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**State of Washington**  
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(consolidated with 54156-4-II)

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

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STATE OF WASHINGTON, Respondent

v.

MICHAEL ALLEN SMITH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-01656-8

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. Because “enters or remains unlawfully” does not create alternative means of committing Residential Burglary the jury instructions did not violate Smith’s right to jury unanimity.**
- II. The trial court properly excluded as irrelevant the evidence that H.K. had been thinking of breaking up with her boyfriend in the months prior to the night that she was sexually assaulted by Smith.**
- III. The prosecutor did not commit flagrant and ill-intentioned misconduct during closing argument.**
- IV. The trial court properly exercised its discretion by applying the burglary anti-merger statute to punish Smith for each of his crimes.**
- V. Smith is correct that remand is required to strike the provision imposing interest on his legal financial obligations.**
- VI. Smith’s personal restraint petition fails to establish he is under unlawful restraint or advance an argument under which he is entitled to relief.**

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Michael Allen Smith was charged by information with Indecent Liberties (with Forcible Compulsion) and Residential Burglary with Sexual Motivation for an incident on or about November 17, 2017 where he unlawfully remained in H.K.’s residence and sexually assaulted her. CP 1-2. The case proceeded to a jury trial before the Honorable Robert Lewis,

which commenced on March 18, 2019 and concluded the next day with the jury's verdicts finding Smith guilty as charged. RP 5-363; CP 33-35. The trial court sentenced Smith to an indeterminate sentence pursuant to RCW 9.94A.507, with a standard range, minimum sentence of 84 months of total confinement plus an additional 18 months for the sexual motivation enhancement. RP 382; CP 57, 60-62; RP 370. Smith filed a timely notice of appeal. CP 84.

B. STATEMENT OF FACTS

H.K. lived in a home in Vancouver with her two children, her boyfriend Corey Jones, who was the father of one of the kids, and Aaron Karr. RP 149-150, 251-52, 266-67. Joshua Garza was the father H.K.'s other child, and the two (Garza and H.K.) remained close. RP 265-67. In fact, even Jones and Garza maintained a friendship. RP 265-66.

Smith was Jones's supervisor at work, but they were also very good friends and spent a lot of time outside of work hanging out. RP 251-53, 259. Smith would often come by H.K. and Jones's house to visit. RP 152-53, 197-98.

On November 17, 2017, Garza came over to H.K.'s home during the afternoon to pick up the kids and take them to his house. RP 151, 193-94, 266-67, 271. Jones, who had not shown up for work that day, left for a friend's house, planned to hang out there for the night, and hoped to meet

up with H.K. later. RP 144-45, 193, 228-29, 255, 304. Meanwhile, Karr was working a later shift at Buffalo Wild Wings. RP 133, 144-45. Thus, as day became night, H.K. was home alone and lounging in her pajamas. RP 151-53, 162.

At around 8:00 PM an intoxicated Smith angrily barged into H.K.'s home asking where Jones was and ranted about Jones missing work. RP 153-54, 197-98. Smith was swaying, leaned against things, slurred his speech, and smelled strongly of alcohol and cigarettes. RP 153-55. While Smith often came inside the home without announcing or knocking, he also often left if Jones was not around. RP 152-53, 197-98. This time was different; he stayed.

Smith's ranting continued, he kept getting closer to H.K., and he was making her feel very uncomfortable. RP 154-55, 199-200. H.K., at this point, did not ask Smith to leave, but tried to look occupied by pretending to clean up and play on her phone. RP 155, 199-200. Smith, however, kept following H.K. around. RP 155.

When H.K. was walking back to the living room, Smith grabbed her wrist and began trying to wrestle with her. RP 156. According to H.K., Smith was being playful, but she was sober and annoyed. RP 156. She described the wrestling as "[j]ust a really uncomfortable situation." RP

156. Finally, H.K. asked Smith to stop, but he did not. RP 156. “And then he became angry. And then he wasn’t playing anymore.” RP 156.

Smith went from laughing and smiling to scowling and visibly angry. RP 158. H.K., in a stern, loud voice told Smith multiple times “you need to stop,” to quit it, and to leave her house. RP 157, 219-220. She tried breaking free and getting away from Smith, but he had her wrist and did not let go. RP 157. Smith’s grip of H.K. got tighter and then he tackled her to the floor. RP 158, 200-01. H.K was on her back and Smith was on top of her, straddling her body. RP 158.

At this point, H.K. was “really scared” and began screaming for Smith to get off of her and “get out of my house.” RP 159. H.K. hoped that a neighbor would hear her yelling. RP 160. H.K. bucked as hard as she could and tried to roll to her side. RP 159-160. But Smith did not relent and kept one hand on H.K.’s wrists. 159-160.

While H.K. was trying to fight Smith off, Smith was grabbing H.K.’s breasts aggressively, grabbing at her vagina, and trying to penetrate her vagina with his fingers. RP 160-163, 220-21. H.K. explained that she “could feel him almost getting in” her vagina through her pants and that his grabbing was painful. RP 160-63, 220-21. Smith also worked on getting his pants off and unbuckled his belt. RP 160, 165.

H.K.'s bucking and fighting paid off when she was able to roll onto her hands and knees and begin to try to crawl away from Smith. RP 159-160-61, 163. Smith, however, continued to pull and grab at H.K., to include putting his hands on her hips and pulling her back into his groin, unsuccessfully pulling at her pants to try to get them down, and grabbing her breasts. RP 163-64. Smith then suddenly stopped, H.K. broke free, and she crawled away. RP 163-64, 202.

When she got away, H.K. turned around and screamed for Smith "to get out and leave my house." RP 164, 202. Smith responded by saying something like "this isn't what you want" to which H.K. shouted "no." RP 165. Smith became "really angry" and slammed the front door on his way out of the house. RP 165. After Smith left, H.K. felt overwhelmed with emotion, could not stop crying, and felt gross. RP 166-67.

Next, H.K. went into the bathroom to take a bath. RP 167. H.K. was fully naked in the bath with the door closed and locked when Smith "swung the door open and stood in the doorway yelling at" her. RP 168-69, 203. While H.K. screamed at Smith to get out and attempted to cover her body up, Smith kept yelling at her. RP 169-170. Smith repeated things like: "[W]hat the fuck, [H.K.?] Are you serious right now? Is it going to be like this? This how it is?". RP 169-170. Smith then left the bathroom

and H.K. heard him slam the front door again as he again left her house.  
RP 170.

H.K., still in shock and very upset, got out of the bath and drank what she described as a lot of alcohol. RP 170-72, 204. A then hysterical and intoxicated H.K. called Garza and asked him to come over. RP 172-73, 268-69, 273. Garza arrived at the house and found H.K. by herself. RP 268-69. She did not want to be touched and was crying, but she tried to pull herself together to tell Garza what had happened. RP 174, 205, 268-69, 275. Garza urged H.K. to go to the police. RP 174, 271.

When he was originally told what happened, Garza believed that H.K. had said that Smith put his fingers in her vagina. RP 206, 269. In the following days when Garza was “try[ing] to really figure it out without her crying” H.K. clarified that Smith’s fingers did not enter her vagina. RP 206, 269-270. H.K. also asked Garza not to tell Jones, because she did not know if she wanted to tell people about what happened. RP 174. Garza, however, called Jones right after he left the house. RP 174-75, 255, 270, 276.<sup>1</sup> An upset Jones, in turn, called H.K. and she told him what had happened. RP 175, 255-56.

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<sup>1</sup> Garza called Jones because he was upset with him and wanted to express that anger, which he did “very clearly.” RP 276. The reason for that anger was not further explored.

