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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CHARLES BAKER, aka DANIEL WILSON, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Advanced for the first time on appeal, did the trial court err when it instructed the jury on the permissive burglary inference instruction?

2. With respect to the different intents which may be present during the commission of a residential burglary, was the defendant entitled to a unanimity instruction on the underlying intent to commit a crime if one was not requested or required?

3. Did the deputy prosecutor commit misconduct during closing argument when discussing the permissive inference instruction?

## **II. STATEMENT OF THE CASE**

Charles Baker was convicted by a jury of residential burglary.<sup>1</sup> CP 34. With an offender score of “16” on both residential burglary and possession of a controlled substance convictions, the defendant was sentenced to a prison-based drug offender sentencing alternative. CP 320.

During November 2017, Amirah Dour and Griffin Jorgen were the sole renters on a lease<sup>2</sup> for a home located at 1814 East Fourth Avenue in

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<sup>1</sup> The defendant pleaded guilty to a joined charge of possession of a controlled substance – heroin before the start of trial. No error has been assigned to that conviction. The defendant was sentenced on both the residential burglary and possession of a controlled substance convictions at the time of sentencing.

<sup>2</sup> Several other people had been preapproved and several others without preapproval lived in the home during period of the lease. RP 145-46, 161-63.

Spokane and were in the process of moving out.<sup>3</sup> RP 135-38, 158-61. The lease on the home ended on November 30, 2017. Neither Dour nor anyone else lawfully resided in the home past October 22, 2017. RP 164-66, 187-87. Although not living in the home, Dour paid for the utilities through November 30, 2017. RP 184. Before departing, Dour locked the doors to the home. RP 172.

On November 7, 2017, James Blaine drove by Dour's residence. RP 111. Blaine was a general contractor and had been doing some work at the home. RP 110-11. Blaine observed two unknown males, one later identified as Baker, on the porch smoking a cigarette. RP 111. After Blaine confirmed with the home owner that the sole tenant was Dour, he made contact and was allowed entry into the home by Baker<sup>4</sup> on a ruse. RP 112-13, 121. While in the residence, Blaine observed a broken window in a back bedroom, which had been covered with cardboard. RP 113-14, 129. The window had not been damaged prior to Dour moving out. RP 172-73.

After walking around the home, Blaine, Baker, and the unknown male contemporaneously exited and left the residence. RP 117-18. A short

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<sup>3</sup> Dour occasionally saw Baker in the neighborhood prior to the burglary. RP 164. Dour did not know Baker other than to greet him on the street. RP 164.

<sup>4</sup> At that time, Baker and the unidentified male were still outside. RP 121. Baker produced some keys and allowed Blaine entry into the home. RP 121-22. Dour was uncertain whether she left a house key inside the home when she moved out. RP 175.

time later, Blaine returned to the residence as Baker had been detained inside by the police. RP 119. Baker apologized to Blaine for being inside the home. RP 119. Ultimately, Spokane police arrested the defendant inside the home on November 7, 2017. RP 224.

Baker was not on the lease, never lived at that address, and had been previously barred from the property by the homeowner for an unrelated incident. RP 134-35, 137, 163. In addition, Baker did not have permission to be in the home, to rent the home, to reside in the home or to take any property from the home. RP 139, 167-69, 175-76. No one other than Dour and Jorgen had permission to be in the home on November 7, 2017.

Dour arrived at the rental shortly after the police had detained the defendant. RP 168. A table and chairs had been removed from the home. RP 169. Several items which did not belong to Dour, which included drug paraphernalia, were on her nightstand. RP 170. Additionally, Dour did not recognize some male clothing located in the laundry room and unknown clothes hanging in a bedroom closet. RP 174, 188. The house appeared as if someone had been living in it after it was vacated by Dour. RP 189, 212. Bedding had been placed on an air mattress<sup>5</sup> in the bedroom and, unbeknownst to Dour, the defendant had decorated the house for

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<sup>5</sup> Dour ultimately discarded the air mattress because it had unknown blood and other stains on it, which occurred after she moved out. RP 191-92.

