

FILED  
Court of Appeals  
Division II  
State of Washington  
12/6/2019 3:10 PM

NO. 53443-6-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SMITH,

Appellant.

---

---

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

The Honorable Robert Lewis, Judge

---

---

CORRECTED BRIEF OF APPELLANT

---

---

MARY T. SWIFT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	6
1. SMITH’S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHERE INSUFFICIENT EVIDENCE SUPPORTS ONE OF THE ALTERNATIVE MEANS OF BURGLARY PRESENTED TO THE JURY .....	6
2. THE TRIAL COURT ERRONEOUSLY EXCLUDED DEFENSE EVIDENCE OF H.K.’S RELATIONSHIP TROUBLES, RELEVANT TO HER CREDIBILITY AND MOTIVE TO LIE.....	10
3. SMITH WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF IN REBUTTAL.....	16
4. SMITH’S CONVICTIONS CONSTITUTE THE SAME CRIMINAL CONDUCT WHERE THEY WERE BASED ON THE SAME ELECTED ACT .....	19
5. THE PROVISION IMPOSING INTEREST ON ALL LEGAL FINANCIAL OBLIGATIONS MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE .....	25
D. <u>CONCLUSION</u> .....	26

**TABLE OF AUTHORITIES**

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Det. of Keeney</u> 141 Wn. App. 318, 169 P.3d 852 (2007).....	6
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	17
<u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 (1990).....	23
<u>State v. Adcock</u> 36 Wn. App. 699, 676 P.2d 1040 (1984).....	23
<u>State v. Allen S.</u> 98 Wn. App. 452, 989 P.2d 1222 (1999).....	12, 14
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	17
<u>State v. Burns</u> 114 Wn.2d 314, 788 P.2d 531 (1990).....	23
<u>State v. Corn</u> 95 Wn. App. 41, 975 P.2d 520 (1999).....	8
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	11, 12
<u>State v. Dunaway</u> 109 Wn.2d 207, 743 P.2d 1237 (1987).....	23
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	17
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Franklin</u> 180 Wn.2d 371, 325 P.3d 159 (2014).....	15
<u>State v. Garcia</u> 179 Wn.2d 828, 318 P.3d 266 (2014).....	7, 10
<u>State v. Gonzales</u> 133 Wn. App. 236, 148 P.3d 1046 (2006).....	9
<u>State v. Graciano</u> 176 Wn.2d 531, 295 P.3d 219 (2013).....	20
<u>State v. Gunderson</u> 181 Wn.2d 916, 337 P.3d 1090 (2014).....	11
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	2, 3, 5, 9, 11, 13, 15
<u>State v. Kalebaugh</u> 183 Wn.2d 578, 355 P.3d 253 (2015).....	17
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	7
<u>State v. Kloepper</u> 179 Wn. App. 343, 317 P.3d 1088 (2014).....	23
<u>State v. Lessley</u> 118 Wn.2d 773, 827 P.2d 996 (1992).....	24
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	17, 19
<u>State v. Lubers</u> 81 Wn. App. 614, 915 P.2d 1157 (1996).....	12
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	16

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Ortega-Martinez</u> 124 Wn.2d 702, 881 P.2d 231 (1994).....	6, 7
<u>State v. Perez</u> 137 Wn. App. 97, 151 P.3d 249 (2007).....	11
<u>State v. Peterson</u> 174 Wn. App. 828, 301 P.3d 1060 (2013).....	6
<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (2018).....	25, 26
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	16
<u>State v. Roberts</u> 25 Wn. App. 830, 611 P.2d 1297 (1980).....	12, 15
<u>State v. Sony</u> 184 Wn. App. 496, 337 P.3d 397 (2014).....	8
<u>State v. Vasquez</u> 178 Wn.2d 1, 309 P.3d 318 (2013) .....	7
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	19
<u>State v. Wittenbarger</u> 124 Wn.2d 467, 880 P.2d 517 (1994).....	10
<u>State v. Woodlyn</u> 188 Wn.2d 157, 392 P.3d 1062 (2017).....	7, 10
<u>State v. York</u> 28 Wn. App. 33, 621 P.2d 784 (1980).....	12

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES**

Berger v. United States  
95 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) ..... 16

Crane v. Kentucky  
476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)..... 11

