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Court of Appeals
Division I
State of Washington

NO. 73946-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

GREGORY NOVOA, JR.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Brian Stiles, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Gregory Novoa, Jr. had a no contact order with his wife. He entered her apartment where he had never resided while the order was in effect. He fled when law enforcement was called, climbing on top of and walking across numerous vehicles to avoid arrest and damaging them. Novoa was convicted of Residential Burglary, Violation of a No Contact Order and Malicious Mischief in the Second Degree.

Novoa's contention that the prosecutor committed misconduct fails since the prosecutor did not impermissibly lower the burden of proof, inappropriately misstate the elements of the charge, or admit excluded evidence. Novoa's claim the court failed to answer a jury question must be denied because the trial court did not abuse its discretion since the question did not pertain to the facts of the case and did not require clarification of instructions.

For these reasons, Novoa's appeal must be denied and his conviction affirmed.

II. ISSUES

1. Since burglary does not require the element of the crime there and the agreed instructions given did not specify a crime therein, was the prosecutor's argument that the elements did not limit the crimes therein improper?

2. Where the jury unanimously found the crime therein of violation of a no contact order, was any error harmless beyond a reasonable doubt?
3. Where there was no objection and the instructions and argument as a whole showed the jury was properly informed that the malicious mischief must be knowing and malicious, was a prosecutor's single statement about knowledge as an element appropriate in context of the arguments presented?
4. Where there had been no exclusion of evidence of the issue of drug use prior to jury selection and no argument that jury selection was limited, was the prosecutor's questioning of jurors pertaining to knowledge of drug use improper?
5. Where there was no evidence admitted as to the defendant's drug use, was there a violation of the trial court's ruling?
6. Where the jury question did not address the elements the jury was required to find, was the trial court's reference to the instructions already within the trial court's discretion?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On January 22, 2015, Gregory Novoa was charged with Residential Burglary and Violation of a No Contact Order, both with a domestic violence allegation, and one count of Malicious Mischief in the First Degree.

CP 56-7. It was alleged that on January 16, 2015, Novoa had forced entry into his girlfriend's apartment at a time when Novoa had a protection order in effect with her. CP 4. After he fled the area of the apartment, Novoa began jumping on multiple vehicles in a nearby parking lot. CP 4. When officers arrived, Novoa refused to come down and a Taser was used to subdue him. CP 4. Novoa eventually jumped to the ground and had to be forcibly taken into custody. CP 4.

On July 20, 2015, the information was amended to split the single count of Malicious in the First Degree into two counts of Malicious Mischief in the Second Degree for the separate vehicles damaged. CP 76.

On July 20, 2015, the case proceeded to trial. 7/20/15 RP 19.¹

On July 22, 2015, the jury returned verdicts finding Novoa guilty of Residential Burglary, Violation of a No Contact Order and one count of Malicious Mischief in the Second Degree. CP 80, 83, 82 respectively, 7/22/15 RP 119-21. The Residential Burglary and Violation of a No Contact

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

5/6/15 RP	3.5 Hearing (in volume with 7/1, 7/16, 7/20/15)
5/14/15 RP	Trial Confirmation – Continuance (in volume with 6/11/15)
6/11/15 RP	Omnibus / Status (in volume with 5/14/15)
7/1/15 RP	Trial Continuance(in volume with 5/6, 7/16, 7/20/15)
7/16/15 RP	Trial Confirmation (in volume with 5/6, 7/1, 7/20/15)
7/20/15 RP	Trial Day 1 – Voire Dire, Testimony (in volume with 5/6, 7/1, 7/16/15)
7/21/15 RP	Trial Day 2 – Testimony – (in volume with 7/22, 8/13/15)
7/22/15 RP	Trial Day 3 – (in volume with 7/21, 8/13/15)
8/13/15 RP	Sentencing – (in volume with 7/21, 7/22/15.

Order charges were found to be against a family or household member. CP 77, 78. Novoa was found not guilty of one count of Malicious Mischief in the Second Degree. CP 81.

On August 13, 2015, Novoa was sentenced to 80 months confinement on the Residential Burglary, 25 months on the Malicious Mischief in the Second Degree with all the time suspended on the Violation of a No Contact Order charge. CP 46, 8/13/15 RP 130-1.

On August 31, 2015, Novoa timely filed a notice of appeal.