Halloween. RP 188, 191, 206. In addition, a chair had been propped up against the residence's back door to prevent ingress. RP 212. Furthermore, graffiti was written on a cabinet above the washer and dryer and the front door of the home appeared to be "kicked in." RP 170-71, 226.

Prior to the burglary, Baker had remarked to a neighbor, George Hettinger, that he was residing in Dour's home and that he had found a key to the residence. RP 202. The neighbor told Baker it was unwise for him to stay in the home. RP 203. Baker remarked he would contact the owner to see if he could rent it. RP 203. Hettinger observed the defendant take the garbage out for collection while he resided in Dour's home. RP 205.

### III. ARGUMENT

#### **A. RAP 2.5 PRECLUDES THE DEFENDANT FROM ARGUING, FOR THE FIRST TIME ON APPEAL, THAT THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY REGARDING THE "PERMISSIVE INFERENCE" INSTRUCTION. THE STATE PRESENTED SUFFICIENT EVIDENCE, INDEPENDENT OF THE PERMISSIVE INFERENCE INSTRUCTION, OF THE DEFENDANT'S INTENT TO COMMIT A CRIME AGAINST PERSON OR PROPERTY WHILE HE UNLAWFULLY RESIDED IN THE RESIDENCE.**

Baker alleges the trial court erred when it instructed the jury on the permissive burglary inference. *See* Appellant's Br. at 6-8. The defendant essentially argues the State failed to prove that he intended to commit a crime against a person or property while unlawfully residing in the

residence and the intent to commit a crime against a person or property only flowed from his unlawful presence in Dour's home.

*Standard of review.*

An appellate court reviews error of law challenges to jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

At the time of trial, the jury was instructed, in pertinent part, on the elements of residential burglary:

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

- (1) That on or about the November 7, 2017, the defendant entered or remained unlawfully in a dwelling;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

CP 121. *See* RCW 9A.52.025.<sup>6</sup>

Without objection, the jury was also instructed regarding the statutory, permissive burglary inference:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not

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<sup>6</sup> The jury was also instructed on the lesser included offense of first degree criminal trespass. CP 127-29.

binding upon you and it is for you to determine what weight, if any, such inference is to be given.

RP 266, 280; CP 126; WPIC 60.05.<sup>7</sup>

In any burglary prosecution, if a person enters or remains unlawfully in a building, it may be inferred that the person acted with intent<sup>8</sup> to commit a crime against a person or property. RCW 9A.52.040. The inference is permissive rather than mandatory. *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). The State may use permissive inferences to assist it in meeting its burden of proof. *Cantu*, 156 Wn.2d at 826.

The standard of proof regarding a permissive inference is that the inferred fact more likely than not flowed from the proven fact. *Id.* “[W]hen permissive inferences are only part of the State’s proof supporting an element and not the ‘sole and sufficient’ proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact.” *Id.* at 826. However, the State is still required to persuade the jury that the inference follows from the proven facts. *State v. Sandoval*, 123 Wn. App. 1, 5, 94 P.3d 323 (2004).

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<sup>7</sup> The instruction has been approved by the Supreme Court. *See State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006), *as amended* (May 26, 2006); *State v. Handran*, 113 Wn.2d 11, 19, 775 P.2d 453 (1989); *State v. Bergeron*, 105 Wn.2d 1, 19, 711 P.2d 1000 (1985).

<sup>8</sup> “A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a).

1. *RAP 2.5(a)*.

It is a fundamental principle of appellate jurisprudence in Washington that a party may not assert a claim on appeal that was not first raised at trial. *RAP 2.5(a)*; *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied under *RAP 2.5*, which “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Id.* at 749. This rule discourages a party from not addressing the issue at trial and not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seeking a new trial on appeal. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006). Here, the defense did not object to the “permissive inference” instruction, despite CrR 6.15(c) requiring timely, specific objections to jury instructions approved or rejected. RP 266, 280.

