SUPREME COURT NO. 100034-1

NO. 54123-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON FARMER,

Petitioner.

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

The Honorable BERNARD VELJACIC, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Aaron Farmer asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Farmer, 2021 WL 2673384 (No. 54123-8-II, filed June 29, 2021).[1]

B. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(1) and (b)(2) where Division Two's decision in this case concerning prosecutorial misconduct conflicts with this Court's decision in State v. Allen[2] and Division Three's opinion in State v. Jones[3]?

2. Is review appropriate under RAP 13.4(b)(4) where the trial court's denial of surrebuttal was based on a misunderstanding of the law and denied Farmer the right to a fair trial?

C. STATEMENT OF THE CASE

1. Evidence at Trial.

Tanner Taylor was the owner of a 1985 Honda Prelude until September 2018 when he sold it to Sydney Farris. RP 209-300, 304, 333-35, 374. Farris received a bill of sale and title from Taylor. RP 300-03, 309. Although Tanner reported the sale to the Department of Licensing,

[1] A copy of the opinion is attached as an appendix.

[2] 182 Wn.2d 364, 341 P.3d 268 (2015).

[3] 13 Wn. App. 2d 386, 463 P.3d 738 (2020).

Farris never filed out a notice of sale with the Department of Motor Vehicles (DMV). RP 309, 334. Farris also failed to register the title that she kept in the glove compartment of the Prelude. RP 306-07, 317-18.

Although the Prelude had an ignition and speakers, it was unreliable in starting and driving, so Farris worked on the car with her ex-boyfriend. She kept it parked on her property while they did so. RP 306-07, 318, 320-23, 328, 330-31.

When Farris returned home from work on April 4, 2019, the car was gone. RP 305-06, 310. She still had the Prelude keys in her possession. RP 306-07. Because Farris had not given permission for anyone to take the car, she reported the Prelude stolen within an hour of realizing that it was missing. RP 310-11, 330, 373-74. Police entered the vehicle identification number (VIN) into a database of stolen cars. RP 374-75.

Later that evening, Vancouver police officer Douglas Keldsen pulled his patrol car into a church parking lot so he could monitor nearby traffic. RP 338-42. Keldsen noticed a 1980's Honda Prelude parked in a corner of the parking lot. RP 343, 461. He found it unusual that any cars would be in the parking lot at that hour. RP 344-35.

Keldsen observed that the car door was open, and a man was hunched over working on something inside the Prelude. RP 345-46. The

man approached Keldsen as he walked toward the Prelude. RP 345-47, 397. Keldsen opined that the man seemed nervous. RP 396. Keldsen noticed that the Prelude's stereo had been removed and saw speakers in the backseat of the car. RP 346, 397, 415-18.

The man did not respond when Keldsen asked if he had any outstanding warrants. RP 403, 408-09. The man did not identify himself to Keldsen and explained he did not have a driver's license. RP 347, 368, 396. The man explained that the Prelude belonged to his friend, Aaron Farmer, who had dropped him off at the parking lot so that he could prepare the car to be scrapped. RP 347-49, 368, 461-62.

The man retrieved the Prelude title, bill of sale, and registration from inside the car and gave them to Keldsen. RP 347-50, 461, 464. The title showed that Tanner Taylor had sold the Prelude to Aaron Farmer on April 1. Farmer then gifted the car to Brandon Wolf. RP 366. Keldsen observed the signatures on the title appeared to be "scribbled out" and "traced." RP 349. Keldsen opined the signature on the bill of sale did not match the title. RP 367, 407.

The Prelude lacked a front license plate, so Keldsen walked to the back of the car to check the license plate. RP 368. When he ran the license plate number it came back as reported stolen. RP 370, 392. The VIN of the Prelude matched the VIN of the car reported stolen. RP 393.

Keldsen arrested the man who was later identified as Farmer. RP 393. Keldsen did not find car keys on Farmer's person. RP 393-94. Keys were found in the car, however. RP 400-01, 418, 420. A search of the car also showed the steering column and ignition could be freely slid out of their housing. RP 413-15, 417-18, 422. There was no evidence however that the ignition had been forcibly removed. RP 421-22. Farmer acknowledged that tools found inside the car belonged to him. RP 395-96, 418-20.

The Prelude was returned to Farris later that day. RP 326. She maintained that the speakers, radio, and ignition were not in the same position they were before the car was taken. RP 310, 326-29, 331. Farris did not know Farmer and denied that his name was on the title she received from Taylor. RP 304, 310, 330, 336-37.