2. Summary of Trial Testimony

Juana Rodriguez DeReyes lived at 200 South Laventure Road, Apartment F-104 in Mount Vernon, Washington. 7/21/15 RP 5. She had been married to Gregory Novoa for four years. 7/21/15 RP 5. Her three children lived with her. 7/21/15 RP 13.

Rodriguez was woken up in the early morning to a noise and heard Novoa's voice asking to be let in. 7/21/15 RP 6. Rodriguez looked out and saw Novoa outside her apartment very close to the bedroom window that was slightly open. 7/21/15 RP 6-7. Novoa was grabbing onto the window. 7/21/15 RP 9. Some of the blinds ended up outside. 7/21/15 RP 9-10. Rodriguez was able to close and lock the window. 7/21/15 RP 8. Rodriguez

tried to call 911, closed all the windows and checked to make sure her door was closed. 7/21/15 RP 10.

Rodriguez said Novoa had never been in the apartment. 7/21/15 RP 11. Rodriguez was aware of the no contact order against the defendant. 7/21/15 RP 13.

Officer McCloud was dispatched to a call of a burglary in progress on January 16, 2015. 7/20/15 RP 134-5. When McCloud arrived, he talked to a homeowner who told McCloud someone was in the backyard. 7/20/15 RP 135. McCloud could hear a male's voice from behind the fence in the backyard. 7/20/15 RP 135-6. McCloud went in the back yard, saw no one else and moments later saw Novoa walking on a ten to twelve foot tall shed, yelling. 7/20/15 RP 137-8, 142. McCloud was concerned Novoa was coming towards him. 7/20/15 RP 138-9. McCloud used his Taser to no effect. 7/20/15 RP 140. Novoa then jumped on the roof of another car and then over a fence away from the apartment. 7/20/15 RP 140. Another officer arrived and grabbed Novoa off the vehicles. 7/20/15 RP 141.

Patrol Sergeant Martinez along another officer went to help McCloud and set up a perimeter. 7/20/15 RP 87-9, 91. Martinez saw Novoa standing on a Suburban elevating him above a fence. 7/20/15 RP 92-3, 99. Novoa had Taser probes embedded in his clothing. 7/20/15 RP 92-3. When Novoa jumped on a vehicle toward Martinez, Martinez discharged his Taser

to no effect. 7/20/15 RP 94-6. Novoa continued to run on the roofs of multiple vehicles. 7/20/15 RP 95. Martinez was able to grab Novoa, who resisted efforts to be taken into custody. 7/20/15 RP 95, 97.

Martinez was able to confirm that there was a no contact order between Novoa and Juana Rodriguez. 7/20/15 RP 110. Rodriguez told Martinez that Novoa had put his foot through the apartment window to attempt to enter, but she closed the window on him. 7/20/15 RP 116. Martinez found the blinds from the apartment on the outside of the window. 7/20/15 RP 116, 125, 128.

Martinez asked one homeowner to get an estimate of damage to the vehicles. 7/20/15 RP 108. After Novoa was in custody, Martinez spoke with Lorenzo and Ava Garcia, at 200 South Laventure Street. 7/20/15 RP 99. He had seen Novoa jump from a vehicle in one backyard to their back yard. 7/20/15 RP 100. Garcia owned a Mercedes that had a dent in the hood and roof line. 7/20/15 RP 104-5. He also owned a Chevy Malibu which suffered damage to the hood. 7/20/15 RP 108-9, 124.

A copy of the no contact order was admitted. 7/20/15 RP 11-3.

Officer VanDyk was present at the hospital for transport of Novoa. 7/20/15 RP 148-9. VanDyk spoke with Novoa, who was coherent and spoke clearly. 7/20/15 RP 150, 1152. Novoa told VanDyk, that he was staying at the residence at 200 South Laventure, Apartment F-104. 7/20/15 RP 150.

Novoa told VanDyk that he was aware of the protection order, but that he had no place else to stay. 7/20/15 RP 151. He also told her he had climbed out of the window. 7/20/15 RP 152.

