

NO. 74674-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD BLUNT,

Appellant.

FILED
Sep 29, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Bruce I. Weiss, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's residential burglary conviction.

2. The trial court erred in denying appellant's State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), motion to dismiss for insufficient evidence after the State rested its case in chief.

3. The trial court erred in denying appellant's motions to sever his trial from his co-defendants.

4. The prosecutor committed misconduct in rebuttal by arguing facts not in evidence and expressing a personal opinion on appellant's guilt.

Issues Pertaining to Assignments of Error

1. Mere presence at the scene and assent to the crime does not establish accomplice liability. The evidence established only that appellant was present at the scene and knew other individuals involved in the residential burglary. Is there insufficient evidence to sustain appellant's residential burglary conviction?

2. Did appellant preserve his right to challenge the trial court's denial of his Green motion to dismiss after the State rested its case in chief where appellant did not introduce any evidence or testify on his own behalf, only his co-defendants did?

3. Did the trial court err in denying appellant's repeated motions to sever his trial from his two co-defendants, where there was specific prejudice to appellant resulting from antagonistic defenses, a complex quantity of evidence, a co-defendant's statement inculcating appellant, and a gross disparity in the weight of evidence against appellant's co-defendants compared to appellant?

4. In rebuttal, the prosecutor argued his personal theory that appellant's role in the burglary was to gain access to the house. No evidence introduced at trial supported this argument. Did the prosecutor commit reversible misconduct by arguing facts not in evidence and expressing his personal opinion on appellant's guilt?

B. STATEMENT OF THE CASE¹

On December 11, 2014, the State charged Edward Blunt with one count of residential burglary. CP 123. The State alleged that on September 27, 2012, Blunt entered and remained unlawfully in the dwelling of Sandra Davis, with intent to commit the crime of theft therein. CP 123. The State charged four other co-defendants: Michael Bruce, Denis Gorbunov, Vladimir Karabut, and Svein Vik. CP 123. After the trial court denied

¹ The relevant procedural facts are discussed in their corresponding argument sections below.

Blunt's multiple motions to sever his trial from his co-defendants, Blunt, Bruce, and Vik proceeded to a joint jury trial. 1RP 77-78; 3RP 72.²

Davis has a house on Serene Way in Lynnwood, Washington, which travels around Lake Serene. 5RP 102; 8RP 733. She does not live there fulltime. 8RP 727-28. There are many waterfront homes on Lake Serene, and Davis's backyard extends down to the lake. 5RP 102; 8RP 733.

Davis testified her house was first burglarized on September 22, 2012. 8RP 731. She explained the burglars left a mess inside, with "things just piled everywhere." 8RP 732. Davis replaced her door and the locks on the gates to her backyard, all of which were damaged in the burglary. 8RP 732-35. She suspected the burglars might be people who worked on her house sometime in the past few months—none of whom were charged for the September 27 burglary. 8RP 748-49, 788-89.

William Campbell was walking his dogs along Serene Way around 5:30 a.m. on September 27, 2012. 5RP 95-99. Campbell testified he saw a man come out of the carport at Davis's home carrying a white plastic bag, which he placed in the back of a Jeep Cherokee about 100 yards away. 5RP 99-101, 181. Campbell said the man walked around to the passenger side, then got in the Jeep on the driver's side. 5RP 101-01. Campbell saw two

² This brief refers to the verbatim reports of proceedings as follows: 1RP – 4/24/15; 2RP – 11/6/15; 3RP – 11/23/15; 4RP – 11/24/15; 5RP – 11/30/15; 6RP – 12/1/15; 7RP – 12/2/15; 8RP – 12/3/15; 9RP – 12/4/15; 10RP – 12/7/15; 11RP – 1/25/16; 12RP – 2/5/16.

more men—later identified as Gorbunov and Vik—come from the carport area and walk down the street. 5RP 103-05; 6RP 414-16. Another man then came out of the carport, “carrying a whole stack of boxes.” 5RP 104. Campbell called 911. 5RP 103. When he looked back down the street, Campbell said he saw a white SUV pull up next to the Jeep, stop for around five to ten seconds, then “they both drove off.” 5RP 106, 114. Campbell could not identify any of the men in the courtroom. 5RP 118-19.

