Supreme Court No. 99508-7
(COA No. 80195-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDALL MACHETA,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

Washington Constitution

United States Constitution

Washington Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Randall Macheta, petitioner here and appellant below, asks this Court to accept review of the unpublished Court of Appeals decision, filed January 19, 2021, terminating review. RAP 13.3(a)(1); RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. When the State presents evidence of multiple acts, any one of which could form the basis of a single count charged, the court needs to inform the jury it must be unanimous as to the single act that constitutes the charged offense unless the prosecutor makes a clear election. Here, the State admitted evidence of three separate unlawful entries and discussed all three in closing and rebuttal arguments, but the prosecutor did not make a clear election, and the court denied Mr. Macheta's request for a multiple acts unanimity instruction. Should this Court accept review because the trial court deprived Mr. Macheta of his constitutional right to a unanimous verdict under the state and federal constitutions? RAP 13.4(b)(1)-(3).

2. The State bears the burden of proving every element of a crime beyond a reasonable doubt. Criminal law disfavors evidentiary presumptions and inferences because the jury may interpret them as relieving the State of its burden. It is improper for a court to instruct the jury on inferred intent in a burglary case where the presumption creates

the sole evidence of intent or where the facts of the case do not support the presumption. Should this Court accept review where the court improperly gave the jury the disfavored instruction? RAP 13.4(b)(2), (3).

3. The State violates the presumption of innocence and the due process requirement that the government prove all elements of an offense beyond a reasonable doubt when it shifts the burden of proof to the defendant. Here, the prosecutor focused his closing argument around the theme that the only explanation for Mr. Macheta's conduct was a criminal one. Did this prosecutorial misconduct deprive Mr. Macheta of his right to a fair trial? RAP 13.4(b)(1)-(3).

C. STATEMENT OF THE CASE

Randall Macheta wandered into Kenneth Schellhase's home, claiming he had a random connection with Mr. Schellhase through their fathers. RP 214, 218. Mr. Schellhase, who does not know Mr. Macheta, told him to leave and pushed him out of the house. RP 218-19. Mr. Schellhase noticed the doorknob on the door to his house was "all twisted." RP 220.

After Mr. Macheta left, Mr. Schellhase drove around the neighborhood looking for Mr. Macheta but did not find him. RP 220. When he returned home, Mr. Schellhase noticed the side door to his detached garage was ajar, and it appeared someone pried it open. RP 222-

23. Additionally, Mr. Schellhase observed some blankets in his truck, which was parked in his driveway, were "messed up," and a couple of packs of cigarettes were missing from his truck's visor. RP 221. Mr. Schellhase admitted he left his truck unlocked the night before. RP 235. The truck was open and unlocked for at least ten hours before Mr. Macheta walked into his house. RP 235.

Mr. Macheta returned to Mr. Schellhase's house a few minutes later, knocked on the door, and stated, "I heard you were looking for me." RP 222. After Mr. Schellhase accused Mr. Macheta of taking his cigarettes, Mr. Macheta handed Mr. Schellhase two packs of cigarettes. RP 224. Mr. Schellhase told him to get off his property, and Mr. Macheta left. RP 223.

Mr. Schellhase followed Mr. Macheta and called 911. RP 225-26. Police arrested Mr. Macheta on the street around the corner. RP 227, 242, 291-92. Police asked Mr. Macheta if he had been in someone's house. RP 244. Mr. Macheta answered yes, then clarified that he was in someone's garage and that he pried his way inside. RP 244-45.

Mr. Schellhase testified Mr. Macheta did not take anything from his house or garage. RP 234, 236, 302-03. Mr. Macheta was not carrying any sort of backpack or bag that could have held items. RP 233. He did not have any tools. RP 233-34. In addition, Mr. Macheta was not hostile

or aggressive. RP 233. Mr. Macheta was not covering his face or attempting to hide his identity. RP 233. Nonetheless, the jury found Mr. Macheta guilty of residential burglary. CP 57.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court deprived Mr. Macheta of his right to a unanimous jury verdict when it refused to give Mr. Macheta's requested unanimity instruction.

The federal and state constitutions protect against conviction except by a unanimous jury verdict. Const. art. I, §§ 21, 22; U.S. Const. amends. VI, XIV; *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 1396-97, 206 L. Ed. 2d 583 (2020); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *abrogated in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). This requires the jury to agree unanimously on which alleged act constituted the crime. *Kitchen*, 110 Wn.2d at 411. This Court should accept review because the Court of Appeals affirmed Mr. Macheta's conviction where the trial court failed to ensure Mr. Macheta was convicted by a unanimous jury verdict. RAP 13.4(b)(1)-(3).