To raise an error for the first time on appeal, the error must be “manifest” and affect a constitutional right. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *RAP 2.5(a)(3)*. The defendant must further show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error “manifest” and allows review.<sup>9</sup> *Kirkman*, 159 Wn.2d at 926-27. To demonstrate actual

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<sup>9</sup> Specifically regarding *RAP 2.5(a)(3)*, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not

prejudice, the appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Our Supreme Court has made clear that “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.* at 99-100.

Here, Baker, having failed to identify or argue how his claim implicates a constitutional right, fails to meet the first part of the test to qualify for the RAP 2.5(a)(3) exception. He also fails to establish the second part of the test because he neither argues nor demonstrates that the claimed instructional error was “manifest.” Finally, Baker fails to identify or discuss a “practical and identifiable consequence” at trial. This Court should decline to address this issue.

2. *The “permissive inference” instruction was not the “sole and sufficient basis for finding guilt” as there was sufficient evidence independent of the inference.*

Notwithstanding that the defendant has not established a manifest constitutional error allowing him to raise this issue for the first time on appeal, sufficient underlying facts were presented to the jury from which it

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litigated below.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (internal quotation and citation omitted).

could have inferred Baker's intent to commit a crime inside the residence. Appellate courts evaluate the propriety of a permissive inference instruction on a case-by-case basis considering the evidence presented by the prosecution. *State v. Hanna*, 123 Wn.2d 704, 712, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994).

Criminal intent may be inferred when the defendant's conduct and the surrounding facts "plainly indicate such an intent as a matter of logical probability." *State v. Woods*, 63 Wn. App 588, 591, 821 P.2d 1235 (1991). For example, in *State v. Brunson*, 76 Wn. App. 24, 31, 877 P.2d 1289 (1994), *aff'd*, 128 Wn.2d 98 (1995), the defendant was convicted of residential burglary. Brunson argued on appeal that outside of his unlawful entry into a home, there was no evidence he intended to commit a crime while inside the home. *Id.* at 30-31. When the defendant was confronted by the home owner inside the home, the defendant lamented that he only wanted to use the phone. *Id.* at 31. Division One found this statement was an admission of the defendant's criminal intent to commit theft of services and the conviction was affirmed.

Here, the challenged jury instruction was not the sole evidence of the defendant's intent. There was considerable other evidence to establish Baker's intent to commit a crime. The jury was able to consider: a bedroom window was broken presumably for ingress and egress by the defendant

before ostensibly finding a key to the residence; a dining room table and chairs were stolen from the residence; there was physical damage to the front door of the residence; and a cabinet above the washer had graffiti written on it.

In addition, notwithstanding the physical damage to the home and theft of property, the jury in the present case could have easily resolved that the defendant intended to commit a theft inside the home by his continued use of the water, gas and electric utilities paid for by Dour. Contrary to defendant's argument, a utility bill for water, gas and electricity is not static, but is measured by the amount of water, gas and electricity used for a given period. It is uncontroverted that the defendant admittedly lived in the home and used those services in late October to early November 2017, and that he did not pay for them; rather, Dour paid the utilities during that period. At a minimum, the defendant committed a theft of the water, gas and electric utilities paid for by Dour, while he entered and unlawfully resided in her home.

The trial court did not err when it instructed the jury on the permissive burglary inference. There was direct evidence that Baker intended to and did commit the crime of third degree theft, in conjunction with other crimes, while he unlawfully entered, remained and resided in the residence. As such, there were sufficient underlying facts upon which the

jury could rely to use the permissive inference of Baker's intent to commit a crime. A rational trier of fact could find each element of residential burglary beyond a reasonable doubt based on this evidence. RCW 9A.52.025(1); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This claim has no merit.