Several officers responded. The lock on the left gate to the backyard was damaged and the gate open. 6RP 428-35; 7RP 646-48. There were boxes of items outside the house that Detective Collin Ainsworth thought looked staged. 6RP 437-38, 448-54. The door to the house appeared to have been “pried, booted into,” with damage to the door jamb. 7RP 656-58.

Two officers checked every room of the house for immediate threats. 7RP 660-63; 8RP 693. No one was found inside the house. 7RP 662-63; 8RP 707. Deputy John Sadro explained they did not check the backyard before searching inside the house. 8RP 707.

After the initial sweep, a K-9 unit searched the entire house, including the basement, with Buddy the dog. 5RP 130, 140-42, 154. Sergeant Coleman Langdon explained Buddy is trained to detect fresh human scent, and has approximately 300 million olfactory receptor cells, compared to just five million in the human nose. 5RP 154. Neither the

police officers nor Buddy detected anyone inside the house. 5RP 145, 154-56. Langdon agreed it was unlikely Buddy would not find someone present inside the house. 5RP 157-58. Buddy also did not find anyone in the backyard, but Langdon noted air currents make it more difficult for Buddy to detect human scent outdoors. 5RP 147-50, 157-58.

Ainsworth and Langdon contacted Gorbunov and Vik as they walked toward a white Dodge Caravan parked a block or two away from the house. 5RP 135-38; 6RP 412-16, 420. Karabut, whose wife was the registered owner of the van, was sitting in the driver's seat. 6RP 416-17; 7RP 573. Langdon patted Gorbunov down and found a "flat, pry-tool-type device" in his pocket. 5RP 138. Inside the van were stringed instruments and silver items that were later confirmed to be stolen from Davis's house. 6RP 418-19; 7RP 487-88.

Vik told Ainsworth that Karabut had driven him and Gorbunov there, and acknowledged seeing Gorbunov carrying a box of silver bowls to the van. 6RP 421-22, 457-60. Vik denied taking anything from the house. 6RP 422. The van was impounded and taken to the precinct. 6RP 419-20. Vik consented to a search of his home the same day, and showed Ainsworth a blue rug that Davis later identified as hers. 6RP 458-68; 8RP 766-67. Property belonging to Davis and Ansel Davis, her deceased father, was found in a subsequent search of the van. 7RP 486-504.

Deputy Troy Koster arrived at the scene at 5:53 a.m. and first contacted Bruce. 5RP 183-89. Koster approached the Jeep and put his hand on the hood, noticing it was warm. 5RP 183. Koster found Bruce laying down in the backseat. 5RP 183-86. Bruce told Koster he had attended a barbecue on the other side of the lake with a man named Scott McKay, but the Jeep broke down on their way home so Bruce slept in the back. 5RP 186-87. The Jeep was towed to police impound. 5RP 211-12; 6RP 321-24.

Sergeant David Sorenson saw Blunt come through the gate in the back of the carport, which leads to the backyard. 5RP 243-45. Blunt walked down the driveway and onto the sidewalk, where Koster contacted him at 6:33 a.m. 5RP 189-91, 230. Blunt told Koster he had been in the backyard with a woman named Teri. 5RP 191. Blunt explained he had fallen asleep back there after getting intoxicated. 5RP 191. Koster did not find Teri in the backyard, but agreed someone could have left through the neighbor's property. 5RP 207. Blunt did not have any stolen property on his person. 5RP 219. Both he and Bruce were released at the scene. 6RP 454.