Sometime following H.K.'s call with Jones, Karr returned home from work. RP 133-34, 175, 208. Karr heard H.K. screaming and crying and went to find a frantic and scared H.K. who said "he raped me."<sup>2</sup> RP 134-35, 140-42, 175-77, 209-210. H.K. told Karr what happened without getting into too many details, but did identify Smith as her assailant. RP 146, 175-76. Karr attempted to comfort H.K. and asked what H.K. needed. RP 137. She asked him to not let anyone into the house. PR 137. After Karr and H.K. went to bed, Karr overheard H.K. crying in her bedroom throughout the night and into the morning, and he checked on her multiple times. RP 137-38, 175-76. Upon Jones return home, either the next morning or the morning after, he noticed that H.K. would not get out of bed, was upset, and not acting normally. RP 256-57, 262.

Over the next few days, H.K. wasn't sure if she wanted to contact the police. RP 179, 181-83, 185, 211, 213. Both of her wrists hurt, she noticed bruising on her wrists and arms, and could not stop thinking about what happened. RP 178-79, 243-47. Thus, on November 22, 2017, H.K. went to the police with Jones to report what happened. RP 181, 183-84, 258. The officer who spoke with H.K. at the station observed and photographed H.K.'s injuries, described H.K. as crying and visibly

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<sup>2</sup> H.K. explained that she used the word rape because she thought of rape to include when a person was "forcibly trying to have sex" and reiterated that since she now knew that rape required penetration that she was not raped. RP 176-77, 209-210.

shaking when she spoke about the incident, and collected a written statement. RP 243-47.

Smith did not testify. But statements of his were admitted through the investigating detective. RP 303-04. Smith indicated that he was aware of the incident and that it did not happen that way. RP 304. According to Smith, he was at H.K.'s home because he was Jones's boss and Jones had not shown up for work. RP 304. And because Jones was not home, that he had left. RP 304.

Smith also called a friend of his, Andrew Luna, as a witness. RP 225. Luna was with Smith earlier in the day and confirmed that Smith planned on going to H.K. and Jones's home to discuss Jones's work issues and that Smith had been drinking, though Luna testified Smith did not drink a lot. RP 226-29.

## ARGUMENT

### **I. Because “enters or remains unlawfully” does not create alternative means of committing Residential Burglary the jury instructions did not violate Smith’s right to jury unanimity.**

Pursuant to RCW 9A.52.025(1), 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. . . .” In 2003, Division I of the Court of Appeals in *State v. Klimes* held that

“enters unlawfully” and “remains unlawfully” are alternative means of committing burglary. 117 Wn.App. 758, 765-67, 73 P.3d 416 (2003). But *Klimes* was wrong in the first instance, this Court is not bound by *Klimes* or any of the subsequent opinions from Division I that follow it, and *Klimes*’ holding cannot withstand the analysis found in the parade of Supreme Court opinions after 2003 concluding that a number of other crimes are not “alternative means” crimes. Burglary is not an alternative means crime. As a result, Smith’s claim that his “right to a unanimous jury verdict was violated” fails. Brief of Appellant at 6-10.

a. Burglary as an alternative means crime in the Courts of Appeals.

As a preliminary matter, our Supreme Court has “reject[ed] any kind of ‘horizontal stare decisis’ between or among the divisions of the Court of Appeals.” *In re Arnold*, 190 Wn.2d 136, 149, 410 P.3d 1133 (2018). On the contrary, giving “respectful consideration to decisions of another division” is preferred because it encourages “rigorous debate at the intermediate appellate level” and “creates the best structure for the development of” the law. *Id.* at 147, 152-54.

Since *Klimes*, Division I has decided a number of cases in which it has described burglary as an alternative means crime. *State v. Sony*, 184 Wn.App. 496, 499-501, 337 P.3d 397, 399-400 (2014) *State v. Gonzalez*,

133 Wn.App. 236, 243-44, 148 P.3d 1046 (2006); *State v. Spencer*, 128 Wn.App. 132, 142-43, 114 P.3d 1222 (2005); *State v. Howard*, 127 Wn.App. 862, 877, 113 P.3d 511 (2005); *State v. Allen*, 127 Wn.App. 125, 131, 135-36, 110 P.3d 849, 854 (2005). *Allen* came first, accepted *Klimes* holding that unlawfully entering and remaining unlawfully were alternative means of committing burglary, but rejected *Klimes*' jury unanimity holding; instead *Allen* adopted the now disapproved rule that jury unanimity is not required so long as there is "no evidence" of one of the alternative means. *Allen*, 127 Wn.App. at 131, 135-36; *See State v. Woodlyn*, 188 Wn.2d 157, 162-67, 392 P.3d 1062 (2017).<sup>3</sup>

*Howard*, *Spencer*, and *Gonzalez* followed. 127 Wn.App. 862, 128 Wn.App. 132, 113 Wn.App. 236. None of the three broke new ground. Each assumed that unlawfully entering and remaining unlawfully were alternative means of committing burglary and rejected the defendants' jury unanimity arguments because there was sufficient evidence of each alternative. *Gonzalez*, 133 Wn.App. at 243-44, *Spencer*, 128 Wn.App. at 142-43, *Howard*, 127 Wn.App. at 877. Thus, the courts did not need to directly address whether unlawfully entering and remaining unlawfully were true alternative means.

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<sup>3</sup> Generally, express jury unanimity is required when at least one alternative means lacks sufficient evidentiary support. *Woodlyn*, 188 Wn.2d at 164-65.

Next, *Sony* rejected the defendant’s contention that “with intent to commit a crime against a person” and “with intent to commit a crime against property” were alternative means of committing burglary and, without any substantive analysis, cited *Gonzalez, supra*, for the conclusion that the actual alternative means were “unlawfully entering” and “unlawfully remaining.” 184 Wn.App. at 500. Accordingly, Division I’s analysis of whether unlawfully entering or remaining unlawfully are alternative means of committing burglary remains rooted in 2003 and has not been reevaluated in light of the numerous, more recent Supreme Court case law on alternative means, *infra*.

This Court, Division II of the Court of Appeals, has not truly weighed in on the question. In *State v. Johnson*, this Court accepted from *Klimes, supra*, and *Allen, supra*, the proposition that “unlawful entering” and “unlawful remaining” are alternative means, but, again, because the State presented sufficient evidence of both “means” this Court was not required to determine the truth of the matter. 132 Wn.App. 400, 409-410, 132 P.3d 737 (2006). Nonetheless, this Court did observe that “when someone enters unlawfully, that person has no permission to be inside, so any period of remaining is also unlawful, satisfying both alternate means.” *Id.* at 410.

Similarly, Division III has not had occasion to independently determine whether burglary is an alternative means crime<sup>4</sup> since it has only been faced with jury unanimity challenges in which sufficient evidence supported both “means.” *State v. Cordero*, 170 Wn.App. 351, 365-67, 284 P.3d 773 (2012). Consequently, like this Court, Division III has assumed the correctness of Division I’s formulation, though in *Cordero* it did acknowledge the “somewhat anomalous” nature of these alternative means as part of a “sufficiency analysis” since “[w]here a defendant’s initial entry was clearly unlawful, the sufficiency of evidence that he or she remained unlawfully ordinarily follows automatically.” *Id.* at 365-66.

- b. Determining whether a statute creates alternative means and our Supreme Court’s alternative means jurisprudence.

“[T]he two underlying purposes of the alternative means doctrine [] are to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the

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<sup>4</sup> Division III has examined cases dealing with the alternative means of committing Burglary in the First Degree—a true alternative means crime—but that analysis has not informed its resolution of cases dealing with residential burglary. *See, e.g., State v. Brewczynski*, 173 Wn.App. 541, 548-550, 294 P.3d 825 (2013).

various means in order to obtain a unanimous verdict.” *State v. Smith*, 159 Wn.2d 778, 789, 154 P.3d 873 (2007) (citations omitted). Determining “which statutes create alternative means crimes is left to the courts.” *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019) (citing *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015)). Courts begin this determination “by analyzing the language of the criminal statute at issue.” *Id.* (internal quotation omitted). Such an analysis is not anchored in a formal analysis of the statute’s structure, however, as “the use of the disjunctive ‘or’ in the language in question, the presence of statutory subsections, or the availability of definitional statutes do not necessarily create alternative means.” *Id.* at 643-44 (citing *Sandholm*, 184 Wn.2d at 734).