When the prosecution presents evidence of multiple acts, any one of which could form the basis of a single count charged, the court must act to protect jury unanimity. Either the court must instruct the jury it needs to agree unanimously on a specific criminal act or the prosecution must

tell the jury clearly on which act to rely. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007); *Petrich*, 101 Wn.2d at 572.

The State charged Mr. Macheta with a single count of residential burglary. CP 33-34. This required the State to prove an unlawful entry. RCW 9A.52.025(1). However, the prosecution introduced evidence of three separate possible unlawful entries into (1) the complainant's house, (2) the complainant's garage, and (3) the complainant's truck. RP 214-23. Mr. Macheta requested a *Petrich* instruction so the jury would understand it had to agree on one particular entry to convict Mr. Macheta of the burglary charge. RP 279-81; CP 61. Where the State introduces evidence of multiple unlawful entries to support a single count of burglary, the court must give a unanimity instruction or the prosecution must make a clear election to protect jury unanimity. *State v Irby*, 187 Wn. App. 183, 198-99, 347 P.3d 1103 (2015); *State v. Brooks*, 77 Wn. App. 516, 520-21, 892 P.2d 1099 (1995).

The trial court recognized the three distinct occurrences of unlawful entry but rejected Mr. Macheta's request for a *Petrich* instruction because the prosecutor claimed he was making a specific election to rely on the entry into the house. RP 281. However, contrary to his expressed intentions, the prosecutor did not clearly elect a single act in his closing argument. Instead, he discussed all three unlawful entries. RP 331-36,

345-56. Again, in rebuttal, the prosecutor repeatedly referred to the three separate unlawful entries. RP 345-46.

A prosecutor's election defeats a potential unanimity problem only where the prosecutor informs the jury on which specific act it is relying and also disclaims intent to rely on other acts. *State v. Carson*, 184 Wn.2d 207, 228 n.15, 357 P.3d 1064 (2015). Where the State presents evidence of multiple acts and claims it will make an election but then fails to do so, the absence of a unanimity instruction requires reversal. *State v. King*, 75 Wn. App. 899, 902-04, 878 P.2d 466 (1994). Here, the prosecutor discussed all three potential unlawful entries and did not disclaim reliance on any act in closing argument. Therefore, the State did not clearly elect to rely on the entry into the house to support the burglary conviction. The State's promise to make a clear election does not defeat the unanimity problem because it failed to actually do so. *Id.* at 903.

The Court of Appeals acknowledged the trial court denied Mr. Macheta's motion based on the State's representation it would elect an act. Slip Op. at 3-4. Nonetheless, the Court of Appeals affirmed the denial of the instruction because it ruled "the State presented evidence of only one act of residential burglary." Slip Op. at 4. The Court of Appeals agreed the State discussed all of the entries but ruled it did so "only for the

purpose of showing that Macheta entered the house with intent to steal property." Slip Op. at 7.

That the Court of Appeals appreciates the careful delineation of what multiple acts evidence properly could and could not be used for is unsurprising. But that fails to prove *the jury* understood that same essential demarcation and only considered the additional acts for one purpose – inferring intent – and not the other – determining which act constituted an unlawful entry. The relevant inquiry is what *the jury* may have understood. *See Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) ("Whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction").

Faced with evidence of unlawful entry into three separate structures – the house, the garage, and the truck – and hearing argument relying on the unlawful entry into all three, a reasonable jury could have believed any of the three unlawful entries satisfied the burglary offense. That is why Mr. Macheta was entitled to a unanimity instruction. An instruction or election is required "to ensure *the jury's* understanding that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt." *State v. Williams*, 136 Wn. App. 486, 496, 150 P.3d 111 (2007) (emphasis added); *see State v. Borsheim*, 140

Wn. App. 357, 368, 165 P.3d 417 (2007) (instructions informing jury it must find separate and distinct acts for each count must be "manifestly apparent to the average juror").

The Court of Appeals rejected Mr. Macheta's challenge based on a misunderstanding of when a unanimity instruction is required and a mistaken belief of what constitutes a clear election. This Court should accept review.

2. The court violated Mr. Macheta's right to due process when it instructed the jury it could infer Mr. Macheta's intent.

"Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt." *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); U.S. Const. amend. XIV; Const. art. I, § 3. "The state may not circumvent its burden of persuasion through exclusive use of a permissive inference." *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). Even permissive instructions that inform a jury it may infer or presume the ultimate fact from proof of a basic fact are "not favored" in criminal law. *Cantu*, 156 Wn.2d at 826; *accord* Comment to 11A Wash. Prac., Pattern Jury Instructions: Criminal 60.05 (4th ed. 2016). Courts discourage the use of such instructions. *See, e.g., State v. Johnson*, 100 Wn.2d 607, 620, 674 P.2d 145 (1983) (noting permissive inferences are "rarely necessary and usually ill-advised"),

overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985); *State v. Brunson*, 76 Wn. App. 24, 27, 877 P.2d 1289 (1994) (noting use of inference instruction is "discouraged"), *aff'd*, *Brunson*, 128 Wn.2d 98; *State v. Brittain*, 38 Wn. App. 740, 743-44, 689 P.2d 1095 (1984).

