

**FILED
Court of Appeals
Division II
State of Washington
8/3/2018 4:26 PM**

NO. 50316-6-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER BURTON,

Appellant.

RESPONDENT'S BRIEF

**ERIC BENTSON/WSBA 38471
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Representing Respondent**

**HALL OF JUSTICE
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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Burton's conviction should be affirmed because:

- (1) There was sufficient evidence for the jury to find he was armed with a deadly weapon;
- (2) The trial court did not abuse its discretion in admitting the 911 and jail calls;
- (3) There was not prosecutor misconduct and Burton's failure to object waived his claim; and
- (4) Because Burton's claimed errors did not exist, his cumulative error argument fails.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. Taken in the light most favorable to the State, was there sufficient evidence that Burton was armed with a deadly weapon when, while in flight from police for assaulting his girlfriend, he broke into a house, selected a knife with a seven-inch blade, and concealed it in his waistline?
- B. Did the trial court abuse its discretion by admitting a 911 call and a jail call showing Burton was actively fleeing police when he unlawfully entered a home, stole a knife, and armed himself with it?
- C. Did Burton waive his claim of misconduct when he did not object at trial and there was nothing objectionable about the prosecutor's closing argument?

III. STATEMENT OF THE CASE

In the early morning of July 5, 2016, a distressed Virginia Lord called King County dispatch saying she had been assaulted by her boyfriend, Christopher Burton, in her house at 622 Othello Street in Seattle. RP 383-384, 389, 546. Lord explained she was trying to get away from Burton, and that he was still in the living room. RP 384. Lord became frustrated with the dispatcher's lack of concern and began crying. RP at 384. The conversation was interrupted by Burton assaulting Lord, with the sounds of her being struck and screaming audible on the call. RP at 385. After she was assaulted, the dispatcher asked if Lord was still there, and she could be heard screaming and crying. RP at 385. A neighbor then spoke to the dispatcher noting Lord was hurt quite badly and there was quite a bit of blood. RP at 385-86. Lord told the neighbor Burton was no longer there and had left in a 1989 Nissan pickup truck. RP 386. Eventually, Lord returned to speaking with the dispatcher and identified Burton. RP at 389.

Later that morning, Burton wrecked the truck while driving on Coal Creek Road in Longview around the 900 block. RP 596-98, 399. On the road between the interstate and Coal Creek Road is a sign that says "To Oregon." RP 471. If a vehicle exits the interstate and remains in the right lane it would pass this sign but not be in the correct lane to enter

Oregon. RP 471-72. Instead the vehicle would be on Ocean Beach Highway. RP at 471-72. Ocean Beach Highway intersects Coal Creek Road. RP 472. Coal Creek Road is located in a rural area in Cowlitz County. RP 390. Burton's truck had rolled over one time and was sitting in a ditch. RP 434. The canopy on the truck and the roof were crushed. RP 434. From the damage to the truck it appeared to be totaled and incapable of being driven again. RP 439.

Evelyn Plant lived alone at 1005 Coal Creek Road. RP 390-91. Plant was 59-years-old, suffered from kidney failure with below 25 percent function, and had degenerative disc disease. RP 390, 396. Because of her medical condition, Plant was dying. RP 447. Her ability to walk was also affected. RP 396. To assist her in maintaining the ability to walk, Plant would swim for physical therapy. RP 396.

On the morning of July 5, 2016, Plant went swimming at the YMCA in Longview. RP 397-98. Once she finished swimming, she returned home. RP 398. As she drove toward her home, she observed Burton's wrecked pickup truck. RP 399. Both Plant and another woman who was driving in the opposite direction stopped at the location of the collision. RP 399. The women were unable to locate the driver of the truck. RP 399. Plant could smell beer dripping in the truck. RP 399. The other woman who stopped called 911 and reported the collision. RP 399.

After this Plant continued to her home, parked her car, and entered her house through the front door. RP 399-400.

Upon entering the kitchen, Plant noticed a plastic two-liter Dr. Pepper bottle on the counter that had not been there when she left her home. RP 400. The bottle was half-full of water. RP 401. The kitchen had a door that led to the utility room. RP 401. Plant observed that the door from the utility room was ajar. RP 401. Upon observing this, Plant took a deep breath and entered the utility room. RP 401. In the utility room Plant observed Burton walking up the stairwell from her basement. RP 401-02.

Plant was frightened. RP 402. She ordered Burton out of her house. RP 402-03. Burton told Plant he was “trying to hide from the police.” RP 403. Burton also told Plant that he was running from the police, his girlfriend had framed him and abused him, and that he needed to get away from the house and the area where he had wrecked the truck immediately. RP 403. Burton told Plant he was talking to his mother in California, and she told him she did not want him to come down there just before he wrecked the truck. RP 404. Burton also asked Plant where Oregon was. RP 404. Burton offered Plant money to take him to the bus depot. RP 404.

While she was speaking with Burton, Plant's boyfriend, 63-year-old, Ward Linden, drove up. RP 405. Although Linden did not live with Plant, he would come to her home three days a week. RP 406. When Linden arrived, Plant whispered to Linden that she was going to call 911 and to keep Burton busy. RP 449. Plant then dashed into the bathroom, grabbed a phone, and called 911. RP 406.

Linden could smell a light aroma of beer on Burton. RP 449. Burton told Linden, "I got to get away from the cops. Can you take me to the bus station? I'll pay you." RP 450. About this time, Sergeant ("Sgt.") Jeremy Tonissen of the Cowlitz County Sheriff's Office drove by, and Burton went to hide in the trees. RP 450, 460. Sgt. Tonissen turned his vehicle around and returned. RP 460. Linden motioned to Sgt. Tonissen and pointed toward the direction Burton had gone. RP 460-61. Sgt. Tonissen exited his patrol vehicle and paralleled Burton's direction of travel. RP 461.

Sgt. Tonissen told Burton to stop. RP 461. Burton complied and told Sgt. Tonissen he had been at another house at 1011 Coal Creek rather than at Plant's house. RP 461. Sgt. Tonissen told Burton he had observed him in Plant's driveway. RP 461-62. Burton told Sgt. Tonissen it had not been him. RP 462. Another sheriff's deputy, Jason Hammer, arrived to assist. RP 462. Sgt. Tonissen told Burton he was investigating the

accident that had occurred down the road. RP 462. As soon as Sgt. Tonissen completed this sentence, Burton ran from him. RP at 462.