Farmer did not deny possessing the Prelude. RP 434. As he explained however, he purchased the car on April 1 for $500 from someone who identified themselves as Tanner Taylor. RP 435-36, 453-54. Taylor gave Farmer a bill of sale and title for the car. RP 436, 439.

When Farmer purchased the car, it lacked an ignition. RP 437, 454. Farmer installed a new ignition and serpentine belt within three days of purchasing the car. RP 437-38, 454. He then drove the car for a few hours before it broke down. RP 440, 458-59. Famer was able to coast the

Prelude down to the church parking lot. RP 440, 457. Because he lacked money to fix the car or have it towed however, he decided to sell it for scrap. RP 441-44.

Farmer was in the process of removing the speakers and stereo system when Keldsen arrived. RP 444-46. Farmer told Keldsen he had purchased the car. RP 456-47. Farmer did not give Keldsen a driver's license because he does not have one. RP 447. He also did not give Keldsen his name but denied telling him that the car belonged to his friend, Aaron Farmer. RP 447, 456. Farmer acknowledged he was untruthful when he told Keldsen he had not been driving the car. RP 447, 449, 456. Farmer denied presenting Keldsen with a copy of the title or registration. RP 456.

Based on this evidence, the Clark County prosecutor charged Farmer with forgery and possessing a stolen motor vehicle. CP 7-9. A jury found Farmer guilty as charged. CP 93-94; RP 529-30.

2. Prosecutorial Misconduct.

To convict Farmer of possessing a stolen vehicle, the State had to prove beyond a reasonable doubt "[t]hat the defendant acted with knowledge that the motor vehicle had been stolen." CP 84. Similarly, to convict Farmer of forgery, the State had to prove beyond a reasonable

doubt "[t]hat the defendant knew that the instrument had been falsely made, completed, or altered[.]" CP 88.

The trial court provided the following instruction to the jury regarding knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 85.

During its closing argument, the prosecutor acknowledged, "we aren't able to read people's minds. We don't have a machine that that can tell you people's thoughts." RP 501. Emphasizing the language of the knowledge instruction however, the prosecutor stated: "I've highlighted this bottom portion because it's very important. If a person had information that would lead a reasonable person in the same situation to believe that a fact exists, you are allowed, but not required to find that he or she acted with knowledge of that fact." RP 502.

The prosecutor highlighted the circumstantial evidence she believed demonstrated that Farmer knew the car was stolen, including his

evasive behavior with Keldsen, his refusal to identify himself to police, his changing recitation of what occurred during his testimony, the lack of an ignition in the Prelude, and Farmer's failure to provide documents that proved his ownership of the Prelude. RP 497, 503-04.

The prosecutor then repeatedly asserted that the jury could find the knowledge element satisfied based either on what Farmer knew or based on what a reasonable person in his position should have known about the car. See RP 502 ("a reasonable person in that situation, regardless of which side you believe should have known that the vehicle was stolen.") (emphasis added); RP 503 ("even by his [Farmer's] own version of events, a reasonable person in that situation should have known that the car was stolen.") (emphasis added); RP 503 ("any reasonable person in this situation should have known that the car was stolen. So even accepting his [Farmer's] facts, he should have known that the car was stolen.") (emphasis added).

The prosecutor also emphasized the circumstantial evidence she believed showed the car title was forged, explaining, "there are scribbles everywhere. There are signatures on top of signatures. There are crossed-out signatures. This is a forged document." RP 505. The prosecutor then argued, "A reasonable person looking at this title should have known that

it was forged. You are allowed to infer that he [Farmer] knew.") RP 506 (emphasis added).

The prosecutor also returned to this theme during rebuttal closing argument, stating, "[E]ven if you accept those facts [Farmer's] facts as true, a reasonable person in that situation should have known that the car was suspect, that car was stolen. A reasonable person would have questioned the transaction. And if you believe that a reasonable person should have known that car is stolen, then you are able to find that he [Farmer] knew.") RP 519 (emphasis added).

During the defense closing arguments, counsel noted the inconsistent trial testimony from different witness about whether the car had an ignition, could start, and what exactly Farmer told officers or information that he provided them with. RP 511-12, 514-16. Counsel also emphasized that Farmer's prior criminal history and knowledge that he had outstanding warrants explained his evasive interactions with Keldsen, not because he knew he possessed a stolen car or forged title. RP 512-13.

