

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35109-2-III

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STATE OF WASHINGTON, Respondent,

v.

OMAR LOPEZ, Appellant.

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

In his trial for possessing a stolen vehicle, criminal trespass, and having burglary tools, Omar Lopez requested a jury instruction that a visitor has an implied license to enter onto residential property and approach the front door, in support of his argument that he did not enter the property unlawfully. The trial court's refusal of his proposed instruction deprived him of the opportunity to argue his defense. Then, during closing argument, the prosecuting attorney requested the jury to draw adverse inferences from Lopez's failure to testify to argue that he knew the vehicle he was in was stolen. These errors require reversal.

## II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in declining to give Lopez's proposed instruction on the implied license to approach a homeowner's front door.

ASSIGNMENT OF ERROR NO. 2: The prosecuting attorney committed prejudicial misconduct in closing argument by drawing adverse inferences from Lopez's decision not to testify.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE NO. 1:** When Lopez proposed an instruction that correctly stated the law and was necessary to present his defense that he had an implied license to enter the property, was it error to refuse the instruction?

**ISSUE NO. 2:** When the prosecutor urges the jury to infer ownership of property in the defendant's possession by arguing that they did not hear testimony that the defendant owned it, does the prosecutor invite the jury to draw improper inferences from the defendant's decision not to testify?

### **IV. STATEMENT OF THE CASE**

On November 29, 2016, Hector Guzman awoke to find his Jeep Cherokee was missing. RP (Trial)<sup>1</sup> at 43-44. A number of items had been left in the Jeep, including some clothing, a screwdriver, and a slingshot, as well as some larger items including a three-ton lift and an eight-foot chain. RP (Trial) at 45, 48, 49, 56. Guzman did not see who took the truck. RP (Trial) at 52.

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<sup>1</sup> The verbatim reports of proceedings in this case consist of two consecutively paginated volumes of trial proceedings, and a separate volume containing the sentencing proceedings paginated non-consecutively to the trial. For clarity, this brief will refer to the transcripts by volume number (where applicable) and the name of the hearing transcribed as (Trial) and (Sentencing), followed by the page number.

The following day, Darin Smith was on duty as chief of the Royal City Police Department. I RP (Trial) at 84-85. While on patrol around noon, he drove past his parents' house and saw a Jeep Cherokee turn into the driveway. I RP (Trial) at 86-87. He did not recognize the Jeep, so he turned around and saw a man walking toward the sidewalk that led to the house. I RP (Trial) at 89-90. Smith turned around again to park and contact the man. I RP (Trial) at 90. He saw that the driver's door of the Jeep was ajar, and he did not see anybody else nearby. I RP (Trial) at 91. The man was walking back from the house, but as Smith pulled up, he ran away. I RP (Trial) at 91.

Smith immediately called dispatch with the license plate number on the Jeep and drove toward where he believed the man had run. I RP (Trial) at 92. He parked in an area where he could see in several directions and would spot somebody going back to the Jeep. I RP (Trial) at 96. A K9 unit was asked to respond to the scene. I RP (Trial) at 98. Smith directed another officer to search along a canal bank and after he left, Smith walked back toward the house and saw fresh shoe prints in the grass. I RP (Trial) at 101-02. Following the footprints to the corner of the house, he heard a noise behind him. I RP (Trial) at 102-03. At that point, Smith approached an access to the crawl space underneath the house and saw a man in coveralls hiding inside. I RP (Trial) at 103, 105. The man

had a screwdriver and a slingshot in his pocket. I RP (Trial) at 106, 207.

He identified the man as Omar Lopez. I RP (Trial) at 105.

Police contacted Guzman who confirmed the Jeep had been stolen. II RP (Trial) at 238-39. The State charged Lopez with possessing a stolen motor vehicle, possessing burglary tools, and criminal trespass in the second degree. CP 25-26. At trial, Lopez requested two instructions concerning the trespass charge, including an instruction consistent with WPIC 19.07 and an instruction based on *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), stating that a visitor has an implied license to enter onto residential property and approach a homeowner's front door. CP 20, 27. The trial court gave the WPIC instruction, but refused the *Jardines* instruction. CP 52; I RP (Trial) at 130, II RP at 231.