Davis v. Alaska  
415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)..... 12

**RULES, STATUTES, AND OTHER AUTHORITIES**

Engrossed Second Substitute House Bill 1783,  
65th Leg., Reg. Sess. (Wash. 2018) (HB 1783)..... 25, 26

Laws of 2018, ch. 269, § 1 ..... 26

RAP 2.5 ..... 6

RCW 9.94A.030 ..... 20

RCW 9.94A.525 ..... 21

RCW 9.94A.589 ..... 19

RCW 9A.44.010 ..... 20

RCW 9A.44.100 ..... 20

RCW 9A.52.025 ..... 7, 20

RCW 9A.52.050..... 24

RCW 10.82.090 ..... 25, 26

RCW 10.82.090. .... 25

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 10.101.010.....	25
U.S. CONST. amend. XIV.....	16
CONST. art. I, § 3.....	16
CONST. art. I, § 21.....	6
CONST. art. I, § 22.....	6

A. ASSIGNMENTS OF ERROR

1. Appellant Michael Smith's right to a unanimous jury verdict was violated where insufficient evidence supports one of the alternative means of residential burglary presented to the jury.

2. The trial court erroneously excluded defense evidence relevant to impeaching the complaining witness's credibility.

3. Flagrant and ill-intentioned prosecutorial misconduct in rebuttal argument deprived Smith of a fair trial.

4. The trial court erred in concluding Smith's two convictions did not comprise the same criminal conduct.

5. The trial court erred by imposing interest on legal financial obligations (LFOs) other than restitution.

Issues Pertaining to Assignments of Error

1. Must Smith's residential burglary conviction be reversed where there is insufficient evidence to support one of the alternative means presented to the jury, violating Smith's right to a unanimous jury verdict?

2. Must both of Smith's convictions be reversed, where the trial court erred in excluding relevant defense evidence of the complaining witness's relationship troubles, which went to her credibility and motive to fabricate?

3. Did the prosecutor commit flagrant and ill-intentioned misconduct in rebuttal argument by improperly shifting the burden of proof to defense counsel to supply a basis for reasonable doubt?

4. Is remand for resentencing necessary, where the trial court erred in concluding Smith's convictions for indecent liberties and residential burglary were separate criminal conduct, even though they were based on the exact same elected act?

5. Must the provision in Smith's judgment and sentence imposing interest on nonrestitution LFOs be stricken?

B. STATEMENT OF THE CASE

The State charged Michael Smith with one count of indecent liberties by forcible compulsion and one count of residential burglary with sexual motivation, both based on the same incident involving H.K. CP 1. Smith proceeded to a jury trial. RP 110.

Smith lived in a small town outside Vancouver, Washington, with his longtime girlfriend and their three-year-old daughter. CP 44-45. Smith worked as a union framer for years and most recently worked as a journeyman glazier. CP 44. Smith supervised and was close friends with H.K.'s boyfriend, Corey Jones. RP 251-53. H.K. and Jones lived with H.K.'s two children and a roommate, Aaron Karr, in Vancouver. RP 131-32, 254. Smith and Jones hung out "[p]retty much daily." RP 252.

On November 17, 2017, Smith and his coworker Andrew Luna went to work as usual. RP 226. It was a slow day, though, so they left early to scout hunting locations. RP 226. They took a six-pack of beer and spent eight hours driving and hiking around the woods. RP 226-27. Luna recalled Smith had only one beer because he was driving. RP 227.

Smith and Luna returned to Vancouver that evening. RP 228. Luna had to get home, but Smith decided to go to Jones's house and check on him. RP 228-29. Jones had not shown up for work that day and Smith had not heard from him in a few days. RP 228, 304. Jones was about to be fired if he did not start showing up regularly for work. RP 228. Smith stopped by, but left when he discovered only H.K. was home. RP 304.

H.K.'s story differed significantly. H.K. said she was home alone in her pajamas when Smith came over looking for Jones. RP 151-53, 198. H.K. testified Jones entered without knocking, but it was common for him to do so. RP 152-53, 197. H.K. explained they left their door unlocked, so Smith would frequently stop by unannounced and come inside to visit Jones. RP 152, 196-98. Consistent with this, H.K. did not initially ask Smith to leave. RP 155, 218-19.