As he ran, Burton threw his wallet to the ground. RP at 462. Sgt. Tonissen chased after Burton for about 50-55 yards. RP at 463, 468. Eventually, Sgt. Tonissen told Burton if he did not stop he would tase him. RP at 463. At this point, Burton stopped and was placed under arrest. RP at 463. Deputy Hammer searched Burton incident to arrest. RP 523. In his waistband, Deputy Hammer located a large knife in a sheath. RP 523.

The knife found on Burton belonged to Plant. RP 408. The knife blade had a shape that resembled a feather. RP 409. About 10 years earlier, Linden had replaced the original handle on the knife with a piece of a deer horn antler. RP 409-10. Plant kept the knife in a wood bin in her house just outside her bedroom. RP 407, 425. The blade of the knife was sharp and measured seven-and-a-half inches long. RP 408, 444.

Deputy Hammer transported Burton to the jail; however, due to his involvement in the motor vehicle collision, the jail required medical clearance before he could be booked. RP 529. Deputy Hammer took Burton to the hospital and obtained medical clearance, then transported him to the jail. RP 526. At the hospital, Dr. Theordore Leslie diagnosed Burton with a concussion without loss of consciousness. RP 550. Burton denied losing consciousness and did not exhibit any signs of amnesia. RP

556-57. Burton was adamant that he did not want lab tests done. RP 557.

Burton was oriented to time, place, and person. RP 558.

Later that evening at the jail, Burton called his mother. RP 538, 546. Burton told his mother he had wrecked his truck that morning. RP 539. Burton then told his mother that after the wreck he went to a neighbor's "to call the cops." RP 539. Burton claimed he walked to the back of the house. RP 539. He said he heard a car pull up then "came back out, knocked on the door." RP 539. Burton then stated: "The lady was acting super weird. Then her husband pulls up and I'm talking with her husband....So they're trying to get me for residential burglary. I'm in a little town in the middle of Washington[.]" RP 539-40.

Referring to the incident in Seattle, Burton told his mother: "She's been trying to set me up for a while[.]" RP at 540. Burton told his mother: "So I take it she went to the police and called the court and blah, blah, blah?" RP 541. When Burton asked his mother to bail him out, she told him "I live down here." RP 541.

Burton then told his mother that he and Lord had sex, she smelled, and it was gross, so he said something to her. RP 542. Burton said Lord then "called the f***ing cops." RP 542. Burton said: "I'm trying to get the f*** out, but she attacks me, starts screaming and then it ends up in an altercation." RP 542.

Toward the end of the call, Burton's mother asked him where he was. RP 545. Burton asked someone in the jail: "[W]hat town is this?" RP 545. After learning he was in Longview, he relayed this to his mother. RP 545.

Burton was charged with residential burglary with a deadly weapon enhancement, hit-and-run, and obstructing a law enforcement officer in Cowlitz County Superior Court. RP 52, CP 49-51. Burton was also charged with rape in the second degree, assault in the second degree – domestic violence, and interfering with domestic violence reporting in King County. RP 9. On December 1, 2016, the Cowlitz County case proceeded to trial. RP 26. During the trial, Burton testified that he lived in Seattle and on July 5, 2016, he drove from Seattle to Longview to visit his friend Nicholas Shepherd. RP 216. Burton testified he wrecked his truck on Coal Creek Road. RP 218. Burton testified that he remembered walking to a house. RP 221. Burton also claimed he was confused. RP 222. He claimed his memory of the event was limited and had been refreshed by Plant's testimony. RP 223. He also testified he had suffered a concussion. RP 225. When asked what symptoms he exhibited, Burton stated: "So when I came from St. John's, they gave me a concussion treatment sheet, and the same symptoms that were on the sheet is what I had." RP 227.

Burton also claimed he did not recall taking the knife from inside the residence. RP 229. Burton claimed he was not aware of the knife until he was placed in handcuffs. RP 229. Burton claimed that as a result of the motor vehicle accident, his ability to act normally at the time was hindered by his “[c]ognitive thinking ability.” RP 233.

The jury found Burton not guilty of hit-and-run and guilty of obstructing. RP 297. The jury was unable to reach a unanimous verdict as to the residential burglary. RP 298.

The case proceeded to trial on the residential burglary charge for a second time on April 11, 2017. RP 333. Prior to trial the State moved in limine to admit the 911 call and the jail call. RP 360-68. The parties stipulated to the authenticity of the calls. RP 545-46. Burton objected to admitting the calls, claiming it would force him to testify about his pending rape charge in King County and violate his Fifth Amendment right to remain silent regarding the King County charges. RP 368. Burton argued there was no connection between the sexual assault and the residential burglary. RP 368-69. He also argued that the crimes in Seattle were not crimes of dishonesty. RP 368. Finally, Burton argued that the 911 call was more prejudicial than probative because of the alleged sexual assault. RP 369-71.

After identifying the purpose of the evidence, recognizing it went toward proving intent both for the residential burglary and the circumstances involving the knife (which was the basis of the deadly weapon enhancement), and performing an ER 403 balancing test, the Court ruled the calls were admissible as *res gestae* evidence of the crime and under ER 404(b). RP 376-79. When performing the balancing test, the court found the lack of mention of the sexual assault on the 911 call tempered any unfair prejudice. RP 379. The court also ordered the mention of the rape allegation be redacted from the jail call. RP 502. The court included a limiting instruction regarding the admission of the calls in its instructions to the jury. RP 632.

During the trial, Burton called Dr. Leslie as a witness to testify that Burton had suffered a concussion from the motor vehicle collision. RP 550. Burton called Nicholas Shepherd to testify that he had invited him to visit him in Longview on July 5, 2016. RP 594. Burton then testified to wrecking his truck on Coal Creek Road. RP at 597. Burton testified that he did not recall his conversation with Plant, running from Sgt. Tonissen, or going to the hospital. RP 601, 603. However, Burton contradicted this by recounting a portion of his contact with Plant and claiming he had been put into a machine for a CT scan. RP 602, 604. Burton claimed he did not recall his jail call to his mother. RP 604. Burton claimed he did not

remember the inside of Plant's residence. RP 6112. Burton also claimed he had no reason to possess Plant's knife and thought it was "a piece of junk." RP 607.

During closing argument, Burton's attorney stressed that the issue in the case was "intent." RP 659. Burton's attorney told the jury it had to answer the question of "at any point either before or after Mr. Burton went into Ms. Plant's residence did he intend to commit a crime[?]" RP 659. Burton's attorney asked the jury:

- "What's his motive?"
- "What's his knowledge of what's he doing?"
- "How aware is he of what's going on at that time?"