**B. FOR THE FIRST TIME ON APPEAL, THE DEFENDANT ALLEGES HIS RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED. THE DEFENDANT CANNOT ESTABLISH A MANIFEST ERROR UNDER RAP 2.5(a)(3). MOREOVER, SPECIFIC CRIMES INTENDED BY THE DEFENDANT, WHILE UNLAWFULLY IN THE RESIDENCE, ARE NOT ELEMENTS REQUIRING THE STATE TO ELECT WHICH CRIME THE DEFENDANT INTENDED TO COMMIT. IF ERROR, IT WAS INVITED.**

Baker contends for the first time on appeal that his right to a unanimous jury verdict was violated because no unanimity instruction was given regarding the State's suggestion during closing argument that the defendant intended to commit several different crimes which, as he alleges, were not supported by the evidence.

*1. RAP 2.5.*

Here, defendant alleges that the trial court erred by failing to give a *Petrich*<sup>10</sup> instruction even though such an instruction was neither proposed

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<sup>10</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), requires that in cases presenting evidence of several acts, any of which could form the basis of one count charged, either the State must inform the jury which act to rely upon in its

by the defendant nor did he take any exception to the court's instructions, which did not include a unanimity instruction. RP 280. The failure to assert this issue at the trial court is not reviewable on appeal, because there is not a showing that the alleged error is manifest.

2. *Manifest error.*

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is "manifest." As above, Baker fails to identify how his claim implicates a constitutional right, which is necessary to meet the first part of the test to qualify for the RAP 2.5(a)(3) exception. He also ignores the second part of the test because he neither argues nor shows that the instructional error was "manifest." Furthermore, there is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a *Petrich* violation and remedied it. This Court should decline to review this claim.

If this Court determines that it should evaluate this assertion, no election or unanimity instruction is required in cases like the instant one as discussed below.

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deliberations or the court must instruct the jury to agree on a specified criminal act. *See also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

A person is guilty of residential burglary if, “with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025; *see also* CP 121 (elements instruction).

A defendant may have the right to a unanimous verdict as to the means by which the defendant committed the crime when the defendant is charged and instructed on an alternative means crime, *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014), and the failure to do so can be of constitutional magnitude, *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). However, residential burglary is not an alternative means crime<sup>11</sup> requiring the jury find the defendant intended to commit a specific crime or crimes against person or property. *State v. Sony*, 184 Wn. App. 496, 499, 337 P.3d 397 (2014), *review denied*, 182 Wn.2d 1019 (2015). In *Sony*, the court explained that residential burglary is not an alternative means crime regarding the defendant’s intent even though it requires that the State prove the defendant entered or

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<sup>11</sup> Residential burglary is an alternative means crime in that it can be committed by entering unlawfully with intent to commit a crime or remaining unlawfully with intent to commit a crime. *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). However, those particular means are not challenged here.

remained in a dwelling with the intent to commit a crime against a person or property:

The different intents that may be present—“to commit a crime against a person” or “to commit a crime against property”—are not distinct acts and therefore do not constitute alternative means of committing residential burglary. ... []“An element dealing with a defendant’s subjective mental state generally cannot be the subject of an alternative means analysis.”[] Rather, “[t]he intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises.” ... The “specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary...”

*Id.* at 500 (internal citations omitted); *see also Bergeron*, 105 Wn. 2d at 16, (“the specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary that must be included in the information, jury instructions or in the trial court’s findings and conclusions. It is sufficient if the jury is instructed ... in the language of the burglary statutes”). Accordingly, residential burglary does not present an alternative means crime requiring a jury to be unanimous as to which crime or crimes the defendant intended to commit against person or property.

Baker additionally alleges the deputy prosecutor’s examples during closing argument of his intent to commit several potential crimes while inside the residence required the State to elect which potential crime Baker intended to commit and that the jury should have been instructed it had to be unanimous as to that particular crime, even though no *Petrich* instruction

was given or requested by the defense. Notwithstanding that a unanimity instruction was not required, the failure to assert or raise this issue prior to the verdict is not reviewable because there is neither a showing that the alleged error is manifest, nor has the defendant established actual prejudice.

Indeed, the failure to timely assert a *Petrich* claim at trial was attributable to trial tactics. During closing argument, defense counsel essentially argued that the State alleged and attributed multiple criminal acts to the defendant to bolster a claim that because there were several allegations of intended crimes, the defendant must have intended to commit at least one of those asserted crimes; in effect, the defense argued the State had thrown everything at the wall to see what would stick. *See* RP 303 (defense closing argument).