At trial, the homeowners testified that they had gone into Moses Lake on the day in question and they did not know Lopez. I RP (Trial) at 61, 76. The property was not fenced, nor posted with "no trespassing" signs, and the paved walkway from the driveway leads to the back door of the house. I RP (Trial) at 66, 73. Although people did not typically stop by the house, it was not unheard of for farm workers to come there looking for work. I RP (Trial) at 77, 78. At the time of his arrest, Lopez

was wearing work coveralls and rubber-reinforced knit gloves. II RP (Trial) at 225.

The defense contended that Lopez did not know the vehicle was stolen and had only approached the house looking for work. In support of this theory, Lopez pointed to discrepancies between the items found in the Jeep when he was arrested, and the items Guzman had reported missing. The Jeep contained a gas can and a stolen mountain bike that Guzman did not claim, and other items that Guzman reported had been in the Jeep were not recovered. I RP (Trial) at 56, 193, II RP (Trial) at 209. Police did not find any dominion and control items in the truck belonging to Lopez. II RP (Trial) at 246.

Lopez did not testify. II RP (Trial) at 315-16. In closing argument, the State argued that Lopez knew the vehicle was stolen because he had Guzman's screwdriver and slingshot in his pocket when he was arrested. II RP (Trial) at 333. It then pointed to Lopez's failure to testify that the items belonged to him to support its argument, stating:

And also remember what Mr. Guzman said. What Mr. Guzman said was, yes, I had a lot of stuff in there, and I recognize that screwdriver that was on Mr. Lopez's person, it was on his person, and a slingshot, that did not -- you heard no evidence whatsoever that that belonged to Mr. Lopez. What you heard was uncontested testimony that that

was Mr. Guzman's. Nobody else came in and said, that was my stuff.

II RP (Trial) at 333.

The jury convicted Lopez of criminal trespass and possessing a stolen vehicle, but acquitted him of possessing burglary tools. CP 57-59; II RP (Trial) 372-76. Lopez stipulated to his history and offender score, and the trial court sentenced him to a midpoint term of 16 months' imprisonment. CP 63-64, RP (Sentencing) 4-5. The court imposed \$800 in mandatory legal financial obligations. CP 67, RP (Sentencing) 7. Lopez now appeals, and has been found indigent for that purpose. CP 79, 84.

## V. ARGUMENT

1. The trial court's refusal of Lopez's proposed instruction deprived him of the ability to present his defense.

The instruction proposed by Lopez was necessary to argue his defense that he legally entered the property as an ordinary invitee. Denying the instruction fatally limited his argument. Accordingly, the conviction should be reversed.

Each side of a criminal case is entitled to have the jury instructed on its theory of the case if there is evidence to support the theory, and

failure to so instruct is reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997) (citing *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)). “Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), *review denied*, 170 Wn.2d 1022 (2011) (citing *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)).

Consequently, an instruction that presents a defense theory of the case should be refused only where the theory is completely unsupported by the evidence. *Koch*, 157 Wn. App. at 33.

Appellate courts review a trial court’s refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. Ponce*, 166 Wn. App. 409, 412, 269 P.3d 408 (2012) (citing *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, do not mislead the jury, and when read as a whole, they properly inform the jury of the applicable law. *State v.*

*Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); *Barnes*, 153 Wn.2d at 382.

It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995); *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968); *Ponce*, 166 Wn. App. at 419 (refusal to instruct on diminished capacity was reversible error; generalized instruction on criminal intent was not sufficient to apprise the jury of the effect of diminished capacity on intent); *State v. Conklin*, 79 Wn.2d 805, 807–08, 489 P.2d 1130 (1971) (voluntary intoxication defense instruction was required where supported by evidence; instruction that “intent to defraud” was a necessary element was insufficient); *State v. Gilcrist*, 15 Wn. App. 892, 895, 552 P.2d 690 (1976), *review denied*, 89 Wn.2d 1004 (1977) (error to refuse to instruct on involuntary intoxication defense)). Only where the theory is completely unsupported by evidence should the trial court should deny a requested jury instruction that presents a theory of the defendant's case. *Koch*, 157 Wn. App. at 33 (*citing Barnes*, 153 Wn.2d at 382).