RP 659. Burton's attorney argued that Burton was disoriented and lost track of what was going on. RP 662. Burton's attorney argued he entered Plant's house and took the knife because he was not thinking clearly from suffering a concussion when he wrecked his truck. RP 666. Burton's attorney also argued he had come to Longview to visit Shepherd and was not fleeing to California. RP 668. Burton's attorney concluded by arguing that even if Burton committed a trespass by entering Plant's home, he did not intend to commit a crime. RP 670-71.

The jury found Burton guilty of residential burglary with a deadly weapon enhancement. RP 684.

IV. ARGUMENT

A. **TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND BURTON WAS ARMED WITH A DEADLY WEAPON.**

Taken in the light most favorable to the State, there was sufficient evidence for the jury to find Burton was armed with a deadly weapon when he committed the residential burglary. With regard to a jury's special verdict finding of a deadly weapon enhancement, "[a]s long as any rational trier of fact could have found that [the defendant] was armed, viewing the evidence in the light most favorable to the State, sufficient evidence exists." *State v. Eckenrod*, 159 Wn.2d 488, 494, 150 P.3d 1116 (2007). Burton fails to apply this standard of review, and reaches an incorrect conclusion with regard to the question of whether Burton was armed when he concealed a knife in his waistline during the burglary. Under the correct standard of review, when all reasonable inferences are drawn in favor of the State and against Burton, there was sufficient evidence for the jury to find he was armed with a deadly weapon.

The Washington Supreme Court has stated:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When determining the sufficiency of the evidence the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn. App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State’s evidence. *Jones*, 63 Wn. App. at 707-08. “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Nothing forbids a jury, or a judge, from logically inferring intent from proven facts,

so long as it is satisfied the state has proved that intent beyond a reasonable doubt.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State’s favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

“A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes and there is a connection between the defendant, the weapon, and the crime.” *State v. Easterlin*, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006). “Where the weapon is not actually used in the commission of the crime, it must be there to be used.” *State v. Gurske*, 155 Wn.2d 134, 135, 118 P.3d 333 (2005). The Supreme Court has explained, “the legislative purpose in creating the deadly weapons enhancement: to recognize that armed crime, including having weapons available to protect contraband, imposes particular risk of danger on society.” *Eckenrod*, 159 Wn.2d at 493.

For purposes of a deadly weapon enhancement, the requirement that the weapon be easily accessible and readily available for use is met when a burglar steals that weapon during the commission of the burglary. *See State v. Speece*, 56 Wn. App. 412, 416-18, 783 P.2d 1108 (1989). *Speece* unlawfully entered a home and stole two guns. *Id.* at 414. There was no evidence as to the manner in which the guns were stolen or how

they were transported. *Id.* at 418. The court explained that “a gun can be used, whether loaded or unloaded, for the purpose of frightening, intimidating or controlling people.” *Id.* at 417 (quoting *State v. Faille*, 53 Wn. App. 111, 115, 766 P.2d 478 (1988)). Because of this practical reality, regardless of how the guns were transported from the scene of the crime, they were “easily accessible and readily available for use during the burglary.” *Id.* at 418. Thus, there was sufficient evidence to support the jury’s finding that Speece was armed during the commission of the burglary. *Id.*

The “easily accessible and readily available test” is not confined to defendants with the deadly weapon in hand or on their person. *Id.* For example, in *State v. Schelin*, 147 Wn.2d 562, 563-64, 575, 55 P.3d 632 (2002), when police executed a search warrant, a loaded revolver in a holster hanging from the wall six to 10 feet away from Schelin was found to be sufficient evidence that he was armed. This was because “Schelin stood near the weapon when police entered his home and could very well have exercised his apparent ability to protect the grow operation with a deadly weapon, to the detriment of the police.” *Id.* at 574-75. It is noteworthy that in *Schelin*, the court explained that in “analyzing the sufficiency of the evidence claim, the court will draw all inferences from

the evidence in favor of the State and most strongly against the defendant.”¹ *Id.* at 573 (citing *Joy*, 121 Wn.2d at 339).

The requirement that there be nexus or connection between the defendant, the weapon, and the crime is met when the evidence allows a jury to infer the presence of a weapon was there to protect a criminal enterprise. *Eckenrode*, 159 Wn.2d at 494. When determining whether there is a nexus or connection between the defendant, the weapon, and the crime, “[t]he jury, as the trier of fact, is in the best position to determine whether there is a connection.” *Id.* at 496. When a challenge to the sufficiency of this connection is raised, the defendant has the burden of establishing that the “evidence was in fact insufficient, even with all inferences from the evidence drawn in favor of the State.” *Id.* at 496. (citing *Schelin*, 147 Wn.2d at 573). For example, in *Eckenrod*, the presence of firearms in a home, the defendant’s admission to having a loaded gun in his possession during a 911 call, along with a marijuana manufacturing operation and a police scanner was sufficient evidence from which “[a] jury could readily have found that the weapons were there

¹ Burton cites *Schelin* for the proposition that the standard of review is *de novo*, however the question of law the *Schelin* Court was concerned with was whether as a matter of law constructive possession could support a weapon enhancement. *Id.* at 574. When the Court analyzed the sufficiency of the evidence it still considered the evidence in the light most favorable to the State. *Id.* at 573-75 (“The jury was entitled to infer he as using the weapon to protect his basement marijuana grow operation.”).

to protect a criminal enterprise.” *Id.* at 494. Thus, Eckenrod failed to meet his burden and his firearm enhancements were affirmed. *Id.* at 496.

Conversely, “showing a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon.” *State v. Brown*, 162 Wn.2d 422, 432, 173 P.3d 245 (2007). “To establish the nexus between the crime and a weapon one should examine the nature of the crime, the type of weapon or weapons, and the circumstances under which the weapon is found.” *Id.* In *Brown*, after the burglars had left the scene of a burglary, the homeowner observed his rifle on his bed rather than in his closet where it was normally kept. *Id.* at 431. A witness later heard Brown and his accomplice expressing a “desire to have gotten the guns.” *Id.* The Court found no evidence existed that Brown or his accomplice handled the rifle in a manner indicative of an intent or willingness to use it in furtherance of the crime. *Id.* at 432. Further, the testimony of the witness indicated that Brown and his accomplice regarded the weapon as “nothing more than valuable property.” *Id.* Because the facts suggested the rifle was only briefly in one of the burglars’ possession, it was merely loot and was insufficient to show Brown was armed with a firearm. *Id.* at 434-35.