H.K. testified, however, Smith appeared very intoxicated and did not leave when he learned Jones was not home. RP 153-55. H.K. began to feel uncomfortable but still did not ask Smith to leave. RP 155, 199.

H.K. testified Smith playfully grabbed her wrist and started to wrestle with her. RP 156. When she told him to stop, H.K. claimed, Smith got angry and tackled her to the floor. RP 156-58.

H.K. testified Smith straddled her, holding her wrists, as she tried to wriggle free. RP 158-60. H.K. repeatedly told Smith to stop and demanded that he leave. RP 159-61. H.K. testified Smith grabbed her breasts and she could hear him undoing his belt buckle. RP 160-61. H.K. claimed Smith also grabbed her vagina with one hand, over her pajamas, attempting to push his fingers inside her. RP 161-62. H.K. clarified at trial there was no penetration. RP 163.

H.K. testified that, after trying to fight Smith off for some time, she eventually freed herself. RP 164. H.K. told Smith to get out of her house, prompting Smith to storm out. RP 164-65. H.K. did not think to lock the front door, but instead undressed and drew herself a bath. RP 167-68. H.K. testified Smith came back inside and yelled at her in the bathtub. RP 168-70. When H.K. again demanded that Smith leave, he did so and did not return. RP 169-70.

H.K. testified she started drinking and called her son's father, Josh Garza, with whom she is still friends. RP 170-72. Garza came over for a short time, finding H.K. intoxicated and crying. RP 268-69. H.K. told Garza that Smith put his fingers in her vagina. RP 269. Garza did not see

any signs of a struggle. RP 275. H.K. begged Garza not to tell Jones, but Garza did anyway. RP 174-75, 270. Despite the allegation that his girlfriend was raped, Jones did not come home for as long as two days because he “was not in the right state of mind.” RP 210, 256.

H.K.’s roommate, Karr, came home later that night. RP 133. He testified H.K. was frantic and crying. RP 134. She repeatedly told Karr that Smith raped her, again inconsistent with her trial testimony. RP 134-35, 142. H.K. claimed she later clarified with Karr that Smith did not rape her, but Karr denied that H.K. ever did so. RP 147, 209-10.

A few days later, H.K. received a phone call at work. RP 282-83. H.K.’s coworker, Andrew Stamper, recalled that it sounded like an argument. RP 282-83. H.K. told Stamper afterwards that Jones had accused her of cheating on him with Smith. RP 287. H.K. left work, panicked and upset. RP 288. Around the same time, H.K. also told Stamper about the alleged attack. RP 280. The trial court prohibited defense counsel from asking H.K. about her relationship troubles with Jones, RP 186-92, and sustained the State’s objection to defense counsel asking Jones whether he accused H.K. of cheating, RP 264.

H.K. went to the police station on November 22, 2017, with Jones accompanying her for “support.” RP 258. H.K. gave a statement to police, with Jones present for at least a portion of it. RP 184, 247-249.

Photographs were taken of minor bruising on H.K.'s wrists and arms. RP 178-80, 244-47, 346.

The jury found Smith guilty as charged. CP 33-35. Refusing to find Smith's current offenses constituted the same criminal conduct, the court sentenced him to a minimum term of 102 months in prison (84 months on the incident liberties plus 18 months for the sexual motivation enhancement on the residential burglary). RP 376-77, 382; CP 60-62.

Smith timely appealed. CP 84.

C. ARGUMENT

1. SMITH'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHERE INSUFFICIENT EVIDENCE SUPPORTS ONE OF THE ALTERNATIVE MEANS OF BURGLARY PRESENTED TO THE JURY.

Our state constitution guarantees criminal defendants the right to an expressly unanimous jury verdict. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). A unanimity error is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Peterson, 174 Wn. App. 828, 849 n.5, 301 P.3d 1060 (2013). "An alleged violation of the right to a unanimous jury verdict is a constitutional challenge that this court reviews de novo." In re Det. of Keeney, 141 Wn. App. 318, 327, 169 P.3d 852 (2007).

“When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence in order to safeguard a defendant’s right to a unanimous jury determination.” State v. Garcia, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014). Thus, a general jury verdict “satisfies due process only so long as each alternative means is supported by sufficient evidence.” State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062, 1067 (2017). When insufficient evidence supports one or more of the alternative means presented to the jury, “the conviction will not be affirmed.” Ortega-Martinez, 124 Wn.2d at 708.