Lorenzo Garcia lived at 2301 Carpenter Street and called 911 on January 16, 2015, because someone jumped on his cars and roof before jumping to the apartments on the other side of a fence. 7/21/15 RP 20-1, 23. Garcia's dogs were barking on his side of the fence and the man jumped across the fence and onto a white car and a shed before jumping back on his cars. 7/21/15 RP 22-3. Garcia identified Novoa as the person who damaged his Mercedes and his Malibu. 7/21/15 RP 24-5. Garcia got estimates of damage for the Mercedes and the Malibu. 7/21/15 RP 27. Ray Ellis of Gerber Collision provided an estimate of damage to the 2000 Chevy Malibu to be \$1,309.27. 7/21/15 RP 42.

Antonio Martinez lived on South Laventure in Apartment F-204. 7/21/15 RP 36. A neighbor told him his vehicles had been damaged. 7/21/15 RP 36. His 2003 white Toyota Tacoma had damage to the roof line and his 1997 white Toyota Camry also suffered roof damage that evening. 7/20/15 RP 120-1, 7/21/15 RP 36-7. Raymond Bonner of Dally's Auto Body provided estimates of the damage to a 2003 Toyota Tacoma and 1997 Toyota Camry which were admitted. 7/21/15 RP 40-1. The estimate for the

Tacoma repair was \$3,128.97 while the Camry repair estimate was \$1,525.13. 7/21/15 RP 37.

Gregory Novoa testified on his own behalf. 7/21/15 RP 52. He said he had been married to Rodriguez for almost four years and that he lived with her. 7/21/15 RP 55-6.

He claimed to remember only little bits of the morning of January 16th. 7/21/15 RP 53. He claimed he recalled trying to get away from dogs that he thought were in the apartment. 7/21/15 RP 53, 65. He claimed he had been inside the residence, and Rodriguez had blocked his exit, so he went out through a window. 7/21/15 RP 55-6, 66. He denied trying to get in her window. 7/21/15 RP 55. He also claimed he was standing on the cars to stay away from the dogs. 7/21/15 RP 54.

On cross examination, Novoa admitted he did not have a key to the apartment and that the address he provided the court after arrest was in Burlington. 7/21/15 RP 57. He also admitted to knowing of the protection order. 7/21/15 RP 59.

IV. ARGUMENT

- 1. Where the prosecutor mentioned that any crime in the residence would suffice for burglary, there was no objection and the jury found a violation of a no contact order, there was no error meriting reversal.**

Novoa contends the prosecutor improperly² lowered the burden of proof by mentioning the burglary instruction required proof of the intent to commit any crime therein.

Novoa fails to discuss the fact there was no objection in the trial court. Additionally the jury unanimously found a violation of a no contact order with a person who was within the residence. Under these circumstances, reversal of the conviction is not merited.

² Novoa uses the term prosecutorial misconduct. The State addresses the arguments in terms of error. The State contends term prosecutorial misconduct is misleading because although recognized as a term of art by the courts, it is misleading to members of the general public. Misconduct should be reserved for intentional or at least reckless conduct.

“Prosecutorial misconduct” is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Courts in other jurisdictions have recently recognized the unfairness of labeling every mistake made by a prosecutor as “misconduct.” See *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Maluia*, 107 Haw. 20, 108 P.3d 974, 979-981 (2005); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009). The more appropriate term would be prosecutorial error.

[T]he American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant’s rights are fully protected, to use the term “error” where it more accurately characterizes that conduct than the term “prosecutorial misconduct.”

National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010).

i. The prosecutor's argument focused on the crime therein for the burglary as a violation of a no contact order.

The prosecutor started off the closing argument talking about the no contact order, because it was the predicate crime for the burglary.

The reason why I'm starting with discussions about the no contact order is that in order for the crime of residential burglary to have been committed he had to have been there with the intent to commit a crime. The crime was violating a no contact order.

7/22/15 RP 93.

The next element on your residential burglary instruction is that he was there with intent to commit a crime. He had, in fact, committed a crime. He had committed the crime of a no contact order violation. And, again, that's why I started with the discussion. If that element is proven we would already have decided that he violated the no contact order. He knew what he was doing there. He was at her apartment. He knew it was her apartment. He was there to see her.

7/22/15 RP 97.

ii. Novoa failed to object when the prosecutor argued that the residential burglary instruction did not mention the crime therein.

And if you are not satisfied in finding that he was there with the intent to see her and, therefore, commit the crime of violation of the no contact order, he could have been there to commit any other number of crimes against her. Do you ever call 911 on someone who is coming over to have coffee? No. She was terrified of him. She was scared. She was calling the police because she did not trust that whatever he was doing there was for a lawful reason.

