the week. He's got to do these in addition to his other duties that he told you about. Quick visual inspection. He's not walking into the unit to see what's behind things because he's got stuff to do. This was not a burglary. The State has not proven this beyond a reasonable doubt.

3RP 381-82. In short, the defense theme was that someone else had committed the first burglary, no connection had been made between Allen and this other person, and, therefore, the State had not proven Allen guilty of the charged burglary. Had the defense successfully moved to exclude evidence of the first burglary, either pretrial or during trial, Allen would have been virtually without a defense. The jury would have seen the surveillance video of Allen and his cohorts loading the stolen goods into his truck and trailer without any viable argument that the property had been stolen previously and Allen was simply a bona fide purchaser of the locker contents.

In arguing that the prosecutor committed misconduct in closing argument, Allen relies heavily on State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). Boehning is of little help to Allen. In Boehning, the defendant was originally charged with three counts of rape of a child in the first degree, or, in the alternative, three counts of first degree child molestation. Boehning, 127 Wn. App. at 515. At the close of evidence the State dismissed the three rape charges. Id. at 517. In closing argument the prosecutor argued that the jury could infer that the child victim had told the truth in three separate disclosures, which were inadmissible hearsay, to her foster mother, a detective, and a social worker. Id. at 521. Further, the prosecutor twice drew attention to the dismissed rape charges

and suggested that the victim's inadmissible disclosures would have supported those charges. Id. At trial, Boehning had not objected to the prosecutor's arguments, but Boehning held that "this repeated attempt to bolster (the victim's) trial testimony and credibility by instilling inadmissible evidence in the juror's minds was so flagrant as to constitute misconduct." Id. at 523.

In Boehning, the prosecutor's misconduct in repeatedly referring to inadmissible hearsay in an emotionally charged child abuse case was obvious and flagrant. Here, there was no appeal to juror's emotions in a burglary case when the State, in closing argument, referred to evidence *that had been admitted* by the trial court in arguing that the State had no burden to prove beyond a reasonable doubt that the defendant was guilty of the uncharged burglary.

Allen also cites, State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976), claiming that the court of appeals held it to be reversible error that the prosecutor in opening statement suggested that the defendant who was charged with rape could also have been charged with burglary. In fact, the Torres court did not hold that reference standing alone to be reversible error, but rather that the cumulative effect of several instances of prosecutorial misconduct amounted to reversible error. Id. at 264. The misconduct cited in Torres included the prosecutor's opening statement

reference to an uncharged burglary; the prosecutor's repeated references to the defendants as "Mexican-Americans"; the prosecutor's improper phrasing of much of the opening statement in the form of testimony rather than an outline of anticipated facts; the prosecutor's persistent use of leading questions when examining the victim despite repeated sustained objections that led to the court finding the prosecutor in contempt; the prosecutor having asked a witness whether the defendant had testified at a preliminary hearing, thereby improperly implicating the defendant's right against self-incrimination; the prosecutor in closing argument improperly referring to the spousal privilege by pointing out that the defendant's wife did not testify for him; and, in closing argument, the prosecutor persistently discussed prospective punishment despite repeated sustained objections. See id. at 256-62. These egregious facts do not even remotely resemble the case at bar.

Here, considering the context of the arguments and the issues in the case, particularly given that the arguments concerned evidence the admission of which the defense did not object to and in fact benefited from, the prosecutor did not commit misconduct in closing argument. In the context of the case, the defense was essentially attempting to place a burden on the State to prove that Allen was, in fact, responsible for the earlier burglary. It was important for the prosecutor to distinguish for the

jury that the State had the burden of proving beyond a reasonable doubt only the elements of the charged offense, not the earlier burglary. It was not misconduct, under these circumstances, for the prosecutor to explain the lack of the burden of proof, and also to argue from the admitted evidence that Allen probably had been involved in some manner in the first burglary.

d. If The Prosecutor Committed Any Error In Closing Argument It Is Not Reversible.