The sufficient evidence test is satisfied only if the reviewing court is convinced “a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.” State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

A person is guilty of residential burglary “if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1). Consistent with the statute, the to-convict instruction stated:

To convict the defendant of the crime of residential burglary, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about November 17, 2017, the defendant entered or remained unlawfully in a dwelling;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 26 (Instruction 12) (emphasis added). The jury was also instructed: “A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.”<sup>1</sup>

CP 27 (Instruction 13). The jury returned a general verdict on residential burglary. CP 34.

Unlawful entering and unlawful remaining are alternative means of committing residential burglary. State v. Sony, 184 Wn. App. 496, 500, 337 P.3d 397 (2014); State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046

---

<sup>1</sup> The State proposed these instructions. Supp. CP\_\_ (Sub. No. 60, Plaintiff’s Proposed Instructions to the Jury). Defense counsel did not object, but neither did counsel propose any jury instructions. RP 312; State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999) (“[F]ailing to except to an instruction does not constitute invited error.”).

(2006). Both means were presented to Smith's jury. CP 26. However, there was no evidence of unlawful entry in this case—only unlawful remaining.

In closing, the State elected the same act for both the indecent liberties and the residential burglary charge: the allegation that Smith wrestled H.K. to the ground; she demanded that he leave; and he grabbed her breasts and vagina as she attempted to fight him off. RP 338-39. The State did not rely on or attempt to prove Smith's subsequent reentry for the residential burglary charge. RP 328-39.

It was essentially undisputed that Smith's initial entry into H.K.'s home was not unlawful. Smith entered without H.K.'s express permission. RP 153. However, H.K. explained it was normal and common for Smith to show up at their house, unannounced, to visit Jones. RP 152-53, 196. It was also typical for Smith to let himself in without knocking. RP 197-98. Consistent with this, H.K. and Jones did not keep their door locked. RP 198. Also consistent with this, H.K. did not initially ask Smith to leave and she even offered him a drink inside. RP 154-55, 218-19. Smith was a guest with a standing invitation to enter.

Thus, the record is devoid of evidence that Smith unlawfully entered H.K.'s home, with regard to the elected burglary charge. The only evidence was that Smith unlawfully remained in H.K.'s home after he attacked her

and she demanded that he leave. RP 159-64. The State therefore failed to prove the alternative means that Smith unlawfully entered H.K.'s home.

“When one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means.” Woodlyn, 188 Wn.2d at 162. A complete lack of evidence for one alternative does not render the unanimity error harmless. Id. at 165-67. Thus, the complete lack of evidence supporting Smith’s unlawful entry is not harmless. His residential burglary conviction must be reversed. Garcia, 179 Wn.2d at 843-44 (holding reversal is required where insufficient evidence supports one or more of the alternative means presented to the jury, and the defendant may not be retried on the means for which there is insufficient evidence).

2. THE TRIAL COURT ERRONEOUSLY EXCLUDED DEFENSE EVIDENCE OF H.K.’S RELATIONSHIP TROUBLES, RELEVANT TO HER CREDIBILITY AND MOTIVE TO LIE.

Due process requires the accused be given “a meaningful opportunity to present a complete defense.” State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Absent a valid justification, excluding relevant defense evidence “deprives a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful

adversarial testing.” Crane v. Kentucky, 476 U.S. 683, 689-690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

A trial court’s decision to admit or exclude evidence is typically reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). However, a court “necessarily abuses its discretion by denying a criminal defendant’s constitutional rights.” State v. Perez, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). The denial of a defendant’s constitutional right to present a defense is therefore reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Washington courts apply a three-pronged approach to determine whether defense evidence is inadmissible. State v. Darden, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002). First, the evidence must be at least minimally relevant. Id. at 621-22. Second, if relevant, the State bears the burden of showing the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Id. at 622. Third, the State’s interest in excluding the prejudicial evidence must be balanced against the defendant’s need for the information sought. Id. Only if the State’s interest outweighs the defendant’s need can otherwise relevant information be withheld. Id.