In addition to being disfavored, the court may not instruct the jury that it can infer a person intended to commit a crime within a building if the defendant unlawfully entered or remained in the building where that inference does not flow from proven facts in a particular case. *State v. Sandoval*, 123 Wn. App. 1, 3-6, 94 P.3d 323 (2004); *see also State v. Jackson*, 112 Wn.2d 867, 870, 774 P.2d 1211 (1989) (holding inferred intent instruction is improper in attempted burglary cases because "there exist other equally reasonable conclusions which follow from the circumstances"). "A jury is permitted to infer criminal intent from entering or remaining in a building, but only if the State makes a sufficient showing of some fact from which that inference can be drawn." *Sandoval*, 123 Wn. App. at 2 (discussing RCW 9A.52.040). Jurors may never infer intent from equivocal conduct. *Bergeron*, 105 Wn.2d at 20; *see State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

In *Sandoval*, the Court of Appeals discussed when this disfavored instruction is prohibited. 123 Wn. App. at 3-6. In that case, the defendant

broke into the complainant's home by kicking in the locked door, entering, and shoving the complainant. *Id.* at 3. The State presented no evidence of the defendant's intent other than the defendant's actions in shoving the complainant. The defendant was not trying to sneak in, was not wearing apparel that attempted to hide his identity, was not carrying any burglary tools, and did not attempt to flee. *Id.* at 5-6. Because the defendant could have intended something other than to commit a crime inside the home, the court held the trial court erred in instructing the jury on the intent inference. *Id.* at 6.

Here, the court delivered the disfavored inferred intent instruction. CP 81 (Jury Instruction No. 12). However, the evidence did not support the instruction. Like in *Sandoval*, Mr. Macheta did not try to sneak surreptitiously into the house; he walked in through the main door. RP 214 Like in *Sandoval*, Mr. Macheta was not attempting to hide his identity. RP 233. Mr. Macheta was not carrying burglar's tools to assist in an unlawful entry, nor was he carrying a bag that could store and transport items. RP 233-34.

Insufficient evidence supported the inference, and the court erred in instructing the jury. This Court should accept review.

3. The prosecutor's repeated arguments that there was no innocent explanation for Mr. Macheta's behavior violated the presumption of innocence and relieved the State of its burden of proof.

The State, not the defense, bears the burden of proof in a criminal trial. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Arguments that the accused has an affirmative duty to explain the evidence or to identify the absence of evidence are a form of impermissible burden-shifting. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012); *State v. Johnson*, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010). Similarly, arguments that no evidence supports the defendant's theory constitute improper burden shifting and misconduct. *State v. Fleming*, 83 Wn. App. 209, 213-15, 921 P.2d 1076 (1996).

The right to a fair trial also includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Implementing the presumption of innocence requires a court to "be alert to factors that may undermine the fairness of the fact-finding process." *Id.* Arguments suggesting the jury must be able to explain the reason for their doubt "subvert[] the presumption of innocence." *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011);

see also State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); *State v. Walker*, 164 Wn. App. 724, 730-32, 265 P.3d 191 (2011).

Here the prosecutor's arguments that there was no non-criminal explanation for Mr. Macheta's behavior shifted the burden of proof to Mr. Macheta and violated the presumption of innocence. The prosecutor argued this in both closing and rebuttal. In closing, the prosecutor argued:

> In looking at what Mr. Macheta's intent was when [he] entered into Mr. Schellhase's home, think of another plausible explanation for entering the home. You don't work your way into another person's home for an innocent purpose. Mr. Macheta didn't --
>
> MS. SULLIVAN: Objection. Burden-shifting, Your Honor.
>
> THE COURT: The court would just remind the jury that the instructions are -- the law is what is contained in the instructions that I have provided to you.

RP 333-34. Again, in rebuttal, the prosecutor argued:

> And think about what other plausible explanations there could be for entering the house. There are none, other than to commit a crime.

RP 345-46.

The State focused on Mr. Macheta's inability to provide an innocent explanation for the charge. It also argued Mr. Macheta could not have had an innocent intent. This was prosecutorial misconduct.