Several days later, Davis turned over to the police two crowbars found outside her house, as well as a cigarette butt and fast-food ice cream container she found inside the house. 5RP 258-59; 8RP 750. No fingerprints could be obtained from the crowbars. 5RP 262. DNA on the cigarette butt matched a man named Jacob Lee, as did fingerprints on the ice

cream container. 6RP 469-70; 7RP 596. Lee's prints were also found on a glass urn inside Karabut's van. 7RP 594-95. No other fingerprints or DNA matched any of the three co-defendants. 7RP 568.

Police executed a search warrant of the Jeep on October 5. 6RP 321-24. Bolt cutters were found on the floor of the front passenger seat area. 7RP 508. In the spare tire compartment in the rear of the jeep was a white plastic bag containing mail, checkbooks, and prescription bottles belonging to Davis and her father. 6RP 333-35; 7RP 519. In the front center console of the Jeep was a credit card with Ansel Davis's name on it. 7RP 516-17. Papers stuffed in the back pocket of the front passenger seat were addressed to Scott McKay and Judy Ross. 7RP 521-23.

A backpack was found behind the front driver's seat of the Jeep containing Blunt's driver's license, a pawn ticket from September 16 or 18 made out to Blunt, a camera, a pair of pliers, a small jewelry box, some clothing, work gloves, and a laptop. 7RP 511-16. No stolen property was recovered from Blunt's backpack and there was no indication that any of the items inside the backpack did not belong to Blunt. 7RP 553-62. Officers returned Blunt's backpack to the Jeep after concluding there was nothing of evidentiary value inside. 7RP 557-58.

The Jeep was then impounded at Kristoff's Towing. 7RP 557-58. Joshua Gauthier, an employee at the towing company, testified the registered

owner, Michael Moran, picked up the Jeep on October 15, 2012. 5RP 200; 6RP 282-83. However, Gauthier had no personal knowledge of this and did not know whether Moran worked on the Jeep before driving it off the lot. 6RP 287-93. Blunt contacted Ainsworth in November because his backpack had been returned, but his laptop was missing from inside. 7RP 541-42. With regard to how his backpack ended up in the Jeep, Blunt told Ainsworth, "somebody . . . put it in there." 7RP 543.

Police executed a search warrant of Vik's house on October 10. 6RP 337-38. Several people live in Vik's home, including a man named John Jack, who exited his room when police arrived. 3RP 341-43, 383. Seven to eight people were present at Vik's home during the search. 3RP 402; 7RP 563-64. Several items belonging to Davis were found in the garage. 6RP 351-58; 7RP 523-33. Craft beads and a drinking horn, also belonging to Davis, were found in Jack's room, as well as a mailing box addressed to Ansel Davis. 7RP 529-30. Police found mail addressed to Bruce in Vik's nightstand. 3RP 360-61; 7RP 610-11.

Vik testified at trial and explained Bruce did not live at his house, but had his mail delivered there. 8RP 879-80. Vik explained that on the night of September 26, a woman called him to say Bruce needed a ride home because his vehicle had broken down near Lake Serene. 8RP 880. Because Vik does not have a car, he called Karabut to drive. 8RP 880. Karabut arrived at

Vik's in the white van around 3:00 or 3:30 a.m., and they drove with Gorbunov to Lake Serene. 9RP 919-20. They had difficulty finding Bruce on Serene Way because it was dark, so they parked and started walking. 9RP 922. Vik said they passed by a carport when he turned and saw Gorbunov carrying boxes, which Gorbunov placed in the back of the van. 9RP 923-24, 931. On cross-examination, Vik admitted Bruce and Blunt stopped by his house on the evening of September 26. 9RP 918-19.

Bruce's acquaintance, Taylor Nemra, testified she saw Bruce earlier that night at a barbecue on the south side of Lake Serene. 8RP 838-39. Nemra said Bruce arrived with his friend "Scott" in a Jeep, with Scott driving and Bruce in the passenger seat. 8RP 843. Nemra explained Bruce got intoxicated over the course of the night and fell asleep in the Jeep, while Scott left the party separately. 8RP 843-47.