3. Court of Appeals.

Farmer raised two arguments on appeal. First, Farmer argued the prosecutor repeatedly engaged in misconduct during closing by equating

proof of actual, subjective knowledge with what he "should have known." BOA, at 11-19.

The Court of Appeals concluded the State's argument was proper because the prosecutor argued only that Farmer knew the car was stolen and the title forged because a reasonable person should have known based on the circumstances. The Court reasoned that prosecutor did not argue what Farmer should have known was sufficient or that the jury did not need to find actual knowledge. Slip. Op., at 6-7. The Court also concluded that without a defense objection below, reversal was not warranted because a curative instruction could have rectified any prejudicial impact. Slip. Op., at 7-8.

Farmer also argued the trial court erred in denying his request for surrebuttal testimony about how the car ended up in the location where it was when he was contacted by Keldsen. BOA at 19-23. The trial court had denied Farmer's request on the mistaken belief that he was not entitled to surrebuttal: "I'm going to disallow the surrebuttal. I don't think it's appropriate. I've never seen it. If there is authority, let me know." RP 467. The Court of Appeals "assum[ed], without deciding, that the trial court abused its discretion by denying the request for surrebuttal[.]" Slip. Op., at 8. The Court concluded, however, that the error was harmless

because how the car got into the parking space was irrelevant to whether Farmer knew the car was stolen or the title forged. Slip. Op., at 9.

Farmer now seeks this Court's review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Division Two's decision concerning prosecutorial misconduct conflicts with this Court's decision in Allen and Division Three's decision in Jones

The prosecutor repeatedly argued in closing that the jury could find Farmer knew the car was stolen and the title forged based on what a reasonable person would or should have known. This repeated misstatement of the law sought to relieve the State of its burden of proving Farmer's actual knowledge, constituted flagrant and ill intentioned misconduct.

Prosecutors have a duty to ensure the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). It is misconduct for the prosecutor to misstate the law. Allen, 182 Wn.2d at 374. "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675.

During its closing argument, the prosecutor repeatedly asserted that the jury could find the knowledge element satisfied based either on what Farmer knew or based on what a reasonable person in his position should have known about the car:

> "[A] reasonable person in that situation, regardless of which side you believe should have known that the vehicle was stolen." RP 502 (emphasis added).
>
> "[E]ven by his [Farmer's] own version of events, a reasonable person in that situation should have known that the car was stolen." RP 503 (emphasis added).
>
> "[A]ny reasonable person in this situation should have known that the car was stolen. So even accepting his [Farmer's] facts, he should have known that the car was stolen." RP 503 (emphasis added).
>
> "[E]ven if you accept those facts [Farmer's] facts as true, a reasonable person in that situation should have known that the car was suspect, that car was stolen. A reasonable person would have questioned the transaction. And if you believe that a reasonable person should have known that car is stolen, then you are able to find that he [Farmer] knew." RP 519 (emphasis added).

The prosecutor also argued that what a reasonable person "should have known" could substitute for Farmer's actual, subjective knowledge, as to the car title. See RP 506 ("A reasonable person looking at this title should have known that it was forged. You are allowed to infer that he [Farmer] knew.") (emphasis added).

The prosecutor here engaged in the same misconduct that required reversal in Allen: he repeatedly indicated that what Farmer "should have known" could substitute for Farmer's actual, subjective knowledge. As in Allen, "the prosecuting attorney repeatedly misstated that the jury could convict [Farmer] if it found that he *should have known*" the vehicle was stolen. Allen, 182 Wn.2d at 374. The prosecutor even acknowledged that although she could not "read people's minds" that the jury could still decide what a reasonable person would know or should have known. Compare RP 501-03, 506, 519 with Allen, 182 Wn.2d at 374-75 ("under the law, even if he *doesn't actually know*, if a reasonable person would have known, he's guilty"). As in Allen, "the 'should have known' standard is incorrect; the jury must find that [Farmer] *actually knew* [the vehicle was stolen]. The remarks were improper." 182 Wn.2d at 375.

Although the prosecutor at Farmer's trial repeatedly referenced what Farmer "knew," this does not cure the misconduct where, as here, those references were also accompanied by multiple references to what Farmer "should have known." As State v. Jones recently recognized, even under such circumstances, the "should have known" references plainly indicate that the hypothetical knowledge of a reasonable person is all that

is necessary to convict.[4] 13 Wn. App. 2d 386, 396-98, 405, 463 P.3d 738 (2020).