Here, when all reasonable inferences are drawn in favor of the State and against Burton, there was sufficient evidence to show Burton

was armed with the knife. Because the knife was found in his belt it was readily available and easily accessible. Further, because the knife was found on Burton there was a connection between Burton and the weapon.

Burton has the burden of showing no reasonable jury could have found, as the jury did here, that there was a connection between the weapon and the crime. The jury was instructed that in determining whether this connection existed it should consider “the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.” RP 636.

First, as to the nature of the crime, while the crime Burton was convicted of was a residential burglary, there was no evidence the burglary was motivated by an economic interest in looting Plant’s home. Despite the presence of other valuable property inside her home, the only item Burton is known to have stolen was the knife. Further, unlike in *Brown*, where the burglars viewed the guns as “nothing more than valuable property,” here, Burton described the knife as a “piece of junk,” indicating he did not view as valuable property. RP 607. Thus, it was not “merely loot.” It is likely the jury found that by stealing the knife from inside the residence, Burton evinced the intent to commit a crime against person or

property therein, and his purpose in concealing the knife on his person was for use as a weapon to further his flight.

Second, the circumstances surrounding the commission of the crime provided a strong inference that Burton's selection of the knife was for use as a weapon to further his flight from police for his earlier assault. Burton was on the run from the police for having assaulted Lord while she was calling 911 that same morning. He was attempting to drive his truck to California when he wrecked it. When Sgt. Tonissen attempted to contact him, he ran 55 yards and only stopped to avoid being tased. He also tried to distance himself from his identification by throwing it while being chased. As in *Eckenrod*, the availability of the weapon in conjunction with the circumstances surrounding the crime, provided sufficient evidence for the jury to find a connection between the weapon and the crime.

Third, the location of the weapon at the time of the crime suggested he armed himself. Burton specifically selected the knife, which was inside of Plant's home, and placed it in his waistband. At this point during the burglary Burton was armed. And evidence of his intent was informed by the fact that he was in active flight from the police, stole nothing else in the home, and later claimed he saw no value in the knife. The most reasonable inference that could be drawn was that Burton

acquired the knife during the commission of the crime to arm himself in furtherance of his flight. As in *Speece*, his acquisition of the weapon during the burglary and actual possession of it made it readily available to him for several potential uses including violence or intimidation.

Finally, the type of weapon he selected was consistent with arming himself to further his flight. For purposes of a deadly weapon enhancement, a knife having a blade greater than three inches is a deadly weapon.² The knife Burton selected had a seven-and-a-half inch blade. There were other weapons, such as a sword, in the house but Burton selected the knife, which was housed in a sheath, allowing him to conceal it in his waistline. The jury could have drawn the inference that he selected a weapon of this type for its usefulness against others. It was small enough to be stored in his waistband, it had a sheath so he could secret it on his person without cutting himself, and it had a long enough blade that it would easily intimidate a person who it was pulled on, as it had the potential to penetrate deeper than a standard pocket knife.

Burton misinterprets *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), as having “rejected the idea that an enhancement may be imposed based on the idea that a weapon not *actually* used in the commission of a

² See RCW 9.94A.825 (The term deadly weapon includes “any knife having a blade longer than three inches[.]”).

crime was ‘there to be used.’”³ *Appellant’s Brief* at 16. This is not what the *Brown* Court found, but rather that under the facts in *Brown*, there was not sufficient evidence for the jury to have found the rifle was there to have been used. *Brown*, 162 Wn.2d at 434-35. The *Brown* Court explained that the jury should “examine the nature of the crime, the type of weapon or weapons, and the circumstances under which the weapon is found.” *Id.* at 433. Taken in the light most favorable to the State, the evidence permitted the jury to infer that Burton concealed the knife on his person for it to be “there to be used” in furtherance of the crime.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE 911 AND JAIL CALLS.

The trial court did not abuse its discretion when admitted the 911 and jail calls. “The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse.” *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984)). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). When applying this standard, “the

³ Burton cites to *Brown*, 162 Wn.2d at 434. However, at this point in the opinion the Supreme Court reaffirmed the principle from *Gurske* that “‘where the weapon is not actually used in the commission of the crime, it must be there to be used.’” 162 Wn.2d at 434 (quoting *Gurske*, 155 Wn.2d at 138).

Court considers whether any reasonable judge would rule as the trial judge did.” *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002) (citing *State v. Nelson*, 108 Wn.2d 491, 504–05, 740 P.2d 835 (1987)). A reviewing court departs from the abuse of discretion standard when it dismisses a trial court’s determination of relevancy and substitutes its own analysis. *State v. Lane*, 125 Wn.2d 825, 835, 889 P.2d 929 (1995).

Burton’s claim that the trial court abused its discretion in admitting the calls fails for four reasons. First, because the calls completed the story of the crime by providing immediate context of happenings near in time and place, they were relevant as *res gestae* evidence of the crime. Second, Burton did not object to the calls as inadmissible under ER 404(b), therefore he failed to preserve his ER 404(b) claim for review.⁴ Third, because the calls were evidence of Burton’s intent, motive, and absence of mistake, because he unlawfully entered Plant’s home, stole a knife, and armed himself, they were admissible under ER 404(b). Finally, the calls were also admissible under ER 404(b) to rebut material assertions that Burton did not possess intent due to a concussion and was not in flight but rather had driven to Cowlitz County to visit a friend.

⁴ Burton’s attorney argued there was no connection between the assault and the burglary; thus, he preserved his *res gestae* claim.

1. The trial court did not abuse its discretion in finding the calls were admissible as *res gestae* evidence of the crime.

Because the 911 and jail calls show Burton was fleeing from an allegation of assault when he unlawfully entered Plant's home and armed himself with a knife, the calls were admissible as *res gestae* evidence of the crime. "Where another offense constitutes 'a link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible in 'order that a complete picture be depicted for the jury.'" *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (quoting *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 532 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d322 (1998)). The crime of residential burglary required the State to prove Burton unlawfully entered or remained in Plant's home "with intent to commit a crime against a person or property therein." RCW 9A.52.025(1). Further, to determine whether or not Burton was armed with a deadly weapon, the jury was required to determine whether there was a connection between the knife found on Burton and the crime. Burton's intent was an essential element of the crime, because his purpose in taking the knife was relevant both to determining whether he committed the burglary and whether he was armed with a deadly weapon. The 911 and jail calls—both made on the date of the burglary—were admissible to show that when Burton

unlawfully entered Plant's home, he intentionally stole the knife from inside of the house to arm himself in furtherance of his flight.