Instead, our Supreme Court has instructed that “the salient inquiry is whether each alleged alternative describes distinct acts that amount to the same crime.” *Id.* at 644 (quoting *State v. Peterson*, 168 Wash.2d 763, 770, 230 P.3d 588 (2010)). Accordingly, the “more varied the criminal conduct, the more likely the statute describes alternative means.” *Barboza-Cortes*, 194 Wn.2d at 644 (internal quotation omitted). On the other hand, where there is not a significant distinction between the “conduct the legislature is trying to prevent” the statute does not describe alternative

means.” *Id.* at 648; *Peterson*, 168 Wn.2d at 770 (holding that conduct must vary “significantly” to constitute alternative means).

Additionally, “when [a] statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *Id.* at 644 (internal quotation omitted). Nevertheless, that a defendant’s particular conduct does not always violate each and every of the statute’s “alternatives” does not mean that the legislature has created alternative means of committing the crime. *Id.* at 648; *State v. Butler*, 194 Wn.App. 525, 530, 374 P.3d 1232 (2016); *State v. Roy*, No. 52278-1-II, slip op. at 1, 4-7 (Wash.Ct.App. Apr. 7, 2020) (holding that a failure to provide an animal “with necessary shelter, rest, sanitation, space or medical attention” did not create alternative means of committing animal cruelty in the second degree).

Since Division I’s decisions in *Klimes, supra*, (2003) and *Allen, supra*, (2005), the Supreme Court has applied the above alternative means analysis in *State v. Smith, supra*, (2007), *State v. Peterson, supra*, (2010), *State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014), *State v. Sandholm, supra*, (2015), *State v. Tyler*, 191 Wn.2d 205, 422 P.3d 436 (2018), and *State v. Barboza-Cortes, supra*, (2019) and in each case concluded that the statutes at issue—in the manner challenged—did not provide for alternative means. Most recently, *Barboza-Cortes* held that unlawful

possession of a firearm<sup>5</sup> and identity theft in the second degree<sup>6</sup> were not alternative means crimes. 194 Wn.2d at 646-49. As to the unlawful possession of a firearm, *Barboza-Cortes* concluded:

While there may be subtle distinctions in aspects of ownership, possession, and control that may be material in other contexts, in the present circumstance they all describe ways of accessing guns; and all of those interactions have been barred by the legislature as regards felons. Thus, in this context, the statute is more properly characterized as describing nuances inhering in the same prohibited act—accessing guns. We conclude that the alleged alternatives are facets of the same criminal conduct.

*Id.* at 646 (internal quotations and citations omitted). As to identity theft, where “financial information” and “means of identification” were at issue, *Barboza-Cortez* explained:

We acknowledge that the “means of identification” definition expressly excludes information “describing finances or credit.” RCW 9.35.005(3). Nevertheless, while the identity theft statute lists categories of information (and the definitional statute describes specific sets of such information) to which a violation of the statute applies, the statute describes and prohibits only a single type of conduct: the taking of another’s private information to commit or aid and abet commission of a crime.

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<sup>5</sup> “A person . . . is guilty of the crime of unlawful possession of a firearm in the second degree, if the person . . . owns, has in his or her *possession*, or has in his or her *control* any firearm. . . .” *Barboza-Cortes*, 194 Wn.2d at 646 (quoting RCW 9A.41.040(2)(a)) (alterations and emphasis in original).

<sup>6</sup> “RCW 9.35.020(1) provides that “[n]o person may knowingly obtain, possess, use, or transfer a *means of identification or financial information* of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” *Barboza-Cortes*, 194 Wn.2d at 647 (quoting RCW 9.35.020(1)) (emphasis in original).

It is unclear what distinction the legislature intended when it divided “means of identification” and “financial information,” but what is clear is the overlap in a number of the items identified in each of these definitions. . . . [I]t is difficult to see these definitions as describing distinct or different conduct. . . . We conclude that the identity theft statute may be properly characterized as describing nuances inhering in the same prohibited act—taking another’s private information. Thus, the alleged alternatives here are more aptly characterized as facets of the same criminal conduct.

*Id.* at 648-49 (internal case citations and quotations omitted).

*Tyler* concluded that possession of stolen property, and therefore possession of a stolen vehicle, are “single means crime[s].” 191 Wn.2d at 212-13. The definition of “possessing stolen property,” which includes “knowingly to receive, retain, possess, conceal, or dispose of stolen property . . . and to withhold or appropriate the same . . .” does not create alternative means, but is instead a “multifaceted description of the ways in which one may possess stolen property . . . enhancing the understanding of the single means crime.” *Id.*; RCW 9A.56.140(1).

In *Sandholm*, the defendant argued that the three ways in which a person can be found guilty of DUI—alcohol concentration of 0.08 or higher, under the influence of or affected by liquor or a drug, or under the combined influence of or affected by liquor and a drug—constituted alternative means and centered his argument on the fact that the statute was divided into subsections with a disjunctive “or” between the

subsections. 184 Wn.2d at 733. But our Supreme Court rejected that argument<sup>7</sup> and held that:

the DUI statute’s “affected by” clauses do not describe multiple, distinct types of conduct that can reasonably be interpreted as creating alternative means. Rather, those portions of the DUI statute contemplate only one type of conduct: driving a vehicle under the “influence of” or while “affected by” certain substances that may impair the driver. These statutory subsections describe facets of the same conduct, not distinct criminal acts. Whether the defendant is driving under the influence of alcohol, or drugs, or marijuana, or some combination thereof, the defendant’s *conduct* is the same—operating a vehicle while under the influence of certain substances.

*Id.* at 735 (internal citation omitted) (emphasis in original).

In *Owens* the issue was whether “knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others” created alternative means of trafficking in stolen property. 180 Wn.2d at 97 (citing RCW 9A.82.050(1)). In holding that these seven terms did not create alternative means, *Owens* explicitly agreed with this Court’s analysis and conclusion in *State v. Lindsey*<sup>8</sup> and reversed Division I’s opinion holding otherwise.

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<sup>7</sup> *Sandholm* emphasized that “under our current case law, we have disapproved of recognizing alternative means crimes simply by the use of the disjunctive ‘or.’ Nor has it been found that structuring the statute into subsections is dispositive or that definitional statutes create alternative means.” 184 Wn.2d at 734 (citations omitted).

<sup>8</sup> 177 Wn.App. 233, 311 P.3d 61 (2013).

*Id.* at 97-99. *Owens* explained that the above-listed terms “are merely different ways of committing one act, specifically stealing” and that “an individual’s conduct . . . does not vary significantly between the seven terms listed.” *Id.* at 99.

*Peterson* examined whether failure to register is an alternative means crime. 168 Wn.2d 763. There the defendant argued that failure to register is an alternative means crime because “it can be accomplished in three different ways: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another.” *Id.* at 769-770. The Supreme Court characterized this argument as “too simplistic a depiction of an alternative means crime” and concluded that as opposed to the alternative means of theft<sup>9</sup>, where the “conduct varies significantly,” the “failure to register statute contemplates a *single act* that amounts to failure to register: the offender moves without alerting the appropriate authority.” *Id.* at 770 (emphasis in original). Or, in other words, “moving without registering.” *Id.* Accordingly, *Peterson* held that “failure to register is not an alternative means crime.” *Id.* at 771.

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<sup>9</sup> “[T]heft by wrongfully exerting control over someone’s property or by deceiving someone to give up their property.” *Id.* at 770.

In *Smith*, our Supreme Court was asked to determine whether the common law definitions of assault constituted alternative means of committing the crime of assault in whichever degree charged. 159 Wn.2d 778. *Smith* answered no.<sup>10</sup> *Id.* at 789-90. In reaching that conclusion, *Smith* made two particular points: (1) “definitions [that] merely define [an] element” do not create alternative means, and to hold otherwise would (2) create a “means within a means scenario,” which “does not trigger jury unanimity protections.” 159 Wn.2d at 785-89. Further, to treat the common law definitions of assault as alternative means in a second degree assault case, in which, for example, the deadly weapon alternative was charged would lead to the “means within a means” scenario and fail to advance “the two underlying purposes of the alternative means doctrine[:]

. . . to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict.