In Jones, the prosecutor repeatedly mentioned that the defendant "should have known" the car was stolen. 13 Wn. App. 2d at 395-98, 405. Despite the prosecutor also arguing that the defendant "actually knew the car was stolen," Jones concluded the prosecutor nonetheless misstated the law because the attorney also "repeatedly encouraged the jury to convict Jones based on what he should have known without ever mentioning that the jury can convict only if Jones actually knew the car to be stolen." 13 Wn. App. 2d at 405.

As the Allen court recognized, the "nuance" between actual knowledge and the State's "should have known" argument was "critically important. "In Shipp, we reversed the convictions of several defendants because it was 'possible that the jury believed [that the accomplice lacked actual knowledge] and yet convicted him because it believed that an ordinary person would have known.'" Allen, 182 Wn.2d at 379 (alteration in original) (quoting Shipp, 93 Wn.2d at 517). Because the critically important nuance was similarly confounded by the prosecutor's arguments

[4] In other words, a conviction cannot be based on what a reasonable person in the same position would have known *or* on what Farmer actually knew; rather, actual knowledge is always required, and the prosecutor's argument dispensed with this requirement.

here, the prosecutor's arguments constitute misstatements of the law and therefore misconduct.

Contrary to the Court of Appeals' opinion here, Allen and Jones demonstrate the prosecutor did not "properly argue[] that the jury could infer Farmer's actual knowledge from circumstantial evidence and what a reasonable person should have known in the same situation." Slip. Op., at 7. Rather, the prosecutor blatantly invited the jury to convict Farmer based on constructive rather than actual knowledge.

The prosecutor's arguments prejudicially deprived Farmer of a fair trial because they went to the only disputed issue, knowledge. Farmer essentially conceded every other element of both crimes, testifying that he purchased the car, was given the title, and therefore did not know the car was stolen or the title forged. RP 436, 439, 453.

As in Jones, here Farmer presented evidence which undermined the assertion that he possessed the required actual knowledge. 13 Wn. App. 2d at 407. Farmer maintained he purchased the car and was given a bill of sale and title. RP 349, 366, 435-36, 438, 453-54. Other evidence supported this assertion. For example, Farris never filed out a notice of sale with the DMV and failed to register the car's title. The title was kept in the car's glove compartment. RP 306-07, 309, 317-18, 334. Indeed, Farmer presented police with a title, bill of sale, and registration from

inside the car. RP 347-50, 461, 464. Additionally, keys were found in inside the car, and there was no evidence the ignition had been forcibly removed. RP 400-01, 418, 420-21.

In short, like Allen, "the trial turned on whether the State produced sufficient circumstantial evidence to allow the jury to infer [Farmer] had actual knowledge." Allen, 182 Wn.2d at 375. Therefore, a repeated "misstatement that the jury could find [Farmer] guilty if he should have known" the car was stolen "was particularly likely to affect the jury's verdict." Id.; Jones, 13 Wn. App. 2d at 408.

Although Farmer's attorney did not object to the State's misconduct, an objection is not required where the misconduct is flagrant and ill intentioned. Where "case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct," the misconduct qualifies as flagrant and ill intentioned. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012); see also State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (holding prosecutorial arguments flagrant and ill-intentioned where same arguments previously held to be improper in published opinion), rev. denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). Allen, a 2015 Washington Supreme Court case, was available to the prosecutor and it clearly warns

against misstating this aspect of the culpability statute, noting that it can be easily misinterpreted by jurors.

Still, the Court of Appeals concluded that had Farmer objected, a curative instruction could have cured any prejudice caused by the prosecutor's argument. Slip. Op., at 7-8. But Jones rejected similar reasoning. As in Jones, here the jury had already been instructed "in accordance with precedent and standard instructions that the jury must find actual knowledge, but that the jury may infer actual knowledge by constructive knowledge." 13 Wn. App. 2d at 407. Thus, like Jones, here the trial court would only have repeated its already delivered instructions. Id. Even had the trial court repeated its knowledge instruction, that "hardly can compensate for [the prosecutor's] misstating the law multiple other times. Allen, 182 Wn.2d at 377, 381-82. A curative instruction would not and could not have neutralized the prejudicial, misleading effect of the prosecutor's misstatements of the law.

The Court of Appeals decision in this case conflicts directly with Allen and Jones. Review is appropriate under RAP 13.4(b)(1) and (b)(2).