“In addition to the exceptions identified in ER 404(b), our courts have previously recognized a ‘res gestae’ or ‘same transaction’ exception, in which ‘evidence of other crimes is admissible to complete the story of the crime on trial by proving its immediate context of happenings in time and place.’” *State v. Lane*, 125 Wn.2d 825, 833, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)). In *Tharp*, the court explained:

Our courts have previously recognized the so-called “handiwork” exception, *State v. Irving*, 24 Wn. App. 370, 601 P.2d 954 (1979), and an exception for criminal acts which are part of the whole deed, *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971). An exception is also recognized for evidence that is relevant and necessary to prove an essential element of the crime charged. *State v. Mack*, 80 Wn.2d 19, 490 P.2d 1303 (1971).

27 Wn. App. at 204. “The test of admissibility is whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.” *State v. Mott*, 74 Wn.2d 804, 806, 447 P.2d 85 (1968).

The Supreme Court has explained that *res gestae* evidence that would be excluded in another context may be necessitated by the investigation of the truth in courts of justice:

We apprehend that no court would permit the introduction of indecent evidence unless it was so connected with the *res gestae* as to become necessary to the administration of justice. Indecency depends upon the purpose of the utterance or act. 'What we are to conclude, then, since the process of investigating the truth in courts of justice is both an indispensable and a dignified function in life, is that no utterances or acts called for in evidence in that process are to be prohibited because under other circumstances they might be characterized by indecency. In other words, the general policy of discountenancing indecency does not extend to the exclusion of evidence in a court of justice.'

Dunkin v. City of Hoquiam, 56 Wash. 47, 53, 105 P. 149 (1909) (quoting 152 3 *Wigmore on Evidence*, § 2180).

When prior crimes show a continuing course of criminal activity, they provide a complete story of what occurred for the jury. In *State v. Bockman*, 37 Wn. App. 474, 490-91, 682 P.2d 925, *review denied*, 102 Wn.2d 1002 (1984), the court held evidence of prior crimes was admissible when they substantially connected the Bockman brothers to the charged murder. In *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1991), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993), prior vandalism of mailboxes by the defendants showed they were involved in a wave of

criminal activity occurring within a short span of time that escalated to slashing tires on vehicles.

In *State v. Grier*, 168 Wn. App. 635, 643-44, 278 P.3d 225 (2012), earlier in the same night that Grier would later murder her boyfriend, Gregory Owen, Grier waved a gun around, told her son Nathan that she could kill him, and called her son and his girlfriend insulting names. The Court of Appeals explained this evidence was admissible as *res gestae* because “it was evidence of the continuing events leading to the murder[.]” *Id.* at 647. It “showed a continuing course of action by Grier[,]” and “helped ‘set the stage’ for her shooting of Owen later that night.” *Id.* at 648. Importantly, this evidence “was relevant to the State’s charge that Grier had been armed with a firearm when she killed Owen.” *Id.* at 648-49. Further, it “explained parts of the whole story which otherwise would have remained unexplained.” *Id.* at 649 (quoting *State v. Mutchler*, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989)).

Collateral prior crimes are admissible as *res gestae* when they complete the story of a crime “by proving its immediate context of happenings near in time and place.” *Tharp*, 27 Wn. App. at 204. For example, in *Tharp*, the State was permitted to present evidence of a vehicle prowl occurring around 5:00 p.m., a burglary occurring around 6:30 p.m., and a vehicle theft sometime after 8:00 p.m., in a murder trial

where the murder occurred around 11:00 p.m.⁵ *Id.* at 200-01. Not only did the collateral prior crimes occur several hours prior to the murder, but they involved separate victims and occurred at different locations than the murder. *See id.*

Because the evidence “substantially connected” Tharp to all three collateral crimes and the murder, “[t]he jury was entitled to know the whole story.” *Id.* at 205. The court explained that Tharp could not “insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant’s bad character.” *Id.* The court stated: “(A) party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.” *Id.* (quoting *Kansas v. King*, 111 Kan. 140, 206 P. 883, 885 (1922)).

Having found the collateral crimes were admissible as *res gestae*, the Court of Appeals discerned the ultimate issue was whether the relevance and necessity of the evidence outweighed its prejudice. *Id.* The court explained that this question was “one left to the sound discretion of the trial court.” *Id.* at 206. Although the collateral crimes presented obvious prejudice to Tharp, the relevancy of this evidence was not

⁵ The State also was permitted to present evidence that Tharp was on furlough from the Monroe Reformatory on an auto theft sentence at the time of the murder. *Id.* at 201-02.

“entirely engulfed by its prejudice.” Thus, the trial court did not abuse its discretion in admitting the crimes under ER 403. *See id.*

Here, the trial court did not abuse its discretion in finding the calls, which provided evidence of Burton actively fleeing from the police after assaulting Lord, were relevant to complete the story of the crime by proving its immediate context of happenings in time and place. Burton’s decision to break into Plant’s home and arm himself with a knife made little sense without the background of his flight from the assault in Seattle earlier that morning. As in *Grier*, “the calls showed the continuing events leading to” the crime. Burton assaulted Lord during her 911 call and fled in the truck prior to wrecking it near Plant’s home. He then unlawfully entered her house, stole a knife, and concealed it on his person. One would not ordinarily expect a person leaving the scene of a motor vehicle collision to find it necessary to arm himself with a weapon. Moreover, without the context provided by the calls, his decision to break into the home, take the knife, and his statements to Plant and Linden could have been viewed as the actions and ramblings of a concussed or intoxicated driver. Burton’s decision to arm himself was explained by his flight from the police for the assault that he knew they were aware of from earlier in the morning. As further evidence that Burton selected the knife for use as a weapon, he disclaimed the knife having any value to him by testifying it

was a “piece of junk.” Excluding the calls would have forced the State to present a truncated version of what actually occurred.

Burton’s flight from the assault was connected in time and place to the burglary. Similar to *Grier* and *Tharp*, Burton’s prior collateral crime occurred earlier in the same morning that he committed the burglary. Further, similar to *Tharp*, it was also connected in place, as the burglary occurred on Burton’s route to California as he fled King County through southwest Washington. Thus, evidence that Burton was in flight from an assault he committed while the victim was on the phone with 911 represented “‘a link in the chain’ of an unbroken sequence of events surrounding the charged offense,” and was “admissible in ‘order that a complete picture be depicted for the jury.’” *Hughes*, 118 Wn. App. at 725.