7/22/15 RP 98. This argument was consistent with the jury instruction for the residential burglary. The instruction did not specify the crime therein. CP 15.

Case law provides that the crime therein is not an element of the charge. *State v. Bergeron*, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). Thus, this argument was not error.

Additionally, no objection was made to the argument or lack of specificity for the crime therein in the trial court. And a trial court's decision regarding the scope of closing argument is reviewed for abuse of discretion. *See State v. Frazier*, 55 Wn. App. 204, 777 P.2d 27 (1989). The court would have found the argument appropriate in light of the instructions.

iii. Given the failure to object and the argument was not improper, Novoa cannot establish that the argument was so flagrant and ill-intentioned as to merit reversal.

Generally the failure to object below precludes review on appeal.

RAP 2.5(a)

Without objection at trial, reversal based on either is warranted only if there has been a manifest error affecting a constitutional right. RAP 2.5(a). "[T]he appellant has the burden to demonstrate that the alleged error actually affected his or her rights. '[I]t is this showing of actual prejudice that makes the error "manifest", allowing appellate review.'" *State v. McNeal*, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (second alteration in original) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006) (*overruled on other grounds, in State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)). In the context of closing argument, case law has established a higher burden where there was no objection.

Where a defendant fails to object, the defendant is deemed to have waived any error unless the reviewing court can determine that (1) no curative instruction could have cured the resulting prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The objection is not necessary in cases of incurable prejudice because it is effectively a mistrial and a new trial is the only and the mandatory remedy. *State v. Emery*, 174 Wn.2d at 762. When reviewing a prosecutor's misconduct that was not objected to, the courts "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.*

Here, Novoa fails to argue the argument could not have been cured by an instruction. And Novoa fails to establish prejudice given the jury's verdict of guilty on the violation of a no contact order charge. CP 83.

iv. Any error would have been harmless given the jury's verdict of guilty on the violation of a no contact order.

In rebuttal to the defense closing, the State again reiterated what was argued in the initial closing: that the Residential Burglary was predicated on the violation of a no contact order.

If you believe that he was in the apartment, fell out of the apartment, took the blinds with him he's still guilty of residential burglary. If you believe the defendant's entire version of the story is he still guilty of residential burglary?

That's why I talked to you about the no contact order to start with. He's unlawfully there. He's intending to commit a crime by being there. He's committing that.

7/22/15 RP 114.

Given the jury's verdict of guilty on that charge, the proof of the crime therein was established beyond a reasonable doubt and any error in arguing another crime could have been the intent was harmless beyond a reasonable doubt. CP 83, *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (applying constitutional harmless error standard to determine whether prosecutor's appeals to racial bias merited reversal).

2. The prosecutor's closing argument, addressing the significant defense argument regarding knowledge of the owners of the malicious mischief, did not lower the burden of proof.

On appeal, Novoa improperly uses excerpts from closing arguments to suggest the prosecutor misinformed the jurors of the elements the State was required to prove. In context, the prosecutor's argument responded to the defense argument regarding the defendant's knowledge of whose property was being damaged.

i. The defense argued extensively that Novoa did not know the vehicle owners and the State addressed that argument.

During the defense closing argument, in addressing the violation of no contact order charge, the defense argued the malicious mischief was not intentional because he did not know the people whose property he was

damaging and thus had no motive to intentionally and thereby maliciously damage vehicles.

Now, intent means if I come to your house and I steal your car, that's malicious. That's an intentional, individualized malicious act. If I know you, and I don't like you, I know that's your car, and I key it. That's malicious. Being tasered three times with 50,000 volts, trying to follow an officer's instructions with that running through your body and going from one vehicle to the next, walking or running on them, that is not intentional. It's not malicious. It is not malicious. He did not know those people. He didn't know who owned those cars.

7/22/15 RP 106.

So we've got a person whose primarily language is probably Spanish. He's been electrocuted, and is now being commanded to do certain things in English. The commands were shouted in English. And defense argues that under that scenario this person cannot form a malicious intent to damage the people's cars when he doesn't know these people. There's nothing individualized about that.

So what happens if (indistinguishable) is not malicious. Well, he goes into civil court and recoups his money. It's not a criminal act. Not every accident, not every fender bender, not every sort of property damage is a crime. We're not always charged with a crime when somebody's property is damaged. We go to a different court. That's where these, quote, unquote, malicious (indistinguishable) that's civil court. Because he was not able to form an evil intent to damage those people's cars. He didn't know who owned them. He didn't know those people.