A “proper and important function” of the right to present a defense includes the right to attack a witness’s credibility by “revealing possible biases, prejudices, or ulterior motives of the witness as they may relate

directly to issues or personalities in the case at hand.” Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Criminal defendants are therefore entitled extra latitude in presenting a defense and cross-examining witnesses, especially when the particular witness is essential to the State’s case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). This “helps assure the accuracy of the fact-finding process.” Darden, 145 Wn.2d at 620.

Impeachment evidence is relevant if it “(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action.” State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). “Where a case stands or falls on the jury’s belief or disbelief of essentially one witness, that witness’ credibility or motive must be subject to close scrutiny.” State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980); accord State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) (“Where the credibility of the complaining witness is crucial, her possible motive to lie is not a collateral issue.”).

Defense counsel wanted to ask H.K. about her relationship troubles with Jones, to suggest a motive to fabricate the allegations. RP 186-89. Specifically, H.K. would have testified she was thinking about leaving Jones, frustrated with his constant partying and not coming home. RP 186-87. The

very night of the alleged attack, Jones was out drinking and partying with friends. RP 187. But the trial court excluded the impeachment evidence as “irrelevant,” reasoning “the motive [to fabricate] would have to be to make up a thing in the first place, and I’m not hearing any reason why her poor relationship with the boyfriend would be a motive to make something up in the first place.” RP 190-91.

Defense counsel later asked Jones, “Did you make a phone call to [H.K.] at work accusing her of cheating?” RP 264. Jones answered, “No,” but the court sustained the State’s relevance objection and instructed the jury, “Disregard the last question and response.” RP 264.

Later, however, the court allowed defense counsel to ask H.K.’s coworker Andrew Stamper about the cheating accusation, after the State opened the door to it. RP 284-87. Stamper recalled H.K. received a phone call at work, around the same time she told him about the alleged attack, in which Jones accused her of cheating on him with Smith. RP 282-83, 287-88. Stamper testified it sounded like an argument, causing H.K. to cry, and ultimately leave work panicked and upset. RP 282-83, 288.

The trial court erred in excluding relevant defense evidence regarding H.K.’s and Jones’s relationship troubles. The evidence was relevant to their credibility. Both denied the cheating accusation. RP 24, 215, 264, 285. But Stamper, without any apparent reason to make it up,

testified Jones accused H.K. of cheating on him with Smith—right around the time H.K. told Stamper she had been attacked by Smith. RP 280. Why, then, would H.K. and Jones deny the cheating accusation unless they were trying to hide something? As the complaining witness, H.K.’s credibility was certainly “a fact of consequence to the action.” Allen S., 98 Wn. App. at 459-60. Jones’s credibility mattered, too, where he accompanied H.K. to the police station for “support,” suggesting he believed her allegations against Smith. RP 258.

The evidence of H.K.’s and Jones’s relationship troubles was also relevant to H.K.’s motive to lie. The court excluded the evidence basically because of H.K.’s excited utterances to Garza and Karr the night of the alleged attack. But there was no reason the motive to fabricate could not have formed then and continued through H.K.’s report to police. The relationship strain existed the night of the alleged incident. H.K. was frustrated with Jones’s absence and constant partying, including that evening. RP 186-87. Jones did not come home for up to two days after learning his girlfriend has supposedly been raped, because he “was not in the right state of mind,” indicating Jones was volatile and unsupportive. RP 210, 256. Then, just a few days later, Jones accused H.K. of cheating on him with Smith. RP 285.

All of this, taken together, suggested a reason H.K. might have made up the allegations against Smith. Perhaps she wanted to avoid further conflict with Jones or perhaps she knew Jones would accuse her of cheating, so she fabricated and persisted with the claim that Smith sexually assaulted her. But defense counsel was deprived of the most salient evidence on this point—H.K.’s own recognition of her relationship struggles with Jones, as well as Jones’s telling denial of the cheating accusation. The trial court’s exclusion of this evidence therefore denied Smith an important opportunity to impeach the State’s most critical witness, H.K.

An erroneous evidentiary ruling that violates the accused’s right to present a defense is constitutional error, presumed to be prejudicial unless the State can show the error was harmless beyond a reasonable doubt. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014); Jones, 168 Wn.2d at 724.