Of course, the trial court was best-positioned to assess the probative value of the call. The trial court judge was familiar with the case, as it had already been tried in front of the judge previously. The court carefully considered the potential for prejudice but found that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. The court was discerning in doing so, redacting references to the rape from the jail call and providing a limiting instruction that limited the purposes for which the jury could consider the evidence. Thus, the trial court ensured the probative value of the collateral crime

was not “entirely engulfed by its prejudice.” Accordingly, the trial court did not manifestly abuse its discretion in admitting the calls as *res gestae* evidence of the crime.

2. Because Burton did not object under ER 404(b) at trial, he may not raise this issue for the first time on appeal.

At trial, Burton did not object to the calls under ER 404(b); thus he failed to preserve this issue for review. “[A]n issue, theory, or argument not presented at trial will not be considered on appeal.” *State v. Jamison*, 25 Wn. App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’”⁶ *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)); *see also* RAP 2.5(a). “An error under ER 404(b) is nonconstitutional in nature.” *State v. White*, 43 Wn. App. 580, 587, 718 P.2d 841 (1986).

Here, Burton raises grounds under ER 404(b) that he did not raise at trial. Because the court’s decision on ER 404(b) was evidentiary in

⁶ An error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a).

nature it does not amount to a constitutional issue. Thus, to bring his claim under ER 404(b) on appeal, Burton was required to object under ER 404(b) at trial. He did not. Burton's objections to the evidence at trial were: (1) a violation of his Fifth Amendment rights in his King County case; (2) no connection between the assault and the burglary;⁷ (3) that the assault was not a crime of dishonesty;⁸ and (4) that the calls were more prejudicial than probative. RP 368-71. He did not argue that the calls failed to have a purpose under ER 404(b), or that they were not necessary to prove an essential element of the crime, as he does now for the first time on appeal. Thus, his argument under ER 404(b) should not be considered by this Court.

3. The trial court did not abuse its discretion in finding the calls were admissible under ER 404(b) to show motive, intent, and absence of mistake.

The trial court did not abuse its discretion when it found the calls were admissible under ER 404(b) to show motive, intent, and absence of mistake. "A ruling under ER 404(b) is reviewed solely for abuse of discretion, which only occurs where the decision of the trial court was manifestly unreasonable or based on untenable grounds." *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (footnote citations

⁷ By arguing against this connection, Burton preserved his *res gestae* claim. As Burton concedes, *res gestae* is distinct from ER 404(b). See *Grier*, 168 Wn. App. at 645-47.

⁸ Burton's attorney was obviously referencing ER 609. RP 368.

omitted). Even if Burton had preserved his ER 404(b) claim, the trial court did not abuse its discretion when it found the calls were admissible.

While ER 404(b) prohibits the admission of evidence of other crimes or wrongs to prove character and show action in conformity therewith, “such evidence may be admissible for other purposes ‘such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); ER 404(b). “These ‘other purposes’ tend to establish the defendant’s state of mind at the time he or she committed the offense.” *State v. Acosta*, 123 Wn. App. 424, 434, 98 P.3d 503 (2004) (citing ER 404(b)).

For example, in *State v. Johnson*, evidence that the defendant had sold copper wire the day before his arrest for burglary was properly admitted as evidence of the defendant’s motive and intent when he entered a railway car and removed copper wire. 159 Wn. App. 766, 773, 247 P.3d 11 (2011). In *State v. Medrano*, 80 Wn. App. 108, 110-11, 113-14, 906 P.2d 982 (1995), evidence of prior burglary convictions was properly admitted in a residential burglary case when the defendant admitted to burglarizing a home but claimed due to his intoxication from drugs and alcohol he did not possess intent. In *State v. Matthews*, 75 Wn. App. 278, 283-88, 877 P.2d 252 (1994), evidence of the defendant’s financial

situation and recent bankruptcy was admitted to show his motive when he committed a robbery that resulted in murder. In *State v. Walker*, 75 Wn. App. 101, 105, 110, 879 P.2d 957 (1994), the uncharged possession of stolen tools that could be used to steal of a motor vehicle were admissible to show motive and intent in the defendant's trial for theft of a motor vehicle.

Prior to admitting ER 404(b) evidence, the court must (1) find by a preponderance of the evidence the prior act of misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the risk of unfair prejudice pursuant to ER 403. See *State v. Thang*, 15 Wn.2d 630, 642, 41 P.3d 1159 (2002); ER 403. Thus, if the court finds the evidence to be relevant and admissible for a purpose independent of propensity under ER 404(b), it then considers whether the evidence is admissible under ER 403. See *State v. Smith*, 106 Wn.2d 772, 775-76, 725 P.2d 951 (1986).

There is a presumption favoring admissibility under ER 403, and “the burden of showing prejudice is on the party seeking to exclude the evidence.” *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994) (citing 5 K. Tegland, *Wash.Prac., Evidence* § 105, at 346 (1989)). “Because of the trial court’s considerable discretion in administering ER

403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion.” *Id.* (citing *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wn. App. 601, 610, 699 P.2d 804, *review denied*, 104 Wn.2d 1019 (1985)). “An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.” *State v. Nelson*, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987) (citing *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979)). “Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” *Gould*, 58 Wn. App. at 180 (citing *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)).

It should be noted that evidence is only to be excluded when the probative value of the evidence is “substantially outweighed” by the danger of “unfair prejudice.” ER 403. “In determining whether or not there is prejudice the linchpin word is ‘unfair.’” *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (citing *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758, *review denied*, 104 Wn.2d 1016 (1985)). “Unfair” prejudice is “prejudice caused by evidence of ‘scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’” *Carson*, 123 Wn.2d at 223 (citing *United States v. Roark*, 753 F.2d 991, 994 (11th Cir. 1985)). “Almost all evidence is

prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. However ‘unfair prejudice’ is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors.” *Rice*, 48 Wn. App. at 13 (internal citations omitted); *see also Gould*, 58 Wn. App. at 183 (drawing the distinction between prejudicial and unfairly prejudicial evidence). Additionally, evaluating the danger of unfair prejudice should also be considered in light of any limiting instruction given, as “[j]uries are presumed to have followed the trial court's instructions, absent evidence proving the contrary.” *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Here, the trial court did not abuse its discretion in admitting the calls to show Burton’s intent, motive, and absence of mistake or accident. The parties agreed the calls were authentic, the trial court specifically identified the purposes for their introduction under ER 404(b), found they were relevant to these limited purposes, and then carefully weighed whether their probative value was substantially outweighed by the danger of unfair prejudice. The trial court’s ruling was reasonable. An essential element of the crime was whether Burton had the “intent to commit a crime against a person or property therein” when he unlawfully entered and remained in Plant’s home, stole a knife, and concealed it in his

waistline.⁹ The State was also required to prove there was a connection between this knife and the crime to show he was armed with a deadly weapon. *See supra* Part IV-A. Because Burton's intent regarding the knife was precisely what was at issue in the case, evidence of his state of mind had great probative value. Thus, the State, which held the burden of proof, was entitled to present evidence of his motive, intent, and absence of any mistake when he entered the house and armed himself.