Even if this Court were to find that the prosecutor's references to Allen having likely been involved in the earlier uncharged burglary were improper, the error is not reversible. The prosecutor's first reference drew no objection and, thus, Allen has the burden to show that the remark was flagrant and ill-intentioned, and 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." Emery, 174 Wn.2d at 761. Here, given that the prosecutor was addressing evidence of the earlier burglary that had been admitted without objection and which formed the theme of Allen's defense, it cannot be said that the prosecutor's comment was flagrant and ill-intentioned.

Regarding the prosecutor's second reference, to which Allen's objection was denied, Allen has the burden of showing that the

prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d at 760. Here, he cannot do that. The jury heard the testimony of the burglary victim, Burt Brienen, as he narrated the surveillance video of Allen and another man loading Allen's truck and trailer with his property that he knew to have been in his locker after he had reported the first burglary. It is also apparent from the verdict that the jury determined that the pre-auction inventory of the locker by a Public Storage manager would have revealed Brienen's property had it been stolen before Allen gained access. Stolen property that Brienen knew was in his locker after the first burglary was found at Allen's residence. The evidence of Allen's guilt was strong.

In arguing that the prosecutor's alleged misconduct was so severe that reversal is required Allen relies heavily on State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). But Fisher is inapposite. In Fisher, the defendant was convicted of four counts of child molestation, all involving the same victim, Melanie. At a pretrial hearing the trial court determined that the defendant's abuse of several other children would be admissible only to explain why Melanie, who had witnessed the abuse and was fearful, had delayed reporting the offenses against her, and only if the defense raised the issue of delayed reporting. Id. at 734-35. Despite the

trial court's ruling that the disputed evidence was admissible for only a limited purpose, the prosecutor throughout the case developed an improper theme that the defendant had a propensity to commit child abuse.

> ... the prosecuting attorney used the evidence to generate a theme throughout the trial that Fisher's sexual abuse of Melanie was consistent with his physical abuse of all his stepchildren and biological children, an impermissible use of the evidence. In violation of the court's pretrial ruling and in spite of defense counsel's standing objection, the prosecuting attorney directed the jury to consider the evidence of physical abuse to prove Fisher's alleged propensity to commit sexual abuse when he discussed the system failing Tyler, Melanie, Brett, Brittany, Ashland, and Shelby.

Id. at 748.

In finding that the prosecutor's improper argument had a substantial likelihood of affecting the jury's verdict, and therefore reversing his convictions, the court reasoned:

> The jury, therefore, was left with the wrong impression that it must convict Fisher to obtain justice for the harm caused to Brett, Brittany, Ashland, and Shelby, in addition to Melanie.

Id. at 749.

In Fisher, a case involving child sexual abuse, the nature of the prosecutor's argument was undeniably inflammatory. Here, the prosecutor's reference to Allen likely having been involved in the prior burglary would have had no such inflammatory effect,

and thus there was not a substantial likelihood that the comments affected the jury's verdict, particularly given the strength of the evidence against Allen.

3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF REASONABLE DOUBT.

Allen asserts that the language of WPIC 4.01 defining reasonable doubt as "one for which a reason exists," is a misstatement of the law and therefore his conviction must be reversed. This argument has no merit and was never raised below. This Court is bound by precedent of the Washington Supreme Court upholding WPIC 4.01.

a. Relevant Facts.

Here, the trial court instructed the jury as follows:

> The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.
>
> ***A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.*** A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

CP 46 (Jury Instruction 2) (emphasis added). It is the highlighted language of which Allen now complains. This language is from WPIC 4.01. As Allen acknowledges, he did not object at trial to this instruction.

b. The Alleged Error Is Not Manifest And Cannot Be Raised For The First Time On Appeal.

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error). To obtain review, a defendant must show that the claimed error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009).

If the claimed error is of constitutional magnitude, the court will determine whether the error is manifest. An error is manifest if it is "so obvious on the record that the error warrants appellate review." O'Hara, 167 Wn.2d at 99-100. Manifest error also requires a showing of "actual prejudice." Id. 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." Id.