*Id.* at 789 (citations omitted).

- c. The reasoning and holding in *Klimes*, and its incompatibility with the current state of the law.

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<sup>10</sup> In so holding, *Smith* overturned cases from Division I, *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003), and Division III that had reached the opposite conclusion. *Id.* at 786-87.

In determining whether “enters unlawfully” and “remains unlawfully” were alternative means of committing burglary, *Klimes*’ analysis focused on whether “cases applying the burglary statutes” construed them “as separate acts.” 117 Wn.App. at 765. In so doing, *Klimes* examined two cases in which rapists lawfully entered homes before unlawfully remaining and committing rape. *Id.* at 765-67. *Klimes* emphasized that these cases showed “that a person *can* enter lawfully but remain unlawfully in some factual circumstances.” *Id.* at 767 (emphasis added). Next, *Klimes* looked at two cases involving shoplifting at retail establishments, one in which the defendant had previously been trespassed and was found to have “unlawfully entered” and one in which he had not and was found not to have “remained unlawfully.” *Id.* at 767-68. *Klimes* seemingly extracted from that difference support for its “separate acts” analysis and “conclude[d] from these cases that ‘enters unlawfully’ with intent to commit a crime therein and ‘remains unlawfully’ with intent to commit a crime therein are alternate means of committing burglary.” *Id.* at 768.

But *Klimes* incorrectly conflates the fact that it is logically possible to just unlawfully enter *or* to just remain unlawfully—that they *can be* construed as “separate acts”—with an alternative means analysis. 117 Wn.App. at 765, 767. Far from being the touchstone of determining

alternative means, the possibility that a suspect's conduct does not always violate each "alternative" in a statute borders on irrelevant. *Barboza-Cortes*, 194 Wn.2d at 648; *Butler*, 194 Wn.App. at 530; *Roy*, No. 52278-1-II, slip op. at 6-7. Because *Klimes* does not address the "distinct[ness]" of the separate acts, i.e., whether the criminal conduct varies "significantly," or what "conduct the legislature is trying to prevent" its alternative means analysis is not consistent with that of our Supreme Court and should not be followed by this Court. *Barboza-Cortes*, 194 Wn.2d at 648; *Peterson*, 168 Wn.2d at 770.

Moreover, *Klimes* does not ground its alternative means analysis in alternative means case law.<sup>11</sup> 117 Wn.App. at 765-69. When this consideration is combined with the fact that since *Klimes* our Supreme Court has, on six separate occasions, concluded that crimes as varied as unlawful possession of a firearm, identity theft, possession of stolen property, possession of a stolen motor vehicle, trafficking in stolen property, DUI, failure to register as a sex offender, and assault based on the common law definitions, are not alternative means crimes<sup>12</sup>, and in the

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<sup>11</sup> On the contrary, *Klimes*' primary discussion of alternative means case law involves attempting to distinguish the alternative means case law cited by the State. 117 Wn.App. at 768-69.

<sup>12</sup> As challenged and discussed above.

process overruled a number of Division I cases holding otherwise<sup>13</sup>, a reevaluation of whether burglary is an alternative means crime is needed.

d. Burglary is not an alternative means crime

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. . . .” RCW 9A.52.025(1) (emphasis added).

“Enters or remains unlawfully” is defined as one term in RCW 9A.52.010(2). “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.” RCW 9A.52.010(2).

Here, the alleged alternatives of “enters or remains unlawfully” do not describe significantly different criminal conduct. On the contrary, “enters or remains unlawfully” describe “nuances inhering in the same prohibited act[.]” *unlawful presence in a building. Barboza-Cortes*, 194 Wn.2d at 646. As this Court and Division III have already observed “when someone enters unlawfully, that person has no permission to be inside, so any period of remaining is also unlawful. . . .” *Johnson*, 132 Wn.App. at 410; *Cordero*, 170 Wn.App. at 365-66 (remarking that “[w]here a

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<sup>13</sup> See e.g., *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003) *disapproved of by Smith*, 159 Wn.2d at 786-87; *Owens*, 180 Wn.2d at 101 (reversing Division I of the Court of Appeals); *Sandholm*, 184 Wn.2d at 739-740 (reversing Division I of the Court of Appeals); *State v. Lillard*, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004) (alternative means analysis rejected by *Tyler*, 191 Wn.2d at 214-15).

defendant’s initial entry was clearly unlawful . . . that he or she remained unlawfully ordinarily follows automatically”).<sup>14</sup> Accordingly, just like (1) the alleged alternatives of unlawful possession of a firearm statute “are facets of the same criminal conduct” of “accessing guns;” (2) the alleged alternatives of identity theft “are more aptly characterized as facets of the same criminal conduct” of “taking another’s private information;” (3) the alleged alternatives of possession of stolen property are “description[s] of the ways in which one may possess stolen property;” (4) the alleged alternatives of DUI “contemplate one type of conduct” that of “operating a vehicle while under the influence of certain substances;” (5) the alleged alternatives in trafficking in stolen property “are merely different ways of committing one act, specifically stealing;” (6) and the alleged alternatives of failure to register amount to “*a single act*” that of the “offender mov[ving] without” properly registering; the alleged alternatives of residential burglary are “facets of the same criminal conduct” of being unlawfully present in a building. *Barboza-Cortes*, 194 Wn.2d at 646, 648-49; *Tyler*, 191 Wn.2d at 212-13; *Sandholm*, 184 Wn.2d at 735; *Owens*, 180 Wn.2d at 99; *Peterson*, 168 Wn.2d at 770 (emphasis in original).

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<sup>14</sup> Nonetheless, as this Court has acknowledged “not every verb must overlap in order to constitute a single means.” *Butler*, 194 Wn.App. at 530 (holding that identity theft is not an alternative means crime); *State v. Makekau*, 194 Wn.App 407, 414, 378 P.3d 577 (2016); *Roy*, No. 52278-1-II, slip op. at 4-7.

There is no principle that distinguishes the alleged alternatives in burglary from those present in *Barboza-Cortes*, *Tyler*, *Sandholm*, *Owens*, *Peterson*, and *Smith*.

“[E]nters or remains unlawfully” merely describes nuances in the manner in which a suspect’s presence in a building is unlawful and such descriptions of factual circumstances do not create alternative means. *Barboza-Cortes*, 194 Wn.2d at 648-49; *Owens*, 180 Wn.2d at 99. Simply put, when looking at “enters or remains unlawfully” there is not a significant distinction between the “conduct the legislature is trying to prevent.” *Barboza-Cortes*, 194 Wn.2d at 648; *Peterson*, 168 Wn.2d at 770. As a result, burglary is not an alternative means crime.

The Supreme Court of Oregon has reached a similar result. *State v. Pipkin*, 354 Or. 513, 522-24, 316 P.3d 255 (2013); *State v. Henderson*, 366 Or. 1, 12-13, 455 P.3d 503 (2019). Just like in Washington, a person commits the crime of burglary if “the person enters or remains unlawfully in a building with intent to commit a crime therein.” ORS 164.215(1). In analyzing the alleged alternative means, however, Oregon’s Supreme Court has rejected the idea that “enters or remains unlawfully” are “discrete” and instead concluded that “entering and remaining unlawfully are interchangeable and often overlapping findings from which the jury can conclude that the defendant’s presence in a dwelling was unlawful.”

*Henderson*, 366 Or. at 12; *Pipkin*, 354 Or. at 524. In other words, “enters and remains unlawfully are “sometimes complementary ways of proving a defendant’s unlawful presence in a dwelling. . . .” *Pipkin*, 354 Or. at 523. Accordingly, jury unanimity is not required. *Id.* at 524.