Blunt received lesser included instructions on first and second degree criminal trespass. CP 53, 56. The jury found Blunt, Bruce, and Vik all guilty of residential burglary, and Vik guilty of second degree possession of stolen property. CP 27; 10RP 1061-62. With an offender score of zero, the trial court sentenced Blunt to six months confinement, but released him on appellate bond. CP 3-6; 12RP 1127. Blunt timely appealed. CP 18.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN BLUNT’S RESIDENTIAL BURGLARY CONVICTION.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

- a. This Court may only consider evidence presented in the State's case in chief, because Blunt timely moved to dismiss after the State rested.

Before trial, Blunt moved to sever his trial from his co-defendants under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed.2 d 476 (1968). CP 106-14. In Bruton, the U.S. Supreme Court held a defendant's confrontation rights are violated when a non-testifying co-defendant's out-of-court statement implicating the defendant is admitted in a joint trial. 391 U.S. at 842. Vik gave a statement to police that Bruce and Blunt stopped by his house together on September 26, the night before the burglary. CP 113; 9RP 917-19. Blunt also moved to sever under CrR 4.4(c)(2), given the gross disparity of evidence against his co-defendants compared to him. CP 114-16; 1RP 72-76. The trial court denied Blunt's motion to sever, but agreed Bruton required Vik's statement implicating Blunt to be redacted if Vik did not testify at trial.³ 1RP 70-71, 76-78.

After the State rested, Blunt made a Green (i.e., halftime) motion to dismiss, arguing the State failed to produce sufficient evidence of every element of the charged offense. CP 73; 8RP 822-23. Alternatively, Blunt renewed his motion to sever his trial from his co-defendants:

The likely testimony of co-defendant Svein Vik and the attendant crimes of dishonesty (Theft 3, Making a False Statement to a Public Servant) . . . that will impeach his

³ Blunt renewed his motion to sever during motions in limine. 3RP 68.

testimony during cross-examination deliver a highly unfair prejudicial effect on Mr. Blunt and warrant immediate severance.

CP 74. The trial court denied the motion to dismiss, reasoning Blunt's "property was located in the Jeep. He was located on the premises. He was there. It was early in the morning . . . Again, that his property was in the Jeep. The Jeep had property that was involved in the residential burglary." 8RP 835-36. The court also denied the motion to sever, believing the jury could follow the court's instruction to decide each count against each defendant separately. 8RP 836; CP 36.

After the State rested, Nemra testified on Bruce's behalf. 8RP 837. Vik then testified on his own behalf. 8RP 866. On cross-examination, the State asked Vik about the written statement he provided Detective Ainsworth on September 27 implicating Blunt and Bruce. 9RP 917-18. Vik admitted he wrote in the statement that around 8:00 or 9:00 p.m. on September 26, "Mike stopped by to say hi, and I then saw Eddie in the hallway, as well." 9RP 918. Vik wrote Blunt and Bruce were there for approximately an hour; "We were joking a little and telling joke[s], and I was working." 9RP 918. Vik also admitted he had prior convictions for making a false statement and third degree theft, both from 2013. 9RP 925. Blunt rested without testifying, putting on any witnesses, or introducing any evidence. 9RP 942.

After the verdict, Blunt moved for a new trial, arguing insufficient evidence supported his conviction and the court erred in denying his multiple severance motions. CP 22-24. At sentencing, Blunt asserted the trial court could only consider evidence introduced in the State's case in chief—disregarding Vik's testimony—given his timely Green motion to dismiss. 12RP 1101-08. The court again denied the motion. 12RP 1110-11.