The State acknowledges that it is an error of constitutional magnitude when a trial court incorrectly instructs the jury in a way that

misstates reasonable doubt or shifts the burden of proof to the defendant. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). However, although Allen asserts that a constitutional error occurred, he fails to establish that it was manifest error for the trial court to give the standard WPIC defining reasonable doubt. Recently, in State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015), our supreme court found that a trial court's oral instruction on reasonable doubt was manifest error specifically because it differed from WPIC 4.01.

In Kalebaugh, before a jury was impaneled, the trial court gave the jury venire oral instructions that included an incorrect articulation of the reasonable doubt standard:

> If after your deliberations you do not have ***a doubt for which a reason can be given*** as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt.
>
> On the other hand, if after your deliberations you do have ***a doubt for which a reason can be given*** as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt.

Id. at 582 (emphasis added). The defendant did not object. Id. At the close of the evidence, the trial court instructed the jury with relevant Washington pattern jury instructions. Id. The supreme court stated: "More importantly and relevant to our review, the court's instructions

included the complete and proper version of WPIC 4.01, the instruction on reasonable doubt." Id.

The Kalebaugh court, in determining whether the alleged error was "obvious on the record" and "practical and identifiable," and, thus, manifest, contrasted the judge's oral instruction with the correct standard for instructing on reasonable doubt.

> The trial judge instructed that a "reasonable doubt" is a doubt for which a reason can be given, rather than the correct jury instruction that a "reasonable doubt" is a doubt for which a reason exists. WPIC 4.01, at 85. The jury instruction given was a misstatement of the law that the trial court should have known, and the mistake is manifest from the record. Thus, Kalebaugh's claim is a manifest constitutional error and can be raised for the first time on appeal.

Id. at 584. Thus, it was the deviation from the "correct jury instruction," WPIC 4.01, that made the trial court's error manifest. Here, Allen does not even allege that the trial court's instruction on reasonable doubt deviated from what our supreme court termed the correct statement of the law, WPIC 4.01. There was no manifest error.

The trial court's use of WPIC 4.01 is not an "obvious error," and there can be nothing more than pure speculation that the inclusion of the disputed language in the jury instructions had any identifiable consequences. This is insufficient to allow for appellate review. State v. Donald, 178 Wn. App. 250, 271, 316 P.3d 1081 (2013) (refusing

to consider defendant's argument regarding the "to convict" jury instructions because he failed to object below and failed to demonstrate prejudice as required under RAP 2.5). This Court should decline to address Allen's argument regarding the reasonable doubt instruction.

c. The Instructions Correctly State The Law.

Allen argues that WPIC 4.01 is unconstitutional. He contends that the instruction required the jury to articulate a reason to doubt, thereby undermining the presumption of innocence. However, the instruction correctly states the law. It does not lead jurors to believe that that they must be able to articulate their reason for acquittal. Allen's arguments should be rejected.

Jury instructions are read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). The instructions are legally sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The instructions must define reasonable doubt and convey to the jury that the State bears the burden of

proving every essential element of the crime beyond a reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Over 100 years ago, the Washington Supreme Court approved a reasonable doubt instruction similar to WPIC 4.01. State v. Harras, 25 Wash. 416, 420, 65 P.2d 774 (1901). There, the jury was instructed that a reasonable doubt was "a doubt for which a good reason exists." The supreme court said the instruction was correct "according to the great weight of authority" and was not error. Id. at 421.

Almost 60 years ago, the supreme court rejected yet another challenge to a reasonable doubt definition. State v. Tanzymore, 54 Wn.2d 178, 178-79, 240 P.2d 290 (1959). The challenged instruction defined reasonable doubt as:

> a doubt for which a reason exists .... A reasonable doubt is such a doubt as exists in the mind of a reasonable man after he has fully, fairly, and carefully compared and considered all of the evidence or lack of evidence introduced at the trial. If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

Id. The supreme court said that a challenge to that definition, which had been accepted as a fair statement of the law for "many years," was without merit. Id. at 179.