When an instructional error jeopardizes the constitutional right to present a defense, the burden is on the State to show beyond a reasonable doubt that the jury's verdict would not have been different. *Koch*, 157 Wn. App. at 40 (citing *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)); *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Whether the refusal to specifically instruct on a theory of defense would prevent the instructions as a whole from correctly apprising the jury of the law or prevent the defendant from arguing his defense theory determines the harmfulness of the error. *See Rice*, 102 Wn.2d at 123 (without instruction on intoxication defense jury "was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory"); *State v. Turner*, 16 Wn. App. 292, 555 P.2d 1382 (1976) (when instructions considered as a whole permit a party to argue his theory of the case, then it is not error to refuse to give other requested instructions).

In *Koch*, the State charged the defendant with manslaughter and criminal maltreatment for failing to provide necessary care to his elderly father, who had a history of vehemently refusing assistance and treatment. 157 Wn. App. at 26-27. Koch's theory of defense was that forcing unwanted treatment upon his father would have constituted an assault and requested an instruction on language derived from case law that forcing unwanted treatment could constitute an assault. *Koch*, 157 Wn. App. at

28. The trial court declined the instruction and instructed the jury according to the Washington Pattern Jury Instructions. *Id.*

In reversing Koch's conviction, the Court of Appeals observed that the instructions did not allow the jury to consider the ramifications of the history between the parties and the possibility of a defense to the charge. *Koch*, 157 Wn. App. at 35. It noted that the language in the definitional instructions did not adequately inform the jury that it could consider the past history of refusal, and failed to inform the jury that the decedent had a right to be free from unwanted bodily invasion through forced care. *Id.* at 37. Furthermore, the refusal to give the instruction rendered the defendant unable to negate the mental state element. *Id.* at 39-40.

Here, it is unclear whether the trial court denied Lopez's instruction for factual or legal reason. However, under both standards, the instruction should have been given. Legally, the instruction accurately stated the law. In *Jardines*, the Court recognized that there is an implicit license to approach the home by the front path and knock on the door, an invitation that is "managed without incident by the Nation's Girl Scouts and trick-or-treaters." 569 U.S. at 9. However, the *Jardines* Court also acknowledged that whether police were within the scope of the implied invitation to approach the house depended on their purpose in doing so,

and invalidated a search based upon a dog sniff around the front area of the house. *Id.* at 3-4, 10.

Washington cases have similarly recognized the existence of an implied license to enter residential property along the path to the front door. *Singleton v. Jackson*, 85 Wn. App. 835, 935 P.2d 644 (1997). In *Singleton*, the court evaluated whether a Jehovah's Witness who approached the front door of a home was a licensee or a trespasser for premises liability purposes. *Id.* at 837. That court adopted the rule that "strangers approaching a private residence may reasonably interpret the presence of a doorbell or a pathway leading to the front door as tacit consent to approach the residence and attempt to contact its occupants," unless there are signs or physical barriers that communicate that the visitor is unwelcome. *Id.* at 840-41, 842.

Then, in *State v. C.B.*, 195 Wn. App. 528, 536-37, 380 P.3d 626 (2016), the Court of Appeals considered a case where the front yard of the house was completely fenced except for a small opening to a pathway that connected the driveway to the front yard, and lay entirely within the fenced area. At no place did the property open to a public sidewalk. *Id.* at 537. The *C.B.* court recognized that the license arises from local customs

generally permitting entry, unless and until the owner expresses an unwillingness to allow it. *Id.* at 541.