Mr. Macheta properly defended against the charge by arguing the prosecution failed to prove the essential element of the burglary that he possessed the intent to commit a crime against a person or property. When the prosecutor attempted to shift the burden of proof on this element to Mr. Macheta to disprove it, Mr. Macheta objected, preserving the issue. RP 333. The prosecution persisted in its misconduct, again arguing on rebuttal that Mr. Macheta failed to present any "plausible explanations" for his conduct, other than acting with the intent to commit a crime. RP 345-46. The repeated emphasis of this improper argument increased its prejudicial effect. *See, e.g., State v. Hawkins*, 14 Wn. App. 2d 182, 190, 469 P.3d 1179 (2020) (holding defendant was prejudiced by prosecutor's "repeated emphasis" on inadmissible and irrelevant evidence).

Last term, this Court recognized improper comments may prejudice a defendant and deprive him of a fair trial, even where the defendant does not object, and reversed the conviction. *State v. Loughbom*, 196 Wn.2d 64, 470 P.3d 499 (2020). The court noted how the improper comments occurring throughout the case served to create "a thematic narrative" that deprived the defendant of a fair trial. *Id.* at 70.

Here, like *Loughbom*, the prosecutor made improper references to Mr. Macheta's failure to provide a lawful explanation in both the beginning of its closing argument and in its rebuttal. RP 333-34, 345-46.

Whereas Mr. Loughbom did not object to any of the improper comments, here, Mr. Macheta objected to the first improper comment. RP 333. When the court declined to sustain the objection, the prosecutor took advantage of it and repeated the identical improper argument in rebuttal. RP 345-46. A trial court's erroneous overruling of a specific objection "lends 'an aura of legitimacy to what was otherwise an improper argument.'" *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (quoting *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). The prosecutor's actions encouraged the jury to relieve the State of its burden to prove the only contested element in the case.

The Court of Appeals rejected Mr. Macheta's challenges, finding it within the prosecutor's "wide latitude to argue reasonable inferences from the evidence." Slip op. at 17. While both parties may argue reasonable inferences from the evidence, the defendant's failure to present an innocent explanation is no such reasonable inference.

The improper arguments shifted the burden of proof from the State to Mr. Macheta to disprove the crime and explain the charge. A criminal defendant has no obligation to explain the evidence, and it is improper for a prosecutor to suggest otherwise. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The prosecutor's arguments constitute misconduct. The Court of Appeals' opinion to the contrary conflicts with countless

cases holding arguments that shift the burden of proof and violate the presumption of innocence constitute misconduct. This Court should accept review. RAP 13.4(b)(1)-(3).

E. CONCLUSION

This Court should accept review under RAP 13.4(b).

DATED this 16th day of February, 2021.

Respectfully submitted,

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APPENDIX A

January 19, 2021, Opinion

FILED
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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. RANDALL MACHETA, Appellant.	)	No. 80195-3-I UNPUBLISHED OPINION

VERELLEN, J. — Randall Macheta challenges a jury verdict for residential burglary. He contends the trial court erred by failing to give a Petrich[1] unanimity instruction, giving a permissive presumption of intent instruction, and refusing to bifurcate the jury's consideration of the aggravating factor. He also argues that prosecutorial misconduct deprived him of a fair trial. These arguments are not persuasive. We agree that the judgment and sentence should be amended on remand to reflect that Macheta's Social Security benefits may not be used to satisfy his legal financial obligations. In all other respects, we affirm.

FACTS

On the morning of July 30, 2018, Kenneth Schellhase was watching television in the living room of his Renton home. Schellhase's wife had gone to

[1] State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173, 178 (1984), abrogated by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

work, having left the front doorknob locked but the deadbolt unlocked. All of a sudden, a strange man walked into the room and said, "I don't know if you remember me or not. My dad used to work with your dad."[2] Shocked, Schellhase told the man to get out of his house. The man left.

Schellhase got dressed and headed to his truck to go look for the man, later identified as Randall Macheta. As he was shutting the front door, he noticed that the doorknob was "all twisted."[3] He was unable to lock the doorknob and had to use the deadbolt. When he got into his truck, he noticed that it was in disarray. A pile of folded blankets were disturbed, the contents of the glove box had been rifled through, and two packages of cigarettes were missing.

After driving around the block and not finding the man, Schellhase told his next-door neighbors what had happened. When he arrived home, he noticed that the latch to his garage door had been pried off and the door was ajar. Schellhase "could tell that somebody had been in there."[4]

Schellhase went into the house and, as he did, he heard someone knocking on the door. Schellhase opened the door and saw Macheta again. This time, Macheta did not enter the house. He said, "I heard you were looking for me."[5] Schellhase confronted Macheta about breaking into his truck, and Macheta gave Schellhase his cigarettes back. According to Schellhase, Macheta said something

[2] Report of Proceedings (RP) (June 11, 2019) at 214.

[3] Id. at 220.

[4] Id. at 223.