2. Denial of Farmer's request for brief surrebuttal was based on a misunderstanding of the law and denied Farmer his constitutional right to a fair trial.

Farmer testified that after fixing the Prelude he was able to drive it for a few hours before it stopped running again. As a result, he coasted

the car down a hill and into the church parking lot where he was eventually contacted by Keldsen. RP 440, 457.

In rebuttal, the prosecution recalled Keldsen to testify that it would have been "very difficult" for Farmer to coast the Prelude into the parking lot and back it in, if the car was not running. RP 461.

Farmer requested brief surrebuttal to retake the stand and explain that "yes, he drifted into the parking lot and he was directed to put the car there and he pushed it into that spot." RP 466. The prosecutor objected, arguing that Farmer had already had an opportunity to discuss those facts during his testimony and the "defense doesn't then get another rebuttal." RP 466-67. The trial court agreed, explaining, "I'm going to disallow the surrebuttal. I don't think it's appropriate. I've never seen it. If there is authority, let me know." RP 467. Defense counsel explained that he did not have any specific authority to cite to the court relating to surrebuttal, but noted, "I'm sure it's out there[.]" RP 467.

A trial court's refusal to admit surrebuttal evidence is reviewed under a manifest abuse of discretion standard. State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). A court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); State v. Michielli, 132 Wn.2d 229, 240, 937

P.2d 587 (1997)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)).

"Testimony which is merely cumulative or confirmatory or which is merely a contradiction by a party who has already so testified does not justify surrebuttal as a matter of right." State v. Dupoint, 14 Wn. App. 22, 24, 538 P.2d 823 (1978) (citing State v. Stambach, 76 Wn.2d 298, 301, 456 P.2d 362 (1969)). Simply stated, the function of surrebuttal is to rebut the rebuttal. For example, as a matter of right, the defendant in a criminal matter may impeach the credibility of the State's rebuttal witnesses or rehabilitate his own witnesses whose credibility have been attacked by the prosecution's rebuttal evidence. Stambach, 79 Wn.2d at 386.

Farmer was not seeking to present cumulative or confirmatory evidence that should have been presented in his case-in-chief. He testified that he coasted the Prelude down a hill into the church parking lot after it died. He was entitled to rebut Keldsen's rebuttal that it would have been "very difficult" for Farmer to do what he described.

The Court of Appeals stopped short of concluding that the trial court abused its discretion in denying Farmer the right to surrebuttal, reasoning instead that it "assume[d], without deciding, that the trial court abused its discretion by denying the request for surrebuttal[.]" Slip. Op., at 8. Instead, the Court of Appeals concluded that any error was harmless because how Farmer got the car into the parking space was irrelevant to whether he knew it was stolen or the car's title forged. Slip. Op., at 8-9.

But Farmer's explanation of how the car came to be where it was when he was contacted by Keldsen was relevant to his defense that he lawfully purchased the car and spent time repairing it. What Farmer testified to during direct examination was that he "coasted" or "drifted" the car down a hill and into the parking lot. RP 440-41. His direct examination made no mention of how he actually got the car backed into the parking space where it was found, i.e., that he pushed it there after being told where to park it. As Farris acknowledged she could not comprehend how the car was stolen given that she could not even get it to start. RP 330-31.

The importance of Farmer's surrebuttal is further demonstrated by the prosecution's decision to recall Keldsen and begin rebuttal examination by having him explain how difficult it would have been to park the car as it was if it was not running. RP 461. Thus, this issue was

of enough importance that the prosecution felt compelled to address it in rebuttal. Farmer, however, was improperly denied a similar opportunity.

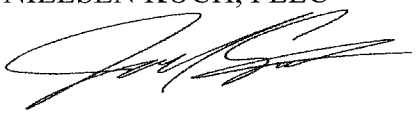
A defendant in a criminal matter may use surrebuttal to counter the testimony of the prosecution's rebuttal witness, as Farmer attempted here. Stambach, 76 Wn.2d at 301. Because the trial court abused its discretion in denying Farmer that right, and the Court of Appeals mistakenly concluded this error was harmless, review is appropriate under RAP 13.4(b)(4).

E. CONCLUSION

Because Farmer satisfies the criteria under RAP 13.4(b)(1), (b)(2), and (b)(4), he respectfully asks that this Court grant review.

DATED this 27th day of July, 2021.