This conclusion is also consistent with burglary’s “unit of prosecution,” which is each “distinct act[] of entering or remaining” in a building. *State v. Brooks*, 113 Wn.App. 397, 400, 53 P.3d 1048 (2002); *State v. Novick*, 196 Wn.App. 513, 525, 384 P.3d 252 (2016).

Accordingly, a person who unlawfully enters a building and remains therein to commit the intended crime cannot be convicted of two counts of burglary. *See Brooks*, 113 Wn.App. at 400; RCW 9A.52.025(1); *see also State v. White*, 341 Or. 624, 639, 147 P.3d 313 (2006).

Moreover, to hold otherwise would necessarily lead to the “means within a means” situation disapproved of in *Smith* anytime a defendant is charged with first degree burglary, which *is* an alternative means crime.<sup>15</sup> *Smith*, 159 Wn.2d at 785-89; RCW 9A.52.010(2) (defining “[e]nters or remains unlawfully”). Consequently, such a holding—that enters

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<sup>15</sup> “A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.” RCW 9A.52.020(1). Subsections (a) and (b) are alternative means. *Brewczynski*, 173 Wn.App. at 548-550.

unlawfully and unlawfully remains are alternative means—would not advance the “purposes of the alternative means doctrine,” most particularly, “to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt” *Smith*, 159 Wn.2d at 789.

Based on all the above, this Court should conclude that residential burglary is not an alternative means crime. And because residential burglary is not an alternative means crime, there are no jury unanimity issues, and Smith’s claim fails.

**II. There is no violation of Smith’s right to jury unanimity because even if burglary is an alternative means crime, the State elected the means that was supported by substantial evidence.**

A defendant has a right to jury unanimity. But a defendant’s right to a particularized “expression of jury unanimity” as to the means or act(s) that constitute the crime for which the defendant has been convicted is limited. *Sandholm*, 184 Wn.2d at 732; *Woodlyn*, 188 Wn.2d at 164; *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). For example, in order to ensure unanimity in “multiple acts cases” where “several acts are alleged and any one of them could constitute the crime charged,” the State must “elect the particular act upon which it will rely for conviction” or the trial court must “instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt” (the

*Petrich*<sup>16</sup> instruction). *Kitchen*, 110 Wn.2d at 409, 411. In either case—election or *Petrich* instruction—there is no requirement that the jury provide a particularized expression of unanimity as to which act it chose to convict the defendant. *Id.* at 409-411.

In alternative means cases, “where a single offense may be committed in more than one way, there must be unanimity as to *guilt* for the single crime charged.” *Id.* at 410 (emphasis in original). The right to jury unanimity in alternative means cases is ensured where “substantial evidence supports each alternative means” charged. *Id.* (citations omitted). Where “there is insufficient evidence to support *any* of the means,” however, courts generally require “a particularized expression of jury unanimity,” e.g., a special verdict form, unless “a reviewing court . . . can rule out the possibility the jury relied on a charge unsupported by sufficient evidence.” *Woodlyn*, 188 Wn.2d at 165 (internal quotation omitted) (citing *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)).

Courts reviewing claims involving juror unanimity “are confronted with competing concerns.” *Id.* at 163. For one, “[t]he purpose of unanimity is to secure the integrity and reliability of jury deliberations and

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<sup>16</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

verdicts.” *Id.* But, “[o]n the other hand, if a jury must specifically articulate its unanimous agreement as to each element, sub element, and relevant fact before it can convict, a defendant might go free even though the jury unanimously agrees that he or she behaved criminally.” *Id.* In balancing these concerns, our Supreme Court has concluded that the aforementioned ideas of “election,” the *Petrich* instruction, or a particularized expression of jury unanimity can all serve to ensure that jurors will not improperly rely on other acts or means in determining a defendant’s guilt. *Woodlyn*, 188 Wn.2d at 165-66; *Kitchen*, 110 Wn.2d at 409, 410-12; *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990).

- a. A defendant’s right to jury unanimity in an alternative means case is not violated where a prosecutor elects the “means” for which the defendant should be convicted.

It is well-settled that in “multiple acts” cases where “several acts are alleged and any one of them could constitute the crime charged,” that a defendant’s right to jury unanimity is not violated so long as the State “elect[s] the particular act upon which it will rely for conviction” *Kitchen*, 110 Wn.2d at 409, 411; *State v. Lee*, --- Wn.App.2d ----, 460 P.3d 701, 709 (2020). Either election, or the giving of a *Petrich* instruction, avoids “the risk that jurors will aggregate evidence improperly.” *Camarillo*, 11 Wn.2d at 64. On the other hand, a violation occurs if the State fails to elect and no *Petrich* instruction is given because of “the possibility that some

jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen*, 110 Wn.2d at 411.

Election is also an appropriate way to ensure jury unanimity in alternative means cases. *See State v. Lobe*, 140 Wn.App. 897, 905-06, 167 P.3d 627 (2007); *Gonzalez*, 133 Wn.App. at 243 (noting that if “the evidence is insufficient to support both means, either the prosecutor must elect the means supported by the evidence, or the court must instruct the jury to rely on that means during deliberations”) (citation omitted). And while our Supreme Court has not explicitly held that the election of a means in an alternative means case remedies any unanimity concerns, it has recognized that such a concern does not arise if the jury was not presented with alternative means for consideration. *Peterson*, 168 Wn.2d at 771 n.6 (citing *Smith*, 159 Wn.2d at 790). An election requires the jury to consider only the means elected. *Cf. Camarillo*, 115 Wn.2d at 64; *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); *Lee*, 460 P.3d at 708-710.

*Woodlyn* is instructive. *See* 188 Wn.2d 157. There, the defendant was charged with committing second degree theft by alternative means. *Id.* at 159-160. A jury returned a general verdict finding the defendant guilty.

*Id.* At issue was whether a violation<sup>17</sup> of the right to a unanimous verdict is harmless when “no evidence supported one of the alternative means.” *Id.* at 161-62.<sup>18</sup>

*Woodlyn* concluded that where insufficient evidence supports any of the means that ends up before the jury and a general verdict is entered that “a reviewing court is compelled to reverse . . . unless it can ‘rule out the possibility the jury relied on a charge unsupported by sufficient evidence.’” 188 Wn.2d at 165 (quoting *Wright*, 165 Wn.2d at 803 n.12). *No evidence* of an alternative means does not suffice to “rule out” that the jury relied on that means; rather there should be “some form of colloquy or explicit instruction” to meet the standard. *Id.* at 166.

The State explicitly electing the particular means by which it is seeking a conviction “rule[s] out the possibility the jury relied” on the means for which there was no or insufficient evidence just as it rules out other acts for “multiple acts” cases. *Id.* at 165 (internal quotation omitted). This is because the election of the particular act eliminates the “*possibility* that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid

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<sup>17</sup> Again, the violation generally occurs when one of the means is not supported by sufficient evidence. *See id.*

<sup>18</sup> *Woodlyn* later determined that sufficient evidence supported both means. *Id.* at 167-170.

conviction.” *Kitchen*, 110 Wn.2d at 411 (emphasis added); *Camarillo*, 115 Wn.2d at 64 (concluding that the election, or the giving of a *Petrich* instruction, avoids “the risk that jurors will aggregate evidence improperly”).

If an election by the State in a case where there are multiple acts alleged and only one count charged rules out the possibility that the jury will rely on those other acts to convict the defendant—even in, for example, child molestation cases—and, therefore, eliminates any jury unanimity issues. *Carson*, 184 Wn.2d at 210, 227-29. Then by that same principle, in a case where there are alternative means by which the charged crime can be committed, e.g., theft by exerting unauthorized control or theft by deception, an election by the State as to the particular means by which the charged crime *was* committed, should rule out the possibility that the jury relied on the alternative means that was *not* elected and *was* disclaimed by the State and for which there was little or insufficient evidence. Thus, even where there is insufficient evidence of one means before the jury, if a State explicitly elects the means for which there is sufficient evidence there is no violation of a defendant’s right to jury unanimity when a general verdict of guilty is returned.