[5] Id. at 222.

like, "[T]his isn't me. I don't know why I did this."[6] Again, Schellhase told Macheta to leave, which Macheta did. Schellhase and a neighbor followed Macheta as Schellhase called the police.

Macheta waited patiently with Schellhase for the police to arrive, at which point, he was arrested. Macheta admitted to the arresting officer that he entered Schellhase's house and that he had pried his way inside.[7] The officer asked Macheta if "he knew the people whose house that he was in, or if the house was random to him."[8] Macheta "replied that it was random."[9]

The State charged Macheta with one count of residential burglary. The State also alleged as an aggravating factor that the victim was present at the time of the crime. A jury convicted Macheta as charged and returned a special verdict on the aggravating factor. Macheta appeals.

DISCUSSION

1. Jury Unanimity

At trial, Macheta proposed a Petrich instruction, arguing the State had offered evidence of multiple entries onto Schellhase's property, including the house, the garage, and the truck. The State told the court that it planned to argue only Macheta's entry into the house constituted residential burglary. Based on the

[6] Id. at 223.

[7] According to the arresting officer, Macheta "later clarified he was in someone's garage." Id. at 245.

[8] Id.

[9] Id.

State's representation, the trial court declined to give the instruction. Macheta argues that the failure to give the instruction deprived him of his right to a unanimous jury verdict. We conclude that there was no unanimity violation because the State presented evidence of only one act of residential burglary.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal defendant has a right to a unanimous jury verdict.[10] When the State presents evidence of several distinct acts that could constitute a charged crime, the jury must agree unanimously on which act constituted the crime.[11] Either the State must elect the act it relies on or the court must instruct the jury to agree unanimously as to what act or acts the State proved beyond a reasonable doubt.[12] As long as the election clearly identifies the particular acts on which charges are based, verbally informing the jury of the election during closing argument is sufficient.[13] Failure to do so is constitutional error because of "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction."[14]

[10] State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

[11] Kitchen, 110 Wn.2d at 411.

[12] Id.

[13] State v. Carson, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015).

[14] Kitchen, 110 Wn.2d at 411.

A person commits residential burglary when he or she "enters or remains unlawfully in a dwelling other than a vehicle" with the intent to commit a crime against a person or property therein.[15] A "dwelling" is "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging."[16] For the purposes of residential burglary, courts have generally only interpreted a garage as a "portion" of a dwelling when the garage is attached to the dwelling.[17]

The trial court instructed the jury on the elements of residential burglary as follows:

> To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 30, 2018, the defendant unlawfully entered or remained unlawfully in a dwelling;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
>
> (3) That this act occurred in the [s]tate of Washington.[18]

In closing argument, the State explained how Macheta's entry into Schellhase's house was an unlawful entry into a dwelling, thereby satisfying the first element. In doing so, the State discussed only the entry into the house:

> I don't think that there are going to be disputes about some of these requirements. There is no question that this occurred on July

[15] RCW 9A.52.025(1).

[16] RCW 9A.04.110(7).

[17] See, e.g., State v. Murbach, 68 Wn. App. 509, 513, 843 P.2d 551 (1993).

[18] Clerk's Papers (CP) at 77.

30th, 2018. You heard from Mr. Schellhase. He testified about the events on July 30th, 2018. You heard from Officer Elliott and Sergeant Morgan of the Renton Police Department, how they responded on July 30th and investigated this incident.

I also don't think there will be much dispute about whether this was a dwelling. This is where Mr. Schellhase lived. You heard that he lives there with his wife. He lived there for the last ten years. In fact, he was just waking up that morning.

Furthermore, I don't believe there will be much dispute about whether it was the defendant that entered the home. You heard from Mr. Schellhase on the stand. He identified Mr. Macheta as the person who walked into his living room.

Next, I don't think that there will be too much dispute about whether he, in fact, entered into the dwelling. Mr. Schellhase testified about the two doors at his residence. There is the—I guess the door to get into what he described as the sunroom, and then the secondary to getting to more of the living room. He testified that Mr. Macheta came through that second door, and he came face-to-face with Mr. Macheta in the living area of his home. In addition, he testified that Mr. Macheta came approximately ten feet into the home.

Finally, with that first element, the State must prove beyond a reasonable doubt the entry into the home was unlawful.

From the State's perspective, it is clear. Mr. Schellhase testified that he didn't know Mr. Macheta. Mr. Macheta didn't have permission to be in his home. Mr. Schellhase was shocked when Mr. Macheta entered his home. That Mr. Schellhase told Mr. Macheta to leave; in fact, pushed him out of the residence or out towards the exit. He also testified that his doorknob had been locked that morning and that the door had been pried open. Beyond that, he told his neighbor that someone had broken into his house and called 9-1-1 to report the burglary. Ladies and gentlemen, this was clearly an unlawful entry.[19]

[19] RP (June 12, 2019) at 329-30.