Forty years ago, Division II of this Court reaffirmed the correctness of that definition in State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975). Thompson argued that the phrase "a doubt for which a reason exists" required jurors to assign a reason for their doubt in order to acquit. Id. at 4-5. The court disagreed. Id. at 5. When read together with all of the instructions, the reasonable doubt instruction did not tell the jury to assign a reason for its doubts, but rather to base its doubts "on reason, not on something vague or imaginary." Id.

Within the last decade, the supreme court has determined that the wording of WPIC 4.01's definition of reasonable doubt is constitutional. In Bennett, supra, the defendant had asked the trial court to instruct the jury using WPIC 4.01. Instead, the court gave the so-called Castle[3] instruction which read, in part:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. . . . There are very few things in this world we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt.

161 Wn.2d at 309. The Bennett court said this instruction was constitutionally adequate but not necessarily "a good or even desirable instruction." Id. at 316. The court exercised its "inherent supervisory

[3] The instruction first appeared in State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997).

powers to maintain sound judicial practice" and instructed every trial court to define reasonable doubt using WPIC 4.01. Id. at 306. Even the four-person dissent, which would have overturned the conviction based on the Castle instruction, agreed that WPIC 4.01's language was clear. Id. at 320.

Most recently, in Kalebaugh, supra, the Washington Supreme Court reaffirmed, as discussed above, that WPIC 4.01 was "the correct legal instruction on reasonable doubt." 183 Wn.2d at 584. There, during its introductory remarks, the trial court orally paraphrased the term as "a doubt for which a reason *can be given.*" Id. at 7 (emphasis in original). However, at the end of the case, the court provided "the complete and proper version of WPIC 4.01, the reasonable doubt instruction." Id. at 582. In concluding that error in the trial judge's "offhand" explanation was harmless beyond a reasonable doubt, the Court specifically disagreed that WPIC 4.01 requires the jury to articulate a reason for having a reasonable doubt or was akin to the improper "fill in the blank" argument made in State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Id. at 585. Thus, Allen's reliance on Emery is undercut by Kalebaugh.

Allen's argument that the language of WPIC 4.01 contains an "articulation" requirement is wrong. In fact, it is misconduct for a prosecutor to suggest that it does. Emery, 174 Wn.2d at 759-60; State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 684, 243 P.3d 926 (2012); State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). If WPIC 4.01 contained an articulation requirement, the prosecutors' statements in the above-cited cases would not have been misconduct because they would have been correct statements of the law. The prosecutors' statements were erroneous precisely *because* WPIC 4.01 contains no articulation requirement.

For example, in Emery, the prosecutor argued that a reasonable doubt was "a doubt for which a reason exists." 174 Wn.2d at 760. That was a correct statement of the law. Id. The error came when the prosecutor argued that, in order to acquit, the jury had to articulate its reason to doubt, something not required under WPIC 4.01. Id.

A prosecutor's statement that a reasonable doubt is one for which a reason exists is not error. Only when the prosecutor tells the jury that it must articulate a reason to doubt in order to acquit does error occur, precisely because that argument misstates what the instruction says.

WPIC 4.01 simply defines a reasonable doubt as a doubt for which a reason exists, with no further requirement. Allen asks this court to parse WPIC 4.01 to give it subtle shades in meaning that simply would not exist in the mind of a juror. There is no reason to believe that jurors would engage in that sort of technical hairsplitting when they are given the definition.

Allen has provided this Court with no basis upon which to depart from the holdings of the Washington Supreme Court in Bennett and Kalebaugh. See State v. Watkins, 136 Wn. App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this Court were inclined to entertain a challenge to controlling precedent, Allen bears the burden of making a "clear showing" that WPIC 4.01 is both "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not done so. "The test for determining if jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." State v. Brown, 29 Wn. App. 11, 18, 627 P.2d 132 (1981). Allen has failed to show that the Supreme Court's multiple decisions are wrong.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Allen's judgment and sentence.

DATED this 30 day of November, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Mary T. Swift, containing a copy of the Brief of Respondent, in STATE V. NATHON ALLEN, Cause No. 73203-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Nov. 30, 2015

Done in Seattle, Washington