Burton's defense only highlighted the need for this evidence. Burton called a witness to testify he suffered a concussion and Burton disclaimed having any memory of entering the house, taking the knife, having a conversation with Plant, or of making the jail call to his mother. Burton also called a witness to testify he had invited Burton to Longview to visit. Thus, Burton attempted to convince the jury he was not on the run, but had just come down to visit a friend. He also attempted to persuade the jury that due to an injury he did have intent when he entered the house or took the knife, and that his statements to Plant and Linden were just the ramblings of a person who had suffered a head injury. Just as Burton was not prohibited from putting forward evidence suggesting he did not possess intent, the State was rightly permitted to present compelling evidence of his intent, especially when it held the burden of

⁹ *See* RCW 9A.52.025(1).

proving his intent beyond a reasonable doubt. Thus, Burton's state of mind was highly probative to the primary issues at trial, permitting the admission of the calls.

Under ER 403, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The trial court even took steps to avoid any potential for unfair prejudice. The trial court gave a limiting instruction to the jury, stating the calls could only be considered for identified limited purposes. Because a jury is presumed to follow the court's instructions¹⁰ and there is no evidence the jury failed to do so here, the court avoided the risk of the jury considering the evidence for reasons other than its identified purposes. Further, the trial court also redacted references to the rape from the jail call. In an exercise of its discretion, the court distinguished evidence that was of greater probative value – Burton discussing what had occurred – from evidence that was unduly prejudicial – a rape allegation. Because the evidence was highly probative to what was directly at issue in the case and the trial court limited the evidence to avoid unfair prejudice, the court did not manifestly abuse its discretion when admitting it the calls under ER 404(b) and 403.

¹⁰ *Kirkman*, 159 Wn.2d at 928.

4. The calls were also admissible under ER 404(b) to rebut Burton's material assertions.

Even if the evidence had not been admissible to show Burton's state of mind, it would still have been admissible to rebut material assertions raised by Burton's defense. Under ER 404(b), evidence may be admissible to rebut a material assertion by a defendant: "Rebuttal evidence is admissible if not cumulative and if it answers new points raised by the defense." *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2010). In *Young*, after the defendant testified to not understanding the risks of attempting to elude the police, the State was properly permitted to rebut this evidence by admitting prior incidents of the defendant eluding the police. *Id.* In *State v. Suttle*, 61 Wn. App. 703, 711, 812 P.2d 119 (1991), the defendant's escapee status was admissible in his trial for robbery to show motive after his accomplice testified that a person other than the defendant had robbed the store with him. In a prosecution for burglary, the defendant's prior burglary conviction became admissible after the defendant testified that he did not know how to open a safe. *State v. Gakin*, 24 Wn. App. 681, 683-87, 603 P.2d 380 (1979).

In *State v. Nelson*, 131 Wn. App. 108, 114, 125 P.3d 1008 (2006), the defendant opposed the trial court's admission of prior uncharged misconduct under ER 404(b). On review, the Court of Appeals found that

the admission of this evidence fell within the requirements of ER 404(b). *Id.* at 116. The evidence was admissible to establish a plausible alternative explanation for the victim's inconsistent statements and "to rebut Mr. Nelson's claim that it showed she fabricated the assault." *Id.*

Here, the State was entitled to rebut Burton's evidence that he was only in Cowlitz County because he had been invited by a friend, that he wandered into the house and accidentally acquired the knife without any intent to commit a crime due to a concussion, and that his statements were merely the result of rambling from a head injury. The calls showed that he was not merely driving through Longview to visit a friend but was actively fleeing the police. The jail call, made after the collision, on the same date as the crime, was evidence that Burton was not severely affected by a head injury as he testified. The evidence of the assault conveyed on the 911 call informed why he was willing to break into a house and arm himself with a knife. It also corroborated Linden and Plant about his urgency in avoiding the police. Thus, even if the calls had not been admissible toward his state of mind, Burton's material assertions that he was visiting a friend, lacked intent, and his actions and statements were the result of a head injury, opened the door to rebut these material assertions.

As in *Medrano*, where evidence of a prior crime was admitted in a burglary to show the defendant's intent when, during a residential

burglary, he claimed he did not possess intent due to intoxication, here evidence that Burton was fleeing the police after assaulting his girlfriend earlier that morning defeated his claim of not possessing intent. Under any reasonable ER 403 balancing test, once Burton presented evidence that he did not possess motive or intent due to a head injury and because he had merely come to Longview to visit a friend, the probative value of this evidence far outweighed the danger of unfair prejudice. Thus, the trial court did not abuse its discretion when it admitted the evidence under ER 404(b) to rebut Burton's claims.

C. BURTON WAIVED HIS CLAIM OF MISCONDUCT WHEN HE DID NOT OBJECT AT TRIAL.

Burton waived his claim of prosecutor misconduct when he did not object to the prosecutor's closing argument. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). Although Burton did not object to the prosecutor's closing argument, he now claims misconduct for the first time on appeal. The prosecutor argued reasonable inferences from the

evidence. Because there was nothing improper about this argument, an objection would not have been successful. Further, even if it is assumed there was improper argument, Burton fails to show this argument was so flagrant and ill-intentioned that it evinced enduring and resulting prejudice that could not have been neutralized by an admonition to the jury had an objection been made at trial.

With all claims of misconduct, “the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial.” *Id.* at 718 (citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvane*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, “prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict.” *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a

heightened standard of review applies: “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

“Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also 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.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, “[r]eviewing courts should 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.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

“In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the

evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *Brown*, 132 Wn.2d at 561). Juries are presumed to follow jury instructions absent evidence to contrary. *Kirkman*, 159 Wn.2d at 928.

A prosecutor’s remarks, even if they would otherwise be improper, are not misconduct if they were “invited, provoked, or occasioned” by defense counsel, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *See State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). “When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence.” *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Although a prosecutor may not shift the burden of proof to the defendant, *see, e.g., In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor’s “remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . .” *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)). Even strong “editorial comments” by a prosecutor are not

improper if they are in response to arguments made by the defendant. *Brown*, 132 Wn.2d at 566.