Even if this Court determines the suggested crimes given by the deputy prosecutor created an alternate means crime, the State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a continuing course of conduct. *Handran*, 113 Wn. 2d at 17. To determine whether several criminal acts constitute a continuing course of conduct, the facts must be evaluated in a “commonsense manner,” considering (1) the time separating the criminal acts and (2) whether the acts involved the same parties, location,

and ultimate purpose. *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

When several criminal acts occur over the course of several days and involve the same parties, location, and ultimate purpose, the acts may be considered the same criminal conduct. *Id.* at 7, 13-5. Likewise, evidence that a defendant engaged in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

Here, the defendant's argument fails because under a commonsense evaluation of the facts, the several crimes committed by the defendant constituted a continuing course of conduct. The State presented evidence that the defendant entered and remained unlawfully in the rental house in late October 2017 until his arrest on November 7, 2017. During that short time frame, the defendant remained in the rental home and did not live elsewhere. The deputy prosecutor argued the defendant's use of the utilities (electricity and water) without paying for them constituted a crime. These acts were continuing in nature. *See* RP 292. Likewise, the criminal acts involved the same parties (Baker and Dour), the same location (the residence) and the same criminal purpose (to unlawfully remain in the premises without cost to the defendant). The deputy prosecutor also argued

the defendant caused damage to the home. *See* RP 292. It can be reasonably inferred that the damage to the doorway and back bedroom window furthered the same criminal purpose, which allowed ingress into and egress from the home, furthering the same criminal purpose of unlawfully entering and remaining in the home. Theft of dining room table and chairs could have been sold or traded and contributed to Baker's paying his own expenses while living in the home. These acts constitute a continuing course of conduct and no unanimity instruction was required.

3. *Invited error.*

Baker should also be precluded from raising this claimed error because he contributed to it at the time of trial. A party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider "whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires "affirmative actions by the defendant." *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Under the "invited error" doctrine, a defendant may not make a tactical choice in pursuit of some real or hoped for advantage and later urge his own action as a ground for reversal. *State v. Lewis*, 15 Wn. App. 172,

176, 548 P.2d 587 (1976), *overruled on other grounds by State v. Stephens*, 22 Wn. App. 548, 591 P.2d 827 (1979). Here, defense counsel proposed instructions, did not request a *Petrich* instruction, and did not object or take exception to the court's instructions. CP 100-09 (defendant's proposed instructions); RP 280. The defense attorney's decision regarding a unanimity instruction, if any, was tactical and used in an attempt to benefit the defendant's theory of the case during closing argument. There was no error,

**C. THE DEFENDANT FAILS TO ESTABLISH THE PROSECUTOR COMMITTED MISCONDUCT DURING HER CLOSING ARGUMENT.**

To prevail on a claim of prosecutorial misconduct, the defendant must "show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). A defendant establishes prejudice if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 161 Wn. App. 172, 192, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741 (2012). Notwithstanding, in closing argument, prosecutors have "wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn.2d at 448.

In the present case, it is uncertain as to what defendant claims constituted prosecutorial misconduct. Assuming it is those prosecutor statements cited in his factual statement, those statements will be addressed in turn.

During the deputy prosecutor's rebuttal closing argument, she remarked, without objection:

So if you have the conduct to plug your phone into a charger and use someone else's electricity, and that happens to be a crime of theft, then you intended that theft. And if your conduct is to purposefully sleep in someone else's bed and booby trap the room so they can't get it back and you purposefully did that, the fact that it is also a crime means that you intended to commit that crime. So don't be confused by additional statements.

You have the instruction that says very clearly what intent is, and what the State has to prove to you what intent is. Conduct that is a crime is presumed to have been intentionally.

Additionally, you have the additional instruction that says you can infer from his presence in the home that he intended to commit the crimes therein. *So just being there unlawful is enough, under the law, to show intent.*

RP 320-321 (emphasis added).