The State then proceeded to discuss the second element of whether Macheta entered the house with intent to commit a crime. In doing so, the State discussed Macheta's entry into the truck and the garage. But it did so only for the purpose of showing that Macheta entered the house with intent to steal property:

> First, look at the actions of Mr. Macheta on that day and look at the surrounding circumstances. Mr. Macheta forced entry into Mr. Schellhase's home. The exterior doorknob had been locked. The door had been pried open. There was damage to the doorknob. The door was cracked. In addition to the damage to the front of the house, there was also damage to the detached garage. The lock had been pried open. This was all new damage. It hadn't been there the day before.
>
> Next, you have Mr. Schellhase's truck that was out in the driveway. It had been entered. His property had been moved around. Cigarettes had been taken. Well, who had the cigarettes? It was Mr. Macheta. When Mr. Macheta returned to Mr. Schellhase's property, Mr. Schellhase testified that he said something along the lines of "I see you have been in my car." What did Mr. Macheta do? Hand his cigarettes that were taken from Mr. Schellhase's truck back to Mr. Schellhase.
>
> Ladies and gentlemen, when someone enters a car to steal another person's property, what do you think that person will do when they try to pry their way into a house? Steal.
>
> . . . .
>
> Ladies and gentlemen, this case is not about whether Mr. Macheta is a good person or a bad person. It's about whether he burglarized Mr. Schellhase's home on July 30th, 2018. On that date, he entered the victim's home with the intent to steal. There was forced entry. The garage had been pried open and items ha[d] been removed. The victim's truck had been rummaged through and cigarettes were taken from the visor area of the truck. Mr. Macheta had those cigarettes.[20]

[20] Id. at 331-36.

The State also told the jury that if they found Macheta guilty, they should find the existence of the aggravating factor. Again, the State discussed only the entry into the house as the basis for residential burglary:

> Now, if you find the defendant guilty of residential burglary, there is a second question that you will answer. That is whether the victim was present in the residence when the crime was committed. Simple. Yes.
>
> You heard testimony from Mr. Schellhase. I don't like to sound like a broken record. He had just gotten up that morning. He was in his underwear getting ready to take a shower when a male unknown to him, Mr. Macheta, entered his house. He came face-to-face with Mr. Macheta in his own home. He was certainly present when the burglary occurred.[21]

A unanimity instruction or an election is required only when the State presents evidence of multiple acts that could each constitute the charged crime. Here, the State presented evidence of only one act that could constitute residential burglary: Macheta's entry into the house. Macheta's entry into the garage did not constitute residential burglary because the garage was detached and not a portion of the dwelling. And Macheta's entry into the truck was not residential burglary because a vehicle is not a dwelling for the purposes of the residential burglary statute. Because the State did not present evidence of multiple acts constituting residential burglary, neither a unanimity instruction nor an election was required.

Even if we agreed with Macheta that an election was necessary, the State's closing argument constituted a clear election. In discussing the elements of residential burglary, the State focused only on Macheta's entry into the house.

[21] Id. at 334-35.

The State told the jury that it could consider Macheta's entry into the garage and truck as evidence of his intent to commit residential burglary but did not argue that they constituted additional acts of residential burglary. Macheta fails to establish that the lack of a unanimity instruction violated his right to a unanimous jury verdict.

2. Inferred Intent Instruction

Macheta next contends the trial court violated his right to due process by giving, over his objection, a pattern instruction allowing the jury to infer from his unlawful entry that he intended to commit a crime. We conclude there was no due process violation because the statutory inference was only part of the State's proof of intent.

The State proposed an instruction based on Washington Pattern Instruction (WPIC) 60.05, which provided as follows:

> A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.[22]

Macheta objected. The trial court gave the instruction, finding that "there is circumstantial evidence of intent, which includes the doorknob, the other evidence relating to the events surrounding the incident."[23]

[22] CP at 81.

[23] RP (June 12, 2019) at 273-74.

Due process requires that the State prove each element of a crime beyond a reasonable doubt.[24] However, the State may rely on evidentiary devices such as presumptions and inferences to meet this burden of proof.[25] When a permissive inference is the "sole and sufficient" proof of an element, the presumed fact must flow beyond a reasonable doubt from the proven fact, so that the prosecution does not "circumvent its burden of persuasion."[26] But where the inference is only part of the State's proof, the presumed fact must flow more likely than not from a proven fact.[27]

RCW 9A.52.040 allows the jury to consider an inference of criminal intent for burglary:

> In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

Macheta argues that the instruction was improper because there was insufficient evidence to support the inference. He contends this case is similar to State v. Sandoval.[28] In Sandoval, the defendant got drunk, kicked open the door of a stranger's home, and entered. The owner said, "What are you doing in my

[24] State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994).