Respectfully submitted,
NIELSEN KOCH, PLLC



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APPENDIX

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Washington State
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June 29, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AARON ROBERT FARMER, Appellant.	No. 54123-8-II UNPUBLISHED OPINION

LEE, C.J. — Aaron R. Farmer appeals his convictions for possession of a stolen motor vehicle and forgery. Farmer argues that the prosecutor committed misconduct during closing arguments and that the trial court erred by denying his request for surrebuttal testimony. We affirm Farmer's convictions.

FACTS

A. BACKGROUND FACTS

Sydney Farris bought a 1985 Honda Prelude from Tanner Taylor in late 2018. One day, Farris returned home from work and the vehicle was gone. Farris reported the vehicle stolen.

Officer Doug Keldsen of the Vancouver Police Department was on patrol on April 4, 2019. Around 5 p.m., Officer Keldsen contacted a vehicle in a church parking lot. It was unusual to see a vehicle in the parking lot at that time. When Officer Keldsen approached the vehicle, he could see that the speakers had been removed and were on the backseat. It also looked like the car stereo had been removed from the console.

Officer Keldsen contacted the person who was in the vehicle. Although the person did not give Officer Keldsen his name, the person was later identified as Farmer. Farmer told Officer Keldsen that the vehicle belonged to his friend, and his friend was planning to scrap the vehicle.

Farmer provided the title, bill of sale, and registration for the vehicle to Officer Keldsen. The title identified Aaron Farmer as the owner of the vehicle. During the contact with Officer Keldsen, Farmer stated that "Aaron Farmer" was his friend who owned the vehicle. 3 Verbatim Report of Proceeding (VRP) at 348.

Officer Keldsen called dispatch to run the license plate number. Dispatch identified the vehicle as stolen. Keldsen placed Farmer under arrest.

The State charged Farmer with possession of a stolen motor vehicle and forgery. The case proceeded to a jury trial.

B. TRIAL TESTIMONY

Farris and Officer Keldsen testified to the facts stated above. Farris also testified that prior to the car being stolen, everything was in it, including speakers and the ignition. The car needed some tune-ups, but it was drivable. When Farris got the car back, multiple things were missing from it. The speakers and the radio were gone. The ignition was also torn off.

Farris identified a document that purportedly was the registration and title that she had signed when she purchased the vehicle. However, her signature had been altered on the documents.

Farmer testified that he first saw the Honda parked near an apartment building with a "for sale" sign in the window. 4 VRP at 434. Farmer called the number and arranged to see the car. Farmer bought the vehicle for $500 from "Tanner Taylor." 4 VRP at 436. Farmer stated that he could not move the car right away because it had no ignition.

On April 4, three days after purchasing the vehicle, he replaced the ignition. A few hours later, the car broke down at the top of a hill. Farmer coasted the car down to the bottom the hill into the parking lot of a church. Farmer decided to scrap the vehicle. Farmer removed the stereo and speakers from the vehicle.

The State called Officer Keldsen for rebuttal testimony. Officer Keldsen testified that it would have been very difficult to get the car down the hill and into the corner of the parking lot if it had not been running. Officer Keldsen also testified that Farmer never identified himself as the owner of the vehicle or claimed to have purchased the vehicle.

Farmer's counsel sought to call Farmer for surrebuttal testimony. The trial court asked whether there was authority allowing a defendant surrebuttal in a criminal case. Farmer's counsel responded,

> Well, of course, there is. He is going to respond to the testimony brought out by this officer because the implication that they want to draw is, is that he could not have drifted the vehicle to where it ended up. Mr. Farmer is going to testify that, yes, he drifted into the parking lot and he was directed to put the car there and he pushed it into that spot.

4 VRP at 466. The State argued that Farmer already had the opportunity to testify to those facts. The trial court ruled,

> I'm going to disallow the surrebuttal. I don't think it's appropriate. I've never seen it. If there is authority, let me know.

4 VRP at 467.

C. JURY INSTRUCTIONS, CLOSING ARGUMENTS, AND VERDICTS

The trial court instructed the jury on the definition of knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

Clerk's Papers (CP) at 85.