The exclusion of impeachment evidence was harmful to Smith’s case because it deprived him of a crucial opportunity to challenge H.K.’s credibility and suggest a reason for fabricating. Courts have recognized, “[i]n the prosecution of sex crimes, the right of cross-examination often determines the outcome,” where the case “stands or falls on the jury’s belief or disbelief” of the complaining witness. Roberts, 25 Wn. App. at 834. The harm was fully realized at the end of trial, where the State argued in rebuttal,

“What reason does [H.K.] have to make this up? There is absolutely no evidence in the record that supports any motivation for her to fabricate something like this . . . What’s the motive? There isn’t one.” RP 354-55. Of course, there was, but Smith was denied the opportunity to present it to the jury.

Where the exclusion of relevant evidence impeaching H.K.’s credibility prejudiced Smith’s defense, this Court should reverse both of Smith’s convictions and remand for a new trial.

3. SMITH WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF IN REBUTTAL.

Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury’s verdict, the accused’s rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Reversal is required, even without defense objection, when the prosecutor’s misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

The presumption of innocence, and the corresponding burden on the State to prove every element of the offense beyond a reasonable doubt, is “the bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The defense therefore has no obligation to produce evidence and no obligation to articulate reasons to doubt the State’s case. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015) (“[T]he law does not require that a reason be given for a juror’s doubt.”); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (“[T]he State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.”).

A prosecutor commits misconduct by misstating the reasonable doubt standard or shifting the burden of proof to the accused. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (“Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant’s guilt beyond a reasonable doubt.”).

H.K.’s credibility was the key issue at trial. A theme of the State’s closing and rebuttal arguments was that H.K. had no motive to fabricate and nothing to be gained from making up the allegations. RP 337 (“There’s no winning for her in this situation.”), 338 (“What is there to be gained by

making this up? Nothing.”), 354-55 (“What’s the motive? There isn’t one.”). But, at the end of rebuttal, the State took this theme too far:

At the end of the day if you believe beyond a reasonable doubt that this happened, that the defendant sexually assaulted Hayley refusing to leave, and nothing that defense counsel says shakes your abiding belief in that, your abiding belief in the charges, then that’s it.

RP 357 (emphasis added). Defense counsel did not object. RP 357. The State then concluded its rebuttal by asking the jury to find Smith guilty as charged. RP 357.

Under the well-established case law discussed above, the State’s emphasized argument was misconduct. It improperly shifted the burden to defense counsel to supply a basis for reasonable doubt. The State essentially asked the jury to assume there was no reasonable doubt because defense counsel had not provided it. But defense counsel need not provide any reason to doubt the State’s case. Even if the jury found defense counsel’s closing argument entirely unpersuasive, it could still acquit based on the evidence or lack of evidence. CP 18 (“A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.”). While the first portion of the argument was unobjectionable, the second portion constituted improper burden shifting.

A curative instruction could not have erased the resulting prejudice. Significantly, the State’s improper remarks came at the end of rebuttal,

which courts recognize “increas[es] their prejudicial effect.” Lindsay, 180 Wn.2d at 443. One of the last things the jury heard before deliberations was the State’s suggestion that, were there reasonable doubt, defense counsel would have supplied it in closing. Without that, the State implied, the jury must convict. The misconduct was also particularly problematic where Smith was prohibited from fully exploring H.K.’s motive to fabricate based on Jones’s accusation of cheating. See argument 2, supra.

The Washington Supreme Court has recognized it is “particularly grievous” for a prosecutor, as “an officer of the State,” to “mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system.” State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Such is the case here. Given the State’s improper argument, prejudicially placed at the very end of rebuttal, this Court should reverse Smith’s convictions and remand for a new trial.

4. SMITH’S CONVICTIONS CONSTITUTE THE SAME CRIMINAL CONDUCT WHERE THEY WERE BASED ON THE SAME ELECTED ACT.

When a person is sentenced for two or more current offenses, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score” unless the crimes involve the “same criminal conduct.” RCW 9.94A.589(1)(a). “Same criminal conduct” means two or

more crimes that involve “the same criminal intent, are committed at the same time and place, and involve the same victim.” Id.

A trial court’s determination of whether multiple crimes constitute the same criminal conduct is reviewed for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 536-37, 295 P.3d 219 (2013). “[W]hen the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’” however, “a sentencing court abuses its discretion in arriving at a contrary result.” Id. at 537-38. The defendant bears the burden of showing multiple crimes involve the same criminal conduct. Id. at 539.