[25] Id.

[26] State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

[27] Id. (quoting Hanna, 123 Wn.2d at 710).

[28] 123 Wn. App. 1, 94 P.3d 323 (2004).

house?" and the defendant responded by saying, "Who are you?" and shoved the owner.[29] The State charged the defendant with first degree burglary, and the trial court gave a permissive inference instruction. Division Three of this court concluded the evidence did not support a logical inference that the defendant entered with the intent to commit a crime. It relied on the fact that the defendant "did not try to take any of [the owner's] property or confess to doing so," as well as the fact that testimony showed the defendant had a history of kicking in his own apartment door when drunk.[30]

Here, contrary to Macheta's claim, the statutory inference was not the sole proof of intent. Macheta pried open the lock to both the house and the garage. And Macheta entered the truck, rifled through Schellhase's possessions, and took two packs of cigarettes. Unlike Sandoval, there was no evidence that Macheta entered the house because he was confused or under the influence. Because Macheta's intent to commit a crime flowed more likely than not from the facts surrounding his unlawful entry, the trial court did not err in giving the inference instruction.

3. Bifurcation of Aggravating Factor

Macheta next argues the trial court's refusal to bifurcate the jury's consideration of the aggravating factor from the underlying crime deprived him of a fair trial. We disagree.

[29] Id. at 3.

[30] Id. at 6.

The State alleged as an aggravating factor, pursuant to RCW 9.94A.535(3)(u), that "the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed."[31] The State proposed, and the trial court gave, jury instruction 19, which stated:

> If you find the defendant guilty of [r]esidential [b]urglary, then you must determine if the following aggravating circumstance exist:
>
> Whether the victim of the burglary was present in the building or residence when the crime was committed.[32]

Macheta moved to bifurcate the jury instructions so that the jury would only be instructed on the aggravating factor if it returned a guilty verdict. He argued that the instruction was prejudicial because its use of the words "victim" and "the burglary" presupposed his guilt as to the burglary.

The trial court denied the request. It concluded that the instructions adequately informed the jury that they could not consider the aggravating factor unless they found Macheta guilty. And it noted that Macheta's position would require bifurcation in any case involving an aggravating factor, which was inconsistent with the statutory language governing aggravating factors:

> As I noted, under RCW 9.94A.537(4), it creates a statutory presumption that the jury will generally consider aggravating circumstances at the same time that it deliberates on the question of guilt, and the argument from counsel in this case is that the use of the phrase or the word "victim" focuses the jury on the question and presupposes guilt.

[31] CP at 33.

[32] CP at 88.

> The court is not convinced that there needs to be instructional bifurcation in this case because, if the court were to accept that argument, every case there would be where there is an aggravator that uses that phrase or even an argument about an aggravator, there would be grounds by which to bifurcate the instructions and the trial, essentially because there would have to be a second phase of either evidence or additional argument that would need to be made. I think that is not what the legislature intended with the presumption in favor of unitary trials.
>
> And the court would also add that any potential prejudice can be cured by utilizing instructions which make clear, one, that the aggravating factor needs to be found beyond a reasonable doubt. The jury should only consider it if they determine that, once they have already established guilt, and the jury is presumed to follow the instruction[s], to read the instructions, to understand the instructions. So based on all of that, the court will deny the request for an instructional bifurcation in this case.[33]

Macheta claims that he was entitled to bifurcation because RCW 9.94A.537(4) requires a separate proceeding for certain aggravating factors when "the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime." But RCW 9.94.537(4) identifies only specific aggravating factors that may be bifurcated from the proceeding and does not include RCW 9.94A.535(3)(u).[34]

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[33] RP (June 11, 2019) at 102-03.

[34] RCW 9.94A.537(4) provides: "Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res gest[a]e of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to

Nonetheless, Macheta argues, even if the statute does not presume a court must bifurcate an aggravating factor, a court must do so where necessary to ensure the fairness of the proceeding. He contends, as he did below, that the aggravating factor instruction constituted a "comment on the evidence" because, by instructing the jury that it must decide whether "the victim of the burglary was present in the building or residence when the crime was committed," the trial court "informed the jury that a burglary had been committed and that there was a victim."[35]

A trial court's decision on whether to bifurcate an aggravating factor instruction is reviewed for abuse of discretion.[36] A court abuses its discretion if a decision is "'manifestly unreasonable or based upon untenable grounds or reasons.'"[37]

Here, the trial court clearly instructed the jury that it was only to consider the aggravating factor if it first determined Macheta had committed the burglary. Jury instruction 19 instructed the jury to determine the aggravating factor only if they found Macheta guilty of residential burglary. And jury instruction 21 instructed the jury, "If you find the defendant not guilty of [r]esidential [b]urglary[,] do not use the

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the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime."