During closing argument, the State reviewed the definition of knowledge. As to the knowledge requirement for the possession of a stolen motor vehicle charge, the State argued,

> Ladies and gentlemen, a reasonable person in that situation, regardless of which side you believe, should have known that vehicle was stolen. Officer Keldsen testified that when he contacted the defendant, he seemed nervous and evasive. He kept changing the questions. He didn't answer a question directly; instead, he would provide something else. Instead of providing his name, he provided the title and the bill of sale.
>
> . . . .
>
> In addition, the ignition had been tampered with. Even by his own version of events, a reasonable person in that situation should have known that car was stolen. You're buying a car from someone you don't know, someone who doesn't identify themselves over the phone by any sort of name, doesn't provide any identification to certify that they are the owner that's on that title, their signature is all over that title making it look very suspicious. There is no ignition in the vehicle. There is not even an ignition key. There is only a door key. Any reasonable person in this situation should have known that car was stolen. So even accepting his facts, he should have known that car was stolen.
>
> Ladies and gentlemen, the State has proven that the defendant knew through his actions and his words because he was evasive, because he kept changing his story, because he refused to identify himself as the owner of this vehicle. Ladies and gentlemen, the State submits to you that a reasonable person who believes themselves to be the rightful owner of a vehicle would identify themselves as such. A reasonable person isn't going to pretend that this belongs to someone else while providing the documents that could prove ownership. That shows knowledge.

4 VRP at 502-04.

As to the knowledge requirement for the forgery charge, the State argued,

> The second question is whether or not he knew the instrument had been falsely made. So again, remember what we talked about. Knowledge can be proven through actions and words and that a reasonable person in that situation you believe a reasonable person should have known, then you're allowed to infer. Well, ladies and gentlemen, a reasonable person looking at this title should have known that it was forged. You are allowed to infer that he knew.
>
> Additionally, there was circumstantial evidence that he knew because he tried to distance himself from this title. He didn't hand this to Officer Keldsen and say, "I'm Aaron Farmer. Here, I bought this car." That's not what happened. He said, "My friend bought this car." Here's the title that showed my friend bought this car. He tried to put space between himself and this title. That is circumstantial proof that he knew that this title was forged.

4 VRP at 506.

In rebuttal, the State argued,

> The defendant's story has not been consistent. He had an opportunity to tell Officer Keldsen that he bought this vehicle. He had an opportunity to explain to him what happened. He had an opportunity to show the officer that he purchased this vehicle, but he didn't take that opportunity. The State submits to you he didn't take that opportunity because he knew, he knew that that car was stolen. The fact that he distanced himself from that title, the fact that he distanced himself from that bill of sale, and the fact that he distanced himself from that registration, that is circumstantial proof that he knew.
>
> But even if you accept his version, even if you accept his version that he just bought a car from some dude he has never met, who didn't verify his name, who provide—who gave him a car that didn't have a key to the ignition, didn't have an ignition in it, even if you accept those facts as true, a reasonable person in that situation should have known that car was suspect, that car was stolen. A reasonable person should have questioned that transaction. And if you believe that a reasonable person should have known that car is stolen, then you are able to find that he knew.

4 VRP at 518-19.

The jury found Farmer guilty of possession of a stolen motor vehicle and forgery. Farmer appeals his convictions.

ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Farmer argues that the prosecutor committed misconduct by arguing that the jury could find Farmer guilty based on what a reasonable person should have known. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The prosecutor's conduct is viewed in "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

First, we determine whether the prosecutor's conduct was improper. *Emery*, 174 Wn.2d at 759. If the prosecutor's conduct was improper, then the question turns to whether the prosecutor's improper conduct resulted in prejudice. *Id.* at 760. To establish prejudice, the defendant must show a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.*

A prosecutor improperly misstates the law if the prosecutor argues that the State is not required to prove actual knowledge, but only that a defendant should have known. *State v. Allen*, 182 Wn.2d 364, 374-75, 341 P.3d 268 (2015) ("[T]he 'should have known' standard is incorrect; the jury must find that Allen *actually knew* Clemmons was going to murder the four police officers."); *State v. Jones*, 13 Wn. App. 2d 386, 405, 463 P.3d 738 (2020) (prosecutor misstated the law when "the attorney repeatedly encouraged the jury to convict Jones based on what he should have known without ever mentioning that the jury can convict only if Jones actually knew the car to be stolen."). However, it is proper to argue that the jury may infer actual knowledge if the defendant had information which would lead a reasonable person to believe the fact at issue.

Allen, 182 Wn.2d at 374; *see also Jones*, 13 Wn. App. 2d at 405 ("[A] jury cannot convict the accused based on constructive knowledge, but may determine constructive knowledge to be evidence of subjective knowledge.").