A person is guilty of indecent liberties when he knowingly causes another person to have sexual contact with him by forcible compulsion. RCW 9A.44.100(1)(a); CP 21. “Sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2); CP 24. A person is guilty of residential burglary if he enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein. RCW 9A.52.025(1); CP 26. Sexual motivation means “one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.” RCW 9.94A.030(49); CP 32.

Defense counsel argued Smith's convictions for indecent liberties by forcible compulsion and residential burglary with sexual motivation encompassed the same criminal conduct. CP 52-54; RP 374-75. Counsel emphasized the two offenses "occurred virtually simultaneously and the burglary effectively furthered [Smith's] criminal objective intent to commit the Indecent Liberties." CP 53.

The trial court refused to find same criminal conduct, reasoning:

Although it is within my discretion, the testimony that I heard was that there were actually two instances in which Mr. Smith arguably committed burglary, the first was when he remained in the house after being expressly told to leave, and the second after leaving the house, coming back into the house to further invade the victim's privacy in the case by staring at her in the bathtub, so for that reason this does not appear to be a situation where the crime should merge.

RP 376-77. The two current offenses therefore added three points to each of Smith's offender scores. RP 378; CP 60 (total offender score of four on each offense); RCW 9.94A.525(17) (where the present conviction is for a sex offense, all other current and prior sex offenses count as three points each).

The trial court's finding of separate criminal conduct was an error of law, and therefore an abuse of discretion, where the State clearly elected the same act for both offenses. Specifically, in closing, the State asked the jury to convict based on the same incident of Smith tackling H.K. to the floor, H.K. demanding that Smith leave, and then Smith grabbing her breasts and

vagina as H.K. fought to free herself. RP 328-32, 338-39, 357. This act, the State contended, was both the forcible compulsion necessary for the indecent liberties and the unlawful remaining necessary for the residential burglary. RP 331-32. The State likewise argued the sexual gratification necessary for indecent liberties was the same sexual gratification necessary for the burglary sexual motivation enhancement. RP 332.

The State did not even mention Smith's reentry in closing, and discussed it only briefly in rebuttal, in response to a defense argument, not as any kind of election. RP 328-39 (closing), 355-56 (rebuttal). Put simply, Smith's reentry and starting at H.K. in the bathtub was not the basis for the residential burglary charge. Even if the subsequent reentry was unlawful, it cannot be assumed the jury found the requisite intent to commit a crime against a person or property therein, where the State did not rely on that act for the burglary.

Based on the record and the State's clear election, the two offenses comprised the same criminal conduct. They involved the same victim, same time, and same place: H.K., in her home, when Smith wrestled her to the floor and grabbed her breasts and vagina without her consent. H.K.'s demand for Smith to leave—the unlawful remaining—occurred simultaneously with the forcible grabbing of H.K.'s private parts—both the indecent liberties with forcible compulsion and the intent to commit a crime

against a person therein. RP 161 (H.K. explaining her demand for Smith to stop and leave was “just constant while he was on top of me”).

The two offenses also involved the same criminal intent. In making this determination, “trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This analysis includes whether the crimes were “intimately related or connected to another criminal event,” whether the objective substantially changed between the crimes, whether one crime furthered the other, and whether both crimes were part of the same scheme or plan. Id. at 214-15 (quoting State v. Adcock, 36 Wn. App. 699, 706, 676 P.2d 1040 (1984)); State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Thus, intent in this context is not the mens rea element of the particular crime, but rather the individual’s objective criminal purpose. State v. Kloepper, 179 Wn. App. 343, 357, 317 P.3d 1088 (2014); State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990).

The indecent liberties and the residential burglary furthered one another. By remaining unlawfully in H.K.’s home, Smith was able to perpetuate the indecent liberties, and vice versa. The State’s own closing argument demonstrates the two crimes involved the same criminal intent: “Once he’s inside, once he’s remaining unlawfully, he formed that intent. Once he’s inside, we know that he had intent to commit a crime against a

person therein because he did commit a crime against somebody.” RP 331. In other words, the crime Smith intended to commit against a person therein was indecent liberties. Likewise, the requisite sexual gratification was simultaneous for both offenses, demonstrating the same criminal purpose. RP 332 (State arguing the sexual gratification necessary for the residential burglary sexual motivation enhancement was the same as necessary for the indecent liberties, “so I’m not going to go over that again”).