[35] Appellant's Br. at 32.

[36] State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008).

[37] State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

special verdict form."[38] Moreover, jury instruction 1 instructed the jury that the trial court would not intentionally comment on the evidence and that the jury should disregard any comment it perceived the trial court to have made. Jurors are presumed to follow the court's instructions.[39] Macheta does not establish that the trial court's decision not to bifurcate the aggravating factor instruction from the remainder of the instructions was a comment on the evidence or any abuse of discretion.

4. Prosecutorial Misconduct

Macheta challenges comments made by the prosecutor in closing argument regarding his intent in entering Schellhase's home. He argues that, by questioning whether there was any noncriminal explanation for Macheta to have entered Schellhase's home, the State shifted the burden of proof to him to disprove the charge. We conclude that no misconduct occurred.

In closing argument, the State argued:

> [I]n looking at what Mr. Macheta's intent was when [he] entered into Mr. Schellhase's home, think of another plausible explanation for entering the home. You don't work your way into another person's home for an innocent purpose. Mr. Macheta didn't—[40]

Defense counsel objected, arguing the prosecutor's remarks misstated the burden of proof. The court reminded the jury that "the law is what is contained in the

[38] CP at 91.

[39] State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

[40] RP (June 12, 2019) at 333.

Instructions that I have provided to you."[41]

In rebuttal, the prosecutor argued:

> In considering what his intent was, look at the circumstances surrounding the situation and his actions on that day. Look at his statements. Look at the jury instruction regarding intent, and think about what other plausible explanations there could be for entering the house. There are none, other than to commit a crime.[42]

Defense counsel did not object to this statement.

To prevail on a claim of prosecutorial misconduct when, as here, a defendant has raised a timely objection, the defendant must establish the conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.[43] To establish prejudice, the defendant must prove "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'"[44] We review comments made by a prosecutor during closing argument in "the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions."[45]

It is improper for a prosecutor to argue that the burden of proof rests with the defendant.[46] Nor may a prosecutor comment on a defendant's failure to

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[41] Id. at 333-34.

[42] Id. at 345-46.

[43] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

[44] Id. at 443 (quoting Magers, 164 Wn.2d at 191).

[45] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

[46] Thorgerson, 172 Wn.2d at 453.

present evidence because the defendant has no duty to present evidence.[47] However, a prosecutor has wide latitude to argue reasonable inferences from the evidence.[48] And "[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense."[49] "A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case."[50]

Here, the purpose of the prosecutor's statement was to point out the improbability of Macheta's defense of having no intent to commit a crime when he entered Schellhase's house. The prosecutor highlighted all the evidence of Macheta's intent and argued that the evidence did not imply a plausible noncriminal explanation. The prosecutor did not suggest to the jury that Macheta had the burden to offer a reasonable explanation or disprove any element of the charged offenses. Macheta fails to establish that the comment was improper, or that it prejudiced the outcome of the trial.

5. Legal Financial Obligations

Macheta contends the judgment and sentence must specify that any funds subject to the Social Security Act's antiattachment statute, 42 U.S.C. § 407(a), may not be used to satisfy his legal financial obligations. The State acknowledges

[47] Id.

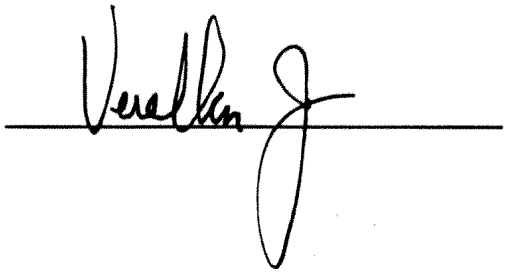
[48] Id.

[49] State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

[50] State v. Sells, 166 Wn. App. 918, 930, 271 P.3d 952 (2012).

that Macheta receives Social Security benefits and that the judgment and sentence should be amended accordingly.

We accept the State's concession and remand to the trial court for the ministerial task of amending the judgment to reflect that legal financial obligations may not be satisfied from Macheta's Social Security benefits. In all other respects, we affirm.



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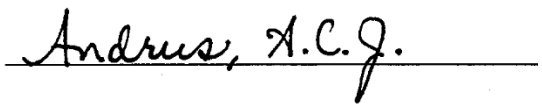

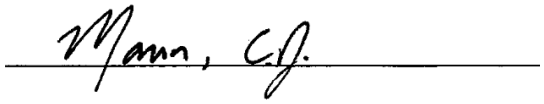

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