Again, intentional, I intentionally keyed that car. I know that person, probably malicious. My point is malicious is higher than intentional. My client didn't intentionally damage those cars. He did not set out to put dents in those hoods.

7/22/15 RP 107.

In rebuttal to the defense argument that the vehicle damage was not malicious because he did not know the owners, the State argued there was no requirement that the defendant intended to damage a particular persons' vehicle citing that the mens rea was knowingly.

The malicious mischief count bears no relevance on if the defendant knew whose cars he was jumping on. It does not matter. There is no intent requirement that he intended to damage particular people's property. Again, refer to your jury instructions if there's any questions about what you are required to find. The requirement of malicious mischief is that he knowingly caused damage. I believe we have satisfied that burden beyond a reasonable doubt.

In closing, I ask you to refer your jury instructions if you have any questions, refer to the no contact order if you have any questions.

7/22/15 RP 115.

In Novoa's brief, he excerpts only the last two sentences of the first paragraph suggesting the prosecutor urged the jury to find guilty on malicious mischief based only upon knowingly caused damage without addressing the malicious element. Opening Brief of Appellant at page 10. But read in context, the prosecutor was addressing the defense argument regarding knowledge of the person whose property was being damaged. Furthermore, in the sentence immediately preceding and immediately after the portion that Novoa cites to, the prosecutor referred the jury to the jury instructions. This argument was not an improper argument.

In addition, in the initial closing the prosecutor had directly argued that the State had to prove the act was both knowing and malicious.

The second element on Instruction 18 is that this act was done knowingly and maliciously. We know he was jumping up and down on the cars. He told us he was jumping up and down on the cars. Malicious means with an evil intent, or wish, or design, to vex, annoy, or injure another person. I would certainly be annoyed if there was damage done like that to my vehicle. You can consider the fact that Mr. Garcia testified he was not listening to law enforcement. He was jumping back and forth on the vehicle. He was running up and down along some of the vehicles. He jumped from the six-foot shed onto one of the vehicles. That certainly was an intent to annoy the property owner of that vehicle.

7/22/15 RP 100.

As a whole and in context, the prosecutor's argument was appropriate.

- ii. Where there was no objection, any error would have easily have been cured by an instruction and there has been no prejudice established, the remedy of reversal of the conviction cannot be granted.**

There was also no objection to the prosecutor's argument. And as stated in the prior section of the brief above, where there was no objection made during closing argument, on appeal a defendant is required to establish that (1) no curative instruction could have cured the resulting prejudice and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

Here, had there been error, an instruction to the jury that the act must be knowing and malicious could easily have cured the error that Novoa now claims. And in the light of the prosecutor's prior argument and the instructions, which the prosecutor directed the jury to follow, there was no likelihood of prejudice.

3. Where there had been no motion in limine to preclude questioning jurors about drug use, the prosecutor's questioning of jurors was not misconduct.

During jury selection, the prosecutor questioned some jurors about their impression about whether drugs could influence a person's behavior. 7/20/15 RP 63-5. The defendant objected. 7/20/15 RP 63. The objection was overruled. 7/20/15 RP 63.

After jury selection was completed, the defendant moved to exclude mention of the defendant's admission to use of methamphetamine. 7/20/15 RP 77-8. The trial court granted the motion.

On appeal, Novoa claims the prosecution committed misconduct by questioning jurors about their impressions about drug use. Opening Brief of Appellant at page 11-2. However, Novoa fails to mention the jury selection portion that he complained of occurred before the trial court addressed the motions in limine. The very citations to the record in the brief show the jury selection area complained of was at page 63 to 65 while the motion in limine

occurred at pages 77 to 82. Opening Brief of Appellant at page 12. The ruling came after jury selection was complete.

The court's ruling reads:

I'm going to grant the motion and restrict any evidence that would suggest that Mr. Novoa was either under the influence of some sort of intoxicating liquor and/or drugs or his statements that allege that.

7/20/15 RP 82. Novoa does not claim on appeal that any evidence was admitted in violation of the court's ruling.

There was no motion made prior to jury selection to preclude questioning of the jury pertaining to observations of effects of drugs.