- b. The prosecutor clearly elected the means by which Smith committed burglary.

“In order for an election to be effective, “the State must tell the jury which act to rely on in its deliberations. . . .” *State v. Carson*, 184 Wn.2d at 207, 227, 357 P.3d 1064 (2015) (quoting *Kitchen*, 110 Wn.2d at 409). This can be as simple as the prosecutor “clearly identify[ing] the act” during closing argument. *Id.* (internal quotation and citation omitted). That said, in electing the act for which the State seeks conviction, the State also “must in some way disclaim its intention to rely on other acts.” *Id.* at 228 n. 15. Nothing more is required, as our Supreme Court has “never held that the State’s election of an act must be ratified by the court or incorporated into the charging document or jury instructions in order to be effective.” *Id.* at 227.

Accordingly, in *Carson*, the prosecutor’s statements in closing argument that it “was only ‘focusing on’” certain incidents and asking the jury “to focus on [those incidents] for the purposes of your deliberations” constituted a sufficiently clear election. 184 Wn.2d at 228-29. More specifically, by telling the jury that certain incidents “were the only acts on which the State was” focusing, the State was disclaiming any “intention to rely on other acts.” *Id.* at 228 n.15, 229.

Here, the State elected the means of residential burglary supported by the evidence and disclaimed any reliance on the unsupported means.

The prosecutor stated in closing argument:

The first element is that on November 17, 2017 the defendant entered or remained unlawfully in her house. *And here the issue is that he remained unlawfully. It wasn't his entry that was unlawful.* He'd come over like that before. *But it was his remaining after she told him to leave. That's the part that's unlawful.*

The second element is that the entering or remaining was with the intent to commit a crime against a person or property inside. So remaining unlawfully, your instructions tells you about that. When someone is not invited -- not invited to stay, that is enough. The defendant was not invited. She repeatedly told him to leave. *He was remaining unlawfully.*

It does not matter if he had been to the house 100 times, 1,000 times. He did not live there. We heard from everyone that lived there the defendant never lived there. He didn't have a key. He didn't have – he didn't have unlimited access to the residence.

This was [H.K.'s] home. It is her safe space. She has the right to tell anyone to leave. And that's what she did. The defendant had no reason to stay. More importantly he had no legal reason to stay. There was nothing legal, lawful that permitted him to remain after someone that lived there told him to leave.

With burglary there has to be an intent to commit a crime therein. Now, he did not have to go to the house with a plan to do what he did. 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 330-31. The prosecutor returned to the issue again during the rebuttal closing:

Now, Defense raises this issue of residential burglary that he came in, and she offered him a drink. *That's undisputed. That's all good and fine.* But guess what, whether she invited him in with open arms or he just walked right in, it doesn't matter. She gets to revoke his invitation at any point.

*He doesn't just get to stay because he got in there successfully, legally initially.* The law recognizes that, that people might be invited into a home, things go sideways, and the law protects people. People have the right to be safe in their homes. [H.K.] had the right to have this safe space, to tell the defendant to leave, and the law required him to leave.

RP 355.

These excerpts show that not only was the prosecutor relying solely on Smith's "remaining unlawfully" to support the burglary, but that she also disclaimed any reliance on "entering unlawfully" by fully conceding that Smith had in fact lawfully entered. Accordingly, the State properly elected the means upon which it relied to secure Smith's conviction and Smith's right to a unanimous verdict was not violated.

**III. The trial court properly excluded as irrelevant the evidence that H.K. had been thinking of breaking up with her boyfriend in the months prior to the night that she was sexually assaulted by Smith.**

H.K. and Corey Jones were in a long-term relationship, lived together, and shared a child. RP 149-150, 251-52, 266-67. That was true prior to the incident in question and remained true at the time of Smith's

trial. RP 149-150, 251-52, 266-67. Nonetheless, in the months prior to November 17, 2017 H.K. had confided to Smith's girlfriend that she had been thinking about breaking up with Jones due in part to his frequent partying and not coming home. RP 186-87. H.K. imagined that she would leave Jones and head to the coast. RP 187.

Smith sought to admit through H.K. that she was considering breaking up with Jones. Smith argued to the trial court that "the relevance would be to show again that there was tension in the relationship." RP 188. Smith claimed that the evidence went to H.K.'s "possible bias [and] motivate to fabricate" and when asked "how" by the trial court, Smith responded by mentioning that Jones encouraged H.K. to report the sexual assault to the police and that it's "Defense's position or theory that in fact she [(H.K.)] was concerned that Mr. Jones was upset because he may have believed that this was . . . some sort of cheating encounter. . . ." RP 189. Recognizing the difference between the offer of proof and what Smith proposed as the significance of the evidence, the trial court remarked:

I suppose one -- if you go through two or three I guess leaps of logic, there might be a reason why a person would fabricate something that didn't happen and then . . . immediately call people and say, well you know, I've just been -- had a forcible sexual encounter, and I don't want to you tell my boyfriend about it.

RP 190-91. Ultimately, the trial court ruled that it found that the evidence had no probative value, “lots of potential prejudicial value[,] and” could cause “jury confusion.” RP 190. Consequently, at that point in the trial<sup>19</sup>, the trial court concluded that evidence that H.K. had been contemplating breaking up with Jones in the months prior to the incident was not admissible. RP 189-192.

Smith argues that the trial court erred by excluding this evidence. But due to the infirmity of the offer of proof—the leap it takes to go from the offer of proof to relevant evidence of a motive to fabricate a sexual assault—he cobbles together testimony from other witnesses later in the trial in order to give the offer of proof the relevance it lacked at the time of the court’s ruling. Br. of App. at 13-16. Because the trial court’s ruling was correct, especially at the time it was made, Smith’s claim fails.

a. Offers of Proof

The proponent of evidence bears the burden of establishing its relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981(1986). Often a party seeks to meet its burden by making an offer of proof. “An offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial

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<sup>19</sup> In ruling against Smith, the trial court stated: “So *at least now – based on the state of the record*, it appears to be irrelevant.” RP 190 (emphasis added).

court of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review.” *State v. Burnam*, 4 Wn.App.2d 368, 377, 421 P.3d 977 (2018) (citation omitted). A failure to provide a “sufficiently definite and comprehensive” offer of proof is fatal to “obtain[ing] appeal review of trial court action excluding evidence.” *State v. Song Wang*, 5 Wn.App.2d 12, 26-27, 424 P.3d 1251 (2018).

b. The Standard of Review for Excluding Defense Evidence

Appellate courts employ a two-step standard of review when a defendant claims that an evidentiary ruling resulted in a violation of his or her right to present a defense. *State v. Arndt*, --- Wn.2d ----, 453 P.3d 696, 703 (2019) (citing *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)). First, the trial court’s evidentiary rulings are reviewed for an abuse of discretion and then “the constitutional question of whether these rulings deprived [the defendant] of [his or] her Sixth Amendment right to present a defense” is reviewed de novo. *Id.* RP 403-05. A court abuses its discretion when “no reasonable person would take the view adopted by the trial court.” *Clark*, 187 Wn.2d at 648 (internal quotation omitted).

Defendants have a constitutional right to present a defense. *Arndt*, 453 P.3d at 703. Demonstrating a key witness’s bias or motive to lie has

long been deemed an important element of a defendant's right to present a defense. *State v. Perez-Valdez*, 172 Wn.2d 808, 814-17, 265 P.3d 853 (2011); *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). The right to present a defense is not absolute, however, as defendants do not have a "constitutional right to present irrelevant evidence." *Burnam*, 4 Wn.App.2d at 376. More pointedly, our Supreme Court has remarked that "judges 'must not abdicate our gatekeeping role by receding from difficult decisions and letting the jury decide how much weight to give to evidence that is in fact irrelevant.'" *Arndt*, 453 P.3d at 710-11 (quoting *State v. Ellis*, 136 Wn.2d 498, 540, 963 P.2d 843 (1998)). Consequently, a defendant's right to present a defense is still "subject to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Blair*, 3 Wn.App.2d 343, 415 P.3d 1232 (2018) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973)). For example, a defendant must still inform "the trial judge of the specific nature of the offered evidence" and cannot just provide "repeatedly vague" offers of proof and still be heard to complain later that his right to present a defense was violated when such evidence is excluded. *Burnam*, 4 Wn.App.2d at 377-78.