The record makes plain the two offenses involved the same time, same place, same victim, and same criminal intent, where the State clearly elected the same act for both. The court erred in relying on an unelected, unproven act of burglary to find separate criminal conduct. The State’s closing argument compels but one conclusion: the indecent liberties and the residential burglary comprise the same criminal conduct.

Sentencing courts retain discretion under the burglar antimerger statute<sup>2</sup> to punish burglary separately “even where it and an additional crime encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). Here, the trial court mentioned the burglary antimerger statute, but it was not the basis for the court’s conclusion that the two crimes were separate criminal conduct. RP 376-77. Remand is

---

<sup>2</sup> RCW 9A.52.050 (“Every person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately.”).

therefore appropriate for the trial court to exercise its discretion under the burglary antimerger statute following a finding of same criminal conduct.

5. THE PROVISION IMPOSING INTEREST ON ALL LEGAL FINANCIAL OBLIGATIONS MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

The trial court found Smith indigent at the time of sentencing, pursuant to RCW 10.101.010(3)(c).<sup>3</sup> CP 60. The court therefore imposed only the mandatory \$500 victim penalty assessment. CP 63-64. However, another provision specified: “The financial obligations imposed in this judgment and sentence shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 65. Imposing interest on nonrestitution LFOs is contrary to recent statutory amendments and so the provision must be stricken.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018, modified Washington’s LFO system, addressing “some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Among other changes, HB 1783 eliminated interest accrual on the

---

<sup>3</sup> RCW 10.101.010(3)(c) specifies a person is indigent if he or she “[r]eceive[s] an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level.”

nonrestitution portions of LFOs. Laws of 2018, ch. 269, § 1 (amending RCW 10.82.090); Ramirez, 191 Wn.2d at 747.

RCW 10.82.090 requires the sentencing court to impose interest on restitution.<sup>4</sup> RCW 10.82.090(1). But, following the changes made by HB 1783, the statute now provides, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). The provision in Smith’s judgment and sentence requiring payment of interest on nonrestitution LFOs, entered well after June 7, 2018, violates this provision of the amended statute. CP 24. Ramirez, in any event, holds the changes effected by HB 1783 apply prospectively to cases still pending on direct appeal, like Smith’s. 191 Wn.2d at 747.

This Court should remand with instructions for the trial court to strike nonrestitution LFO interest from the judgment and sentence. See Ramirez, 191 Wn.2d at 750.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Smith’s convictions and remand for a new trial. Alternatively, this Court should remand for a new sentencing hearing at which Smith’s current convictions are correctly treated at the same criminal conduct. Finally, this Court should

---

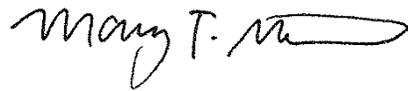
<sup>4</sup> The trial court did not impose restitution in Smith’s judgment and sentence, instead specifying it “may be set by later order of the court.” CP 64. As of the date of filing this brief, no restitution has yet been imposed.

remand for the nonrestitution LFO interest provision to be stricken from the judgment and sentence.

DATED this 6th day of December, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

---

MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**December 06, 2019 - 3:10 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53443-6  
**Appellate Court Case Title:** State of Washington, Respondent v. Michael A. Smith, Appellant  
**Superior Court Case Number:** 18-1-01656-8

**The following documents have been uploaded:**

- 534436\_Briefs\_20191206151001D2899788\_2620.pdf  
This File Contains:  
Briefs - Appellants - Modifier: Amended  
*The Original File Name was SmitMic.53443-6-II.cbrf.pdf*

**A copy of the uploaded files will be sent to:**

- Sloanej@nwattorney.net
- aaron.bartlett@clark.wa.gov
- cntypa.generaldelivery@clark.wa.gov

**Comments:**

Mailed to client on 12/6/19.

---

Sender Name: Mary Swift - Email: swiftm@nwattorney.net  
Address:  
1908 E MADISON ST  
SEATTLE, WA, 98122-2842  
Phone: 206-623-2373

**Note: The Filing Id is 20191206151001D2899788**