The underlying goal of the jury selection process is “to discover bias in prospective jurors” and “to remove prospective jurors who will not be able to follow ... instructions on the law,” and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness. *State v. Davis*, 141 Wn.2d 798, 824-26, 10 P.3d 977 (2000).

State v. Saintcalle, 178 Wn.2d 34, 76, 309 P.3d 326 (2013). Where there was an indication of unusual behavior by Novoa and he claimed to have a memory of just some of the events, the prosecutor's question of the jury as to their impressions was appropriate to determine whether some jurors might perceive a substance abuse issue causing bias.

Given the absence of a violation of a court ruling, the questioning of the jurors was not error.

4. Because the jury question did not pertain to the issues before the jury, the trial court did not abuse its discretion by referring the jurors to the other instructions.

i. The jury question did not ask for further definition.

During deliberations, the jury sent a question asking:

Do all violation of no contact orders include a residential burglary charge if the violator enters their dwelling? Is that why Count 1 Residential Burglary is included in this?

CP 58, 7/22/15 RP 118-9. Both parties agreed that the jurors should be just referred back to their instructions. CP 58, 7/22/15 RP 119.

On appeal Novoa contends “[t]he court should have responded to the jury’s question in order to clarify its misconceptions and to ameliorate the misconduct of the prosecutor.” Opening Brief of Appellate at page 15. But Novoa fails to indicate how the jury should have been instructed.

The question the jury posed actually is not simple to resolve. If a person had permission to be inside a residence where he was not precluded, then a violation occurring at that location would not be a burglary. The defendant claimed during his testimony that he had permission to be inside the residence and that he in fact lived there. 7/21/15 RP 55-6. And in fact, instruction 8 provided that an entry or remaining is unlawful when “he or she is not then licensed, invited or otherwise privileged to so enter or remain.” CP 17. Thus, the jury could have found Novoa was invited into the residence and thus not committing a burglary.

But, where a defendant was not permitted at the victim's home, an entry to violate a no contact order would constitute burglary. By finding the violation of a no contact order, the jury was finding the commission of a crime intending to occur inside the residence. CP 15, 81, 83.

Instructing the jury here would have run the risk of unduly influencing the jury's consideration of the elements. And, as given, the jury instructions provided the jury the proper tools to evaluate guilt or innocence.

ii. Failure to object to the instruction below precludes review.

RAP 2.5(a) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RAP 2.5(a). Under this rule, an appellate court generally will review only those issues properly raised in the trial court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

The application of these principles is well settled in the context of jury instructions. As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude. See *State v. Lord*, 117 Wn.2d 829, 880, 822 P.2d 177 (1991); *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990); *Scott*, at 689-91; *State v. Ng*, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988). Even an error in defining technical terms does not

rise to the level of constitutional error. *Lord*, at 880; *Scott*, at 689-90.

State v. Stearns, 119 Wn.2d 247, 249-50, 830 P.2d 355 (1992).

The State contends that as a whole, the instructions here properly provided the elements of the charge of burglary.

iii. In order for a trial court's decision not to supplement instructions to be reversed, it must be shown the trial court abused its discretion.

Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court. *State v. Brown*, 132 Wn.2d 529, 612, 940 P.2d 546 (1997); *State v. Ng*, 110 Wn.2d 32, 42-43, 750 P.2d 632 (1988).

State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008).

As argued above, Novoa does not describe what instruction should have been given. "The court should have responded to the jury's question in order to clarify its misconception and to ameliorate the misconduct of the prosecutor." Opening Brief of Appellant at page 16. "Due to the prosecutorial misconduct in closing argument, the jury was understandably confused as to the 'intent' element of the residential burglary count. When the jury inquired about this, the court could have easily dispelled the jury's question." Opening Brief of Appellant at page 19.

If it is so "easily dispelled" then on appeal Novoa should have stated how the jury should have been instructed, so the State would have the ability

to respond. And, despite repeating the claims of misconduct, as described above, there was no error by the prosecutor in argument.

Novoa cannot establish the trial court abused its discretion in not providing a further instruction to the jury's question.

V. CONCLUSION

For the foregoing reasons, Gregory Novoa's convictions for Residential Burglary and Malicious Mischief in the Second Degree must be affirmed.

DATED this 17th day of August, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Maureen M. Cyr, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 17th day of August, 2016.


KAREN R. WALLACE, DECLARANT