Factually here, the house was located in a rural area surrounded by farmland. I RP (Trial) at 62. The property was not fenced, nor were “No Trespassing” signs present that would give notice that entries were unwelcome. I RP (Trial) at 66, 73, 79. A sidewalk led from the driveway to an entrance to the house. I RP (Trial) at 71-72. On occasion, farm workers come onto the property looking for work. I RP (Trial) at 78. When Lopez approached the home, he did so along the driveway and the path that led to the door. I RP (Trial) at 89-90. He was wearing work coveralls and gloves. II RP (Trial) 225.

Under these circumstances, the jury could have concluded that Lopez’s initial entry onto the property was lawful because he entered with the purpose to look for work. The proposed instruction was necessary for the defense to effectively argue that the entry did not constitute a trespass. The instruction the trial court gave instructed the jury only that the entry was not a trespass if “the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.” CP 52. But this instruction was inadequate to inform the jury that the defendant may

reasonably rely upon local custom and the openness of the property to approach the entry to an unfenced home along a designated walkway. Consequently, the refusal to give the *Jardines* instruction failed to allow Lopez to effectively argue his defense.

Because Lopez's ability to argue his defense was undermined by the refusal to give the instruction, the refusal was not harmless. *See Rice*, 102 Wn.2d at 123. Accordingly, the conviction should be reversed.

2. The prosecuting attorney committed flagrant misconduct in closing argument by inviting the jury to draw adverse inferences from Lopez's decision not to testify.

The case that Lopez knew the Jeep was stolen was circumstantial, and the prosecutor relied upon his possession of items that Guzman had claimed belonged to him as proof. But the prosecutor crossed the permissible boundaries of this argument when she asked the jury to consider that nobody else had testified to claim the property was theirs. II RP (Trial) at 333. Because the items were in Lopez's possession, this statement plainly referred to Lopez's failure to take the stand and claim the items himself. As such, the argument invited the jury to infer that the

items belonged to Guzman because Lopez did not testify that they were his. This invitation to draw an adverse inference from Lopez's decision not to testify was flagrantly improper and warrants reversal.

A claim of prosecutorial misconduct requires the defendant to show that the prosecutor's conduct was both improper and prejudicial, considering the context of the record as a whole and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). When the defendant has objected at trial, the burden is then to show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). When there is no objection, however, the defendant must show that the misconduct was so flagrant and ill intentioned that no curative instruction could have cured the prejudice. *Emery*, 174 Wn.2d at 760-61; *Korum*, 157 Wn.2d at 650 (quoting *Stenson*, 132 Wn.2d at 719). Employing arguments that have been deemed improper in prior published opinions can be deemed flagrant and ill-intentioned. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

Courts should evaluate misconduct considering the effect it produced. *Emery*, 174 Wn.2d at 762 (quoting *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). The question is whether the jury has been so prejudiced or inflamed as to prevent the defendant from receiving a fair trial. *Id.* (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 434 (1932)). In reviewing the record, the court considers the prosecutor's remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Prosecuting attorneys, as representatives of the people, "have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). A prosecuting attorney may not call the jury's attention to matters or considerations that the jury has no right to consider. *State v. Belgarde*, 110 Wn.2d 504, 508-09, 755 P.2d 174 (1988).

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *Fleming*, 83 Wn. App. at 215. A prosecuting attorney violates a defendant's Fifth Amendment rights when he argues in a manner that the

jury would naturally and necessarily accept the argument as a comment on the defendant's decision not to testify. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995); *see also Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (“the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.”). A prosecutor may refer to testimony as undenied or evidence as undisputed, so long as the comments are “so brief and so subtle that they do not emphasize the defendant's testimonial silence” and do not refer to who could have denied it. *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987).