Although not objected to, the defendant claims the highlighted portion of the deputy prosecutor's argument cited above constituted misconduct. However, he fails to explain or establish how this argument is prejudicial and does not cite any caselaw in support of his allegation. Taken

in context, the remark was not improper as it was in relation to discussing the potential crimes Baker committed while in the residence.

Furthermore, if a defendant does not object, he or she 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, 760-61, 278 P.3d 653 (2012). Under this elevated standard, the defendant must show that (1) no curative instruction would have eliminated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury's verdict." *Id.* at 761.

Here, even assuming the remark was improper, Baker fails to establish by argument or analysis how the statements were so flagrant or ill-intentioned that any prejudice could not have been cured by a timely objection or curative instruction. Likewise, Baker fails to argue, let alone establish, that the alleged misconduct resulted in prejudice which impacted the jury's verdict. The jury was instructed:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark,

statement, or argument that is not supported by the evidence or the law in my instructions.

CP 115; RP 283. The jury is presumed to follow the trial court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). There is no evidence the jury did not follow the court's instructions.

Notwithstanding the above analysis, the deputy prosecutor's remark, in context, was not improper. Even assuming the comment was improper, Baker fails to show that a contemporaneous objection and timely curative instruction would not have neutralized any prejudice. His claim is therefore waived.

Regarding Baker's second claim of prosecutorial misconduct, the deputy prosecutor stated during closing argument:

Turning then to the second element, you look again here on Instruction No. 7, it says "that the entering or remaining was with the intent to commit a crime against a person or property therein." So, again, there are other instructions that define the words and terms in this element, so keep going with these additional instructions.

The first word that I'd like to define is the word "intent" in looking at Instruction 8. "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." So if we look at that, essentially if something you do is a crime and you meant to do it, then you've acted intentionally as to that crime.

*Instruction 11 adds to this a little bit and says "a person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person*

*or property therein. This inference is not binding on you and it is for you to determine what weight, if any, such inference is given.”*

*So this instruction basically tells you that the fact that someone is -- is coming into someone else's house without permission, you can infer they are there to commit a crime; you don't have to, but you can.*

*So when we look about -- look at the facts of our case when discussing whether or not a crime was committed in the home, I want to look at the entirety of the testimony you heard. But, first, I want to remind you again it's important to use our common sense. Your common sense can tell you that conduct creating a risk of or actual harm to person or property within a building is a crime.*

*MS. HAGARA: Objection, Your Honor.*

*THE COURT: Overruled.*

RP 296-97 (emphasis added). The deputy prosecutor followed up with suggestions to the jury as to what crimes the defendant intended as he unlawfully entered and remained in the residence such as assault, theft, and malicious mischief. See RP 297-99.

It is misconduct for the prosecutor to misstate the law in closing argument. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Other than a bare assertion, Baker fails to argue or demonstrate how the deputy prosecutor misstated the law. Furthermore, when reviewing whether a prosecutor's statements are improper, an appellate court does not look at the alleged improper comment in isolation, but in the context of the total

argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). In closing argument, “[p]rosecutors are free to argue their characterization of the facts presented at trial and what inferences these facts suggest.” *Matter of Phelps*, 190 Wn.2d 155, 167, 410 P.3d 1142 (2018).

Although Baker claims the deputy prosecutor misstated the law as to the highlighted portion above, he fails to proffer any argument or analysis as to how the deputy prosecutor misstated the law. Regarding his assertion that it was misconduct for the deputy prosecutor to argue there was sufficient evidence of his intent to commit a crime against person or property, that allegation was addressed above and has no merit.

#### IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 8 day of April, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
CHARLES BAKER,  
  
Respondent.

NO. 36294-9-III  
  
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on April 8, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan  
nodblspk@rcabletv.com

4/8/2019  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

# SPOKANE COUNTY PROSECUTOR

April 08, 2019 - 3:47 PM

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**Superior Court Case Number:** 17-1-04504-8

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