Accordingly, the constitutional right to present a defense does not mean that any and every bit of relevant evidence offered by the defense in support of its theory *is required* to be admitted. *Arndt*, 453 P.3d at 711-12; *State v. Perez-Valdez*, 172 Wn.2d 808, 814-16, 265 P.3d 853 (2011). In other words, a court may “properly exercise[] its gatekeeping function” and limit the evidence presented by the defense, even significantly, without violating a defendant’s right to present a defense when the defendant was still “able to present relevant evidence supporting [his or] her central defense theory.” *Id.*; *Perez-Valdez*, 172 Wn.2d at 816. Thus, in determining whether the exclusion of defense evidence “violated the defendant’s Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record creates a reasonable doubt that did not otherwise exist.” *State v. Duarte Vela*, 200 Wn.App. 306, 326, 402 P.3d 281 (2017).

Here, Smith’s offer of proof through H.K. was insufficient to establish relevance. That H.K. in the months prior to the incident confided in a girlfriend of hers (and Smith’s significant other) that she was contemplating leaving Jones due to his frequent partying does not provide a motive to fabricate the allegation against Smith. And Smith’s wandering trial court argument, which started from the inert claim that “tension in the relationship” provided a “motive to fabricate” and moved to claims that

“Jones encouraging [H.K.] to come forward to the police” and H.K. “being upset that she had heard that Mr. Smith was denying the accusations,” somehow bolstered this “motive to fabricate,” cannot transform the offer of proof from something relatively vague and benign into something that somehow significantly undermined H.K.’s credibility. RP 188-190.

Smith’s current attempt to salvage the offer of proof likewise fails. In arguing that the trial court erred, Smith relies on later questioning of Jones regarding a cheating allegation<sup>20</sup>, testimony from H.K.’s coworker about the same stemming from a partially overheard phone call between Jones and H.K., and H.K.’s later denial of receiving a phone call from Jones at work before confiding in her coworker about the sexual assault. Br. of App. at 13-16 (citing RP 215, 264, 282-88). But evidence that Jones may have accused H.K. of cheating days after the incident is straightforwardly not the same evidence Smith claimed he was planning on eliciting through H.K. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985) (generally courts do not consider new theories of admissibility on appeal).

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<sup>20</sup> The basic claim is that Jones called H.K. at work and accused her of cheating on him with Smith on the night in question. Smith, however, told a detective that on the night in question he showed up at the house learned that Jones was not there and left. RP 304. There was no evidence presented at trial that Smith believed or told others that he had a consensual sexual encounter with H.K. *See* RP.

This cheating allegation was not at all explored with H.K. during the earlier offer of proof and only briefly mentioned by Smith as a “theory,” though in a way entirely untethered to H.K.’s testimony. RP 186-89. Importantly, however, Smith acknowledges that the trial court first prohibited testimony about the cheating allegation before changing course and allowing some defense exploration of the issue after ruling that the State had opened the door. Br. of App. at 13; RP 285-87. Thus, assuming the later testimony and evidentiary rulings made H.K.’s thoughts of leaving Jones relevant, it was incumbent on Smith to re-seek admission based on the changed legal landscape. *See State v. Rushworth*, --- Wn.App.2d ----, 458 P.3d 1192, 1196-97 (2020); *State v. Carlson*, 61 Wn.App. 865, 875, 812 P.2d 536 (1991); *State v. Gefeller*, 16 Wn.2d 449, 455, 458 P.2d 17 (1969). That evidence was later developed, in a way that was not presented to the trial court, cannot form the basis of finding error. *See Carlson* 61 Wn.App. at 875.<sup>21</sup>

Even if, however, some relevance existed in the evidence that H.K. was considering leaving Jones, the trial court did not abuse its discretion in concluding that the danger of prejudice and jury confusion outweighed the probative value of it. Moreover, the trial court did not deny Smith his

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<sup>21</sup> In ruling against Smith, the trial court stated: “So *at least now* – based on the state of the record, it appears to be irrelevant.” RP 190 (emphasis added).

constitutional right to present a defense because such a right does not mean that any and every bit of relevant evidence offered by the defense in support of its theory is required to be admitted. *Arndt*, 453 P.3d at 711-12; *Perez-Valdez*, 172 Wn.2d 808 at 814-16. This precept applies here because Smith was still “able to present relevant evidence supporting [his] central defense theory” that H.K. was not credible. *Id.*; *Perez-Valdez*, 172 Wn.2d at 816. He did this by ultimately getting admitted Jones’s cheating allegation (despite both Jones and H.K. denying that it occurred), cross-examining H.K. at length, and arguing that she lacked credibility based on her actions and statements after the incident. RP 193-215, 285-88, 340-353. That he also did not get to admit evidence that in the months prior to the incident that H.K. was considering breaking up with Jones did not prevent him from presenting his defense because the “omitted evidence evaluated in the context of the entire record” fails to “create[] a reasonable doubt. . . .” *Duarte Vela*, 200 Wn.App. at, 326. On the contrary, the omitted evidence hardly even advances the defense. Thus, the trial court “properly exercised its gatekeeping function” when it excluded the contested evidence and Smith’s claim otherwise fails. *Arndt*, 453 P.3d at 711-12

**IV. The prosecutor did not commit flagrant and ill-intentioned misconduct during closing argument.**

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). But a prosecutor commits misconduct when he or she improperly shifts the burden of proof to the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453-54, 258 P.3d 43 (2011). In particular, a prosecutor may not argue to jurors that in order to acquit they must be able to say, “I don’t believe the defendant is guilty because,” and then fill in the blank with the reason. *Id.* at 454; *State v. Sakellis*, 164 Wn.App. 170, 185-86, 269 P.3d 1029 (2011) (stating that “[w]e have repeatedly held that the ‘fill-in-the-blank’ argument is improper” but concluding that the prosecutor who made a “fill-in-the-blank” argument did not commit flagrant and ill-intentioned misconduct).

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 *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State*

*v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: “[i]f the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Id.* at 760-61 (citation omitted); *State v. Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Under the 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) (citations omitted).

Here, Smith claims that a single statement by the prosecutor during her rebuttal constitutes flagrant and ill-intentioned misconduct that could not have been cured by an instruction and equates the statement to the prohibited “fill-in-the-blank” argument. Br. of App. at 18-19. That statement by the prosecutor, to which Smith did not object, is as follows:

At the end of the day if you believe beyond a reasonable doubt that this happened, that the defendant sexually assaulted [H.K.] 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). But “within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions,” the State did not commit misconduct and did not make a “fill-in-the-blank” argument. *Dhaliwal*, 150 Wn.2d at 578. Moreover, even assuming a misstatement of the law, Smith cannot show that the misstatement was flagrant and ill-intentioned or that a

curative instruction could not have obviated any prejudice from the statement. Smith's prosecutorial misconduct argument fails.

First, when looking at the context of the State's entire argument, the prosecutor properly described the burden of proof as belonging solely to the State on multiple occasions. RP 328<sup>22</sup>, 338-39<sup>23</sup>, 354.<sup>24</sup> Second, the jury was properly instructed both orally and as part of the jury instructions. RP 321-22; CP 18. Additionally, Smith did not object to the statement or move for a mistrial at any point after the statement was made, which "strongly suggests . . . that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." *Swan*, 114 Wn.2d at 661.

Most importantly, however, the argument did not amount to misconduct or the proscribed "fill-in-the-blank" argument, which *does* shift the burden of proof. Here, the prosecutor stated that:

*At the end of the day if you believe beyond a reasonable doubt that this happened, that the defendant sexually assaulted [H.K.] 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.*

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<sup>22</sup> "As the prosecutor, as the State in this case, it is my burden to prove all of the elements of each of crimes beyond a reasonable doubt. That is my burden, and that is something I embrace."