In *Fiallo-Lopez*, the State argued that there was no evidence to explain the defendant's presence at two locations at the time of anticipated drug deals or why he had contact with a drug dealer at both places. 78 Wn. App. at 729. The State further contended that the defendant did not attempt to rebut its evidence of his involvement in a drug deal. *Id.* There, the court held that the argument highlighted the defendant's silence because no one besides the defendant “could have offered the explanation the State demanded.” *Id.* Accordingly, the argument constituted misconduct, although the error was determined harmless in light of the evidence of guilt. *Id.*

In another case, the Court of Appeals found improper an argument by the State that had another person besides the defendant had a motive to kill the victim, the defense would have found out about it and said something about it. *State v. Sargent*, 40 Wn. App. 340, 346, 698 P.2d 598 (1985), *reversed on other grounds*, 111 Wn.2d 641, 762 P.2d 1127 (1988). Because the argument drew attention to the defendant's failure to testify and the remaining evidence was not overwhelming, the argument in *Sargent* was both erroneous and harmful. *Id.* at 347.

Here, the prosecutor's arguments that "[Y]ou heard no evidence whatsoever that that belonged to Mr. Lopez," and "Nobody else came in and said, that was my stuff," are analogous to the arguments found improper in *Fiallo-Lopez* and *Sargent* because only Lopez could have given the testimony the State demanded. Had the prosecutor limited her comments to the observation that Guzman's testimony was uncontroverted, they likely would have passed constitutional muster. But here, she asked the jury to focus on the lack of evidence that the items belonged to Lopez and the fact that he did not testify to claim them. These comments both emphasized the defendant's testimonial silence and referred Lopez as the person who could have denied Guzman's claim of ownership. *Ramirez*, 49 Wn. App. at 336.

The proscription against prosecutorial comments on the defendant's silence was ruled upon by the U.S. Supreme Court more than 50 years ago in *Griffin*, and repeatedly published in Washington state cases thereafter. The prosecutor could not reasonably contend that it was unaware that these arguments are improper. As recognized in *Fleming*, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." 83 Wn. App. at 216. As such, the only reasonable conclusion is that the prosecutor knew the argument was inappropriate and made it anyway. This is the kind of ill-intentioned and malicious argument that taints a trial and cannot be cured even with a timely objection.

Even a flagrant error does not require reversal if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Fiallo-Lopez*, 78 Wn. App. at 729 (*quoting State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988)). But here, the evidence that Lopez knew the Jeep was stolen was not overwhelming. Although the Jeep had been stolen only a short period of time before, there was no evidence that Lopez had committed the theft, and the contents of the Jeep were already substantially changed since it

vanished. I RP (Trial) at 56, 193, II RP (Trial) at 209. No action was taken to conceal the license plates or otherwise prevent the ready identification of the Jeep's ownership, which tended to suggest that the driver was not concerned about being found with it. I RP 92-94, 107-08. The jury could have reasonably believed that Lopez did not take the Jeep but rather obtained it innocently from somebody else, because a person who knew the Jeep was stolen would take steps to prevent its true ownership from being identified.

Because the evidence that Lopez knew the Jeep was stolen was not overwhelming, the prosecutor's argument that Lopez did not testify to explain why he was in possession of the screwdriver and slingshot likely tipped the scale in the jury's consideration. Because there is a reasonable likelihood that the jury would have reached a different result without the improper argument, the conviction should be reversed.

3. Appellate costs should not be imposed.

In the event the court denies Lopez relief on appeal, appellate costs should not be imposed pursuant to RAP 14.2 and this court's general order dated June 10, 2016. He has been found indigent for purposes of appeal,

CP 84, and that presumption continues throughout the proceeding. RAP 15.2(f); *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). Lopez has complied with the requirements of this court's general order, and his report as to continued indigency demonstrates that he has no assets or income from which a cost assessment could be paid. Further, there is no evidence in the record of a substantial change in his financial circumstances. Under these facts, an award of costs is inappropriate under RAP 14.2.

## VI. CONCLUSION

For the foregoing reasons, Lopez respectfully requests that the court REVERSE the convictions for possessing a stolen motor vehicle and second degree criminal trespass, and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 9 day of October, 2017.

  
ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9 day of October, 2017 in Walla Walla,  
Washington.

  
\_\_\_\_\_  
Breanna Eng

**BURKHART & BURKHART, PLLC**

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