Here, the State argued that the jury should find that Farmer knew the car was stolen and the title was forged because a reasonable person should have known based on the circumstances. The State did not argue that what Farmer should have known was sufficient, and the State never argued that the jury did not need to find actual knowledge. *See Allen*, 182 Wn.2d at 374. Instead, the State properly argued that the jury could infer Farmer's actual knowledge from circumstantial evidence and what a reasonable person should have known in the same situation. This is not a misstatement of the law. *Id.* Therefore, the prosecutor's statements were not improper. Because the prosecutor's statements were not improper, Farmer's prosecutorial misconduct claim must fail.

Furthermore, even if the prosecutor's statements were improper, Farmer has waived any such error. Because Farmer did not object to the prosecutor's arguments, he "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." *Emery*, 174 Wn.2d at 760-61. Under this heightened standard of review, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The focus is on whether the resulting prejudice could have been cured. *Id.* at 762.

Here, the trial court properly instructed the jury on the definition of knowledge. If Farmer had timely objected to the prosecutor's arguments, the trial court could have cured any prejudice by striking the improper argument, reiterating the correct definition of knowledge, and reminding

the jury they "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP at 76. Therefore, a curative instruction could have cured any prejudice caused by the prosecutor's argument, so Farmer has waived any alleged prosecutorial misconduct error.

B. SURREBUTTAL TESTIMONY

Farmer also argues that the trial court abused its discretion by denying his request for surrebuttal testimony. Specifically, Farmer argues that the trial court's decision was made for untenable reasons because the trial court categorically denied his request to present surrebuttal testimony based on a misunderstanding of the law. Assuming, without deciding, that the trial court abused its discretion by denying the request for surrebuttal, we hold that any error was harmless.

Here, Farmer testified that when the car broke down, he coasted it down the hill into the parking lot. In rebuttal, Office Keldsen testified that it would have been very difficult to get the car down the hill and into the corner of the parking lot if the car was not running. Farmer requested surrebuttal to testify that he coasted into the parking lot and then pushed the car into the parking space. Therefore, the only testimony that Farmer alleges was improperly excluded by the trial court was his testimony that he ultimately pushed the car into the parking space.

Even if we assume without deciding that the trial court did abuse its discretion by excluding Farmer's surrebuttal testimony, the error was harmless. Under the nonconstitutional harmless error standard, the party presenting the issue for review must show a reasonable probability that the error materially affected the outcome of the trial. *State v. Barry*, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015).

Farmer was charged with possession of a stolen motor vehicle and forgery. To prove Farmer was guilty of possession of a stolen motor vehicle, the State had to prove that Farmer

knowingly received, retained, possessed, concealed, or disposed of a stolen motor vehicle; Farmer knew the motor vehicle was stolen; Farmer withheld the motor vehicle from the true owner; and the acts occurred in Washington. There was no dispute that Farmer was in possession of the car or that the car was stolen. The fundamental issue was whether Farmer knew the car was stolen. The State relied on the condition of the car, specifically the missing ignition, and Farmer's evasiveness and refusal to identify himself as the alleged owner of the vehicle to show that Farmer knew the vehicle was stolen. The State did not reference Farmer's explanation of how the car got into the parking space. And how Farmer got the car into the parking space is irrelevant to whether he knew the car was stolen. Therefore, Farmer has not shown that exclusion of his surrebuttal testimony materially affected the outcome of trial on the possession of a stolen motor vehicle charge.

To prove that Farmer was guilty of forgery, the State had to prove that Farmer possessed a vehicle title which had been falsely made or altered, Farmer knew the title had been falsely made or altered, Farmer intended to injure or defraud, and the acts occurred in Washington. There was no dispute that the vehicle title had been altered. And the State relied on visible alterations to the vehicle title and Farmer's attempt to distance himself from the title to prove that he knew the vehicle title was forged. The State also argued that Farmer had the intent to injure or defraud because his intent was to show that the vehicle was his rightfully owned vehicle. Farmer's testimony that he pushed the vehicle into the parking space would have had no material effect on the outcome of the trial on the forgery charge. Therefore, because the exclusion of Farmer's surrebuttal testimony—that he pushed the vehicle into the parking space—had no material effect on the outcome of Farmer's trial, any error was harmless.

We affirm Farmer's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, C.J.

, C.J.

We concur:

Maxa, J.

Maxa, J.

Sutton, J.

Sutton, J.

NIELSEN KOCH P.L.L.C.

July 27, 2021 - 1:30 PM

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