<sup>23</sup> "I had to prove this case to you, the charges, beyond a reasonable doubt. And your instruction No. 4 tells you what that means."

<sup>24</sup> "There is one thing that Counsel and I agree on, that justice requires that I prove these charges beyond a reasonable doubt. That's absolutely true."

RP 357 (emphasis added). The prosecutor did not state that the jury had to come up with a reason to acquit Smith or argue that the defense counsel had a duty or burden to produce evidence or a convincing argument in order for the jury to acquit. The reference to defense counsel's argument is superfluous—if the jury believed Smith committed the crimes beyond a reasonable doubt then the jury believed Smith was guilty, there is no additional showing that needed to be made—and, as a result, confusing. But the reference does not amount to flagrant and ill-intentioned misconduct since the statement does not clearly shift the burden of proof.

Regardless, even assuming misconduct, any prejudice could have been cured by the trial court rereading jury instruction No. 4 (the reasonable doubt instruction) or referring the jury to it upon an objection by defense counsel. This is especially the case here where the State properly characterized its burden on numerous occasions and where defense counsel also correctly discussed the burden of proof to include the fact that “the Defense has no burden to have the defendant, testify, to produce evidence, or anything along those lines.” RP 339-340. It cannot be the case that a single phrase in one sentence “resulted in prejudice that had a substantial likelihood of affecting the jury verdict” and could not have been cured by an instruction. *Emery*, 174 Wn.2d at 760-62. Not

here, where substantial evidence established Smith's guilt. H.K.'s version of events was strongly corroborated by her materially consistent and contemporaneous disclosures to Jones, Garza, and Karr, Garza and Karr's observations of H.K.'s scared and frantic demeanor after the incident, the slight bruising on H.K.'s wrists and arms, Smith's statement placing him at the scene of the incident, and because, contrary to Smith's claim, H.K. did not have a motive to invent a sexual assault allegation against him. Thus, Smith's prosecutorial misconduct claim fails.

**V. The trial court properly exercised its discretion by applying the burglary anti-merger statute to punish Smith for each of his crimes.**

The burglary anti-merger statute codified at RCW 9A.52.050 states that "[e]very 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." The plain language of the burglary anti-merger statute "shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both." *State v. Elmore*, 154 Wn.App. 885, 900, 228 P.3d 760 (2010) (citing *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *State v. Bonds*, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982)).

Similar to the merger doctrine, when a defendant is convicted of two or more crimes the sentencing court "may enter[] a finding that some

or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589(1)(a). A court will consider two or more crimes the “same criminal conduct” if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). If the sentencing court finds that the crimes encompass the same criminal conduct “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

*State v. Lessley* recognized that the two statutes, the burglary anti-merger statute and the same criminal conduct statute, appear to conflict when two committed crimes encompass the same criminal conduct, but one of the crimes is a burglary and the other is committed during the burglary. 118 Wn.2d 773, 779-782, 827 P.2d 996 (1992). That is, the anti-merger statute would allow the judge to punish each crime separately, whereas the same criminal conduct statute would require the two crimes to be counted as one for the purposes of sentencing.

*Lessley* resolved this apparent conflict by holding that the “the antimerger statute gives the sentencing judge discretion to punish for burglary” and an additional crime “even where it and an additional crime encompass the same criminal conduct.” 118 Wn.2d at 781. “This result accords with the well-established rules that the more specific statute

controls over a conflicting, more general statute.” *Id.* at 781. Thus, “even when the trial court decides that the defendant’s crimes constitute the same criminal conduct, it has discretion to punish for each crime under the burglary antimerger statute.” *State v. Davis*, 90 Wn.App 776, 783, 954 P.2d 325 (1998); *Lessley*, 118 Wn.2d at 781-82. As a result, “[a] defendant who commits multiple crimes after breaking into a home should not be able to escape a more serious offender score.” *Id.* at 782.

Here, the trial court properly exercised its discretion pursuant to the burglary anti-merger statute to punish Smith for each of his crimes. The State explicitly argued that it was “relying on the burglary antimerger statute” to score the crimes against each other and asked the court “to find that the antimerger statute applies.” RP 369, 373-74. The State did not make an alternative argument based on whether the crimes were, or were not, the same criminal conduct. RP 369, 373-74. Smith, on the other hand, argued that “obviously [] these two current offenses are the same criminal conduct,” but recognized that “the burglary antimerger statute is implicated,” and asked the court “to employ [its] discretion here and not apply the statute.” RP 374-75.

The trial court responded to the arguments stating:

Well, I did have a chance to review the statute and the cases that were indicated by counsel. It is discretionary with the Court in situations like this where both the substantive crime

and the burglary are charged. And looking closely at the information and . . . the testimony that I heard at the time of the trial, it appears to me that it's appropriate that the matters not merge, and they be treated as separate criminal conduct.

RP 376. Thus, the trial court exercised the discretion afforded it and applied the burglary anti-merger statute to punish Smith for each crime.

Smith's argument otherwise fails.

**VI. Smith is correct that remand is required to strike the provision imposing interest on his legal financial obligations.**

RCW 10.82.090(1) prohibits interest accrual on “nonrestitution legal financial obligations.” *State v. Lundstrom*, 6 Wn.App. 2d 388, 396 n. 3, 429 P.3d 1116 (2018). Because the trial court sought to strike or waive all discretionary LFOs and was not permitted to allow for interest accrual on nonrestitution LFOs, this Court should remand the matter to the trial court to strike the interest accrual provision in the judgment and sentence. CP 60, 63-65.

**VII. Smith's personal restraint petition fails to establish he is under unlawful restraint or advance an argument under which he is entitled to relief.**

Smith claims that he is in possession of “newly discovered evidence” in the form of his “google maps history” from “November 17, 2017.” PRP at 1. Smith's evidence, his Google Maps Timeline, can “reflect the places you have gone with the devices in which your account

is logged-in and which are reporting location.”<sup>25</sup> Smith argues that this evidence ultimately shows that he “was at home when the complaining witness H.K. testified to when she was assaulted.” PRP at 2-5.

First, this evidence cannot be considered newly discovered since it was always accessible to Smith.<sup>26</sup> Second, a user’s Google Maps Timeline and associated location history can be paused, edited, and/or deleted by the user at any time.<sup>27</sup> Third, Smith has not provided any evidence that he had his cellphone in his possession at all relevant times on November 17, 2017. And lastly, the Google Maps Timeline does not appear to contradict H.K.’s testimony—both H.K. and Smith estimate that Smith arrived at her residence at around 8:00 PM on the evening she alleged that he sexually assaulted her—since it only suggests that Smith was at Zupan’s Markets in Portland from 10:12 AM to 12:06 PM and that he arrived home at 8:39 PM. RP 197; PRP at 2-3, 6. The Timeline, for whatever reason, does not include Smith’s stop at Andrew Luna’s house or at H.K.’s home. PRP at 6. Consequently, the evidence is in no way exculpatory and fails to establish

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<sup>25</sup> <https://perma.cc/7YV9-Q25S> (Help page for Google Maps Timeline) (last visited May 16, 2020).

<sup>26</sup> <https://perma.cc/7YV9-Q25S> (Help page for Google Maps Timeline) (last visited May 16, 2020).

<sup>27</sup> <https://perma.cc/V5TT-TJN9> (Help page for Google Location History) (last visited May 16, 2020); <https://perma.cc/7YV9-Q25S> (last visited May 16, 2020).

that Smith is under unlawful restraint or entitled to relief. Smith's PRP should be denied.

**CONCLUSION**

For the reasons argued above, Smith's convictions and sentence should be affirmed, but his case should be remanded to the trial court to strike the provisions imposing interest on his LFOs.

DATED this 18<sup>th</sup> day of May, 2020.

Respectfully submitted:

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