Circumstantial evidence of a defendant's state of mind may be reasonably inferred from evidence admitted under ER 404(b), and it is not misconduct for a prosecutor to argue for reasonable inferences from the evidence to show a defendant's state of mind. In *State v. Burkins*, 94 Wn. App. 677, 686, 973 P.2d 15 (1999), Burkins argued that testimony about an assault by a different victim on a different occasion should not have been admitted in his murder trial under ER 404(b) when the material issue was whether he possessed premeditation. The trial court instructed the jury to limit consideration of the evidence to Burkins' motive. *Id.* at 688. The Court of Appeals held the connection between the crimes defeated

Burkins' argument that the admission of the ER 404(b) evidence allowed the jury to reach its verdict by speculation and conjecture. Where circumstantial evidence gives rise to a reasonable inference, there is no speculation and conjecture.

Id. at 690. In *Brown*, the prosecutor argued Brown's "motive for murdering Ms. Washa: 'He saw Holly Washa as a vehicle for getting cash so that he could get to Susan Schnell.'" 132 Wn.2d 564. The Court rejected Brown's misconduct argument because the evidence reasonably supported the prosecutor's argument that Brown had a financial motive for abducting Washa. *Id.* at 565.

Here, when Burton's attorney did not object he waived his claim of misconduct. The primary issues at trial were Burton's state of mind as to (1) whether he had "intent to commit a crime against a person or property therein" while entering or remaining unlawfully in Plant's home, and (2) whether he was armed with a deadly weapon when he stole the knife from inside of Plant's home and concealed it in his waistline. The court admitted the 911 call and jail call for the purposes of "providing a complete picture and immediate context to the events of July 5, 2016 or for assessing motive, credibility, intent, knowledge, absence of mistake, or to rebut a material assertion." RP 632. The prosecutor argued reasonable inferences from the evidence admitted that went directly to the issue of Burton's state of mind when obtaining the knife from inside the house. Nothing about this argument was improper.

Without citation to such a statement, Burton wrongly asserts that the prosecutor invoked "strong passions and prejudices against Mr. Burton as a violent guy who was armed and *could have* hurt people[.]" *Appellant's Brief* at 35. Burton then quotes large portions of the prosecutor's closing argument and places portions of this argument in bold, implying such statements were improper. Burton neither articulates what statements should have been objected to, nor on what basis such objections should have been made. Because the prosecutor was arguing

what was at issue in the case by drawing reasonable inferences from the evidence admitted, the argument was not improper.

Burton cites, without explaining what was improper, that the prosecutor discussed the invasion of privacy and danger to Plant that was presented by an armed intruder in her home who was on the run from police, and that Burton was running from the police for assaulting his girlfriend while she was on the 911 call. These were reasonable inferences from the evidence. The mere mention of the dangers created was not improper, but rather a practical reality of the crime. To ignore this reality would be to ignore the evidence. And, as the court instructed, the prosecutor was permitted argue for evidence that provided a “complete picture and immediate context to the events of July 5, 2016.”

Burton also cites, without explaining what was improper, the prosecutor’s argument about Burton’s purpose and state of mind when selecting the knife. This argument was also appropriate considering the issues in the case. At issue in the case was what Burton’s intent was while he was unlawfully in the home and whether he armed himself with a deadly weapon. It was reasonable to infer that because he was on the run from the police for assaulting Lord, he stole the knife from inside the house and hid it on his person for furthering his flight. It was also reasonable to infer from the evidence that his purpose for stealing the

knife, and only the knife, was for potential use as a weapon. The prosecutor argued for Burton's motive and intent from the evidence presented. Further, the dangers that the knife presented were relevant to the issue of whether Burton was armed with a deadly weapon when he placed the knife on his person.

Burton then cites, without explanation of how they were improper, statements that the prosecutor made in rebuttal regarding Burton's decision to steal the knife as a result of his flight from the police, his later decision not to use the knife, and the prosecutor's response to his attorney's argument regarding not possessing intent because he was "not acting right." Yet, Burton's attorney argued his client was not fleeing from the police, that he was not armed and did not intend a crime because he did not display the knife, and that due to his concussion he was "not acting right" and therefore did not possess intent when he entered Plant's house and took the knife. RP 661-62, 666. It was proper for the prosecutor to rebut these claims with reasonable inferences from the evidence that Burton obtained the knife to further his flight, that to commit burglary he merely needed to possess intent to commit a crime—not actually commit that intended crime—and that his volitional decisions to commit criminal acts were "not acting right" but were still intentional.

Burton also premises his argument for misconduct on his claim that the calls should not have been admitted into evidence; therefore, he maintains the prosecutor's arguments regarding this evidence were improper: "The prosecutor's misconduct in closing argument serves as a telling illustration of the magnitude of the error in admitting the 9-1-1 and jail call evidence, further exacerbating the prejudicial effect." *Appellant's Brief* at 38. However, once the evidence was admitted it was not misconduct for the prosecutor to argue for reasonable inferences from this evidence. Further, Burton provides no example of the prosecutor using this evidence in closing argument for purposes outside of the court's limiting instruction.

Because the prosecutor's closing argument was not improper, an objection would have failed. Further, because the prosecutor argued reasonable inferences from the evidence that was admitted, Burton fails to show the argument was flagrant and ill-intentioned. Burton also does not provide any argument as to what statement of the prosecutor could not have been cured by a curative instruction had he asked for one. Moreover, he makes no argument for prejudice independent of the admission of the calls that he claims could not have been cured. The jury was instructed that the "lawyer's statements are not evidence" and to "disregard any remark, statement, or argument that is not supported by the evidence or the

law in my instructions.” RP 628. Because there is no evidence that the jury failed to follow this instruction, Burton fails to meet his burden of showing an enduring prejudice that could not have been overcome by a curative instruction. Thus, Burton’s claim of misconduct was waived when he failed to object.^{11, 12}

V. CONCLUSION

For the above stated reasons, Burton’s conviction should be affirmed.

Respectfully submitted this 3rd day of August, 2018.



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¹¹ Because the prosecutor’s argument was not improper, his attorney was not ineffective for failing to object. Moreover, the prejudice he complains of stems from the evidence on the calls. Because the jury had heard these calls regardless of the prosecutor’s argument, he suffered no prejudice as a result of this argument. Thus, Burton’s ineffective assistance of counsel claim also fails.

¹² Because Burton has not shown an error his claim of cumulative error also fails.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 3rd, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

August 03, 2018 - 4:26 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Christopher E. Burton, Appellant
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