As Blunt argued below, in determining whether there is insufficient evidence to sustain Blunt's conviction, this Court may only consider evidence introduced in the State's case in chief. A criminal defendant may challenge the sufficiency of evidence (1) before trial, (2) at the end of the State's case in chief, (3) at the end of all the evidence, (3) after the verdict, and (5) on appeal. State v. Jackson, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996). "At the end of the State's case in chief, a court examines sufficiency based on the evidence admitted at trial so far." Id. at 608.

Generally, "[a] defendant waives a challenge to the sufficiency of the evidence at the close of the State's case if he introduces evidence, on his behalf, unless the evidence has no bearing on the merits of the case." State v. Young, 50 Wn. App. 107, 111, 747 P.2d 486 (1987). In other words, if the accused "believes his motion [to dismiss] is well taken, he should stand upon it." State v. Portrey, 6 Wn. App. 380, 385, 492 P.2d 1050 (1972). Where the accused introduces evidence after a Green motion, then, courts

review whether the evidence “as a whole”—not just the State’s evidence—supports the criminal conviction. Young, 50 Wn. App. at 111.

Blunt did waive his right to challenge the trial court’s denial of his motion to dismiss at the end of the State’s case in chief. Blunt did not put on any evidence—only his co-defendants did. All three co-defendants had independent constitutional rights to present evidence in their defense, testify on their own behalf, or remain silent, as Blunt did. U.S. CONST. amends. V, VI; CONST. art. I, § 22. Blunt had no control over his co-defendants. He should not be penalized for the lawful exercise of their constitutional rights.

As such, the general rule of waiver does not apply here. See State v. McKeown, 23 Wn. App. 582, 586, 588, 596 P.2d 1100 (1979) (considering the trial court’s denial of McKeown’s halftime motion to dismiss where McKeown did not testify at trial). Even in State v. Allen, where co-defendants were tried together, they waived any challenge to the denial of their halftime motion to dismiss only because they *both* elected to testify in their own defense. 116 Wn. App. 454, 458, 465 n.6, 66 P.3d 653 (2003). Not so in Blunt’s case. Blunt made a timely Green motion to dismiss after the State rested its case in chief. Blunt also repeatedly moved to sever because of Vik’s incriminating out-of-court statement. At no time did Blunt consent to Vik’s testimony. In other words, Blunt believed his motion to dismiss was well taken and stood upon it. Portrey, 6 Wn. App. at 385.

This Court should hold Blunt did not waive his right to challenge the halftime motion to dismiss where he did not testify or put on any evidence. This Court should accordingly only consider evidence introduced during the State's case in chief, and disregard Vik's testimony.

- b. The State failed to introduce sufficient evidence in its case in chief that Blunt was an accomplice to the residential burglary.

To obtain a conviction against Blunt, the State had to prove each of the following elements beyond a reasonable doubt:

- (1) That on or about the 27th day of September, 2012, a defendant or a person to whom a defendant was acting as an accomplice entered or remained unlawfully in a dwelling;

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

- (3) That the acts occurred in the State of Washington.

CP 44.

Without any evidence that Blunt entered Davis's home or possessed any of Davis's property, however, the State theorized that Blunt was an accomplice to the burglary. 9RP 966, 975. To that end, jurors were instructed, in relevant part:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime of residential burglary; or

(2) aids or agrees to aid another person in planning or committing the crime of residential burglary.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 61.

In order to be an accomplice, an individual must have the purpose to promote or facilitate the conduct forming the basis for the charge. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) (citing MODEL PENAL CODE § 2.06 cmt. 6(b) (1985)). Put another way, an individual cannot be an accomplice unless “he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed.” In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distributions, Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)).

Physical presence at the scene and assent to the crime, without more, are insufficient to establish accomplice liability. State v. Roberts, 80 Wn. App. 342, 355, 908 P.2d 892 (1996); State v. Luna, 71 Wn. App. 755, 759,

862 P.2d 620 (1993). Foreseeability that another might commit the crime is also insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

Campbell saw only four men on the morning of September 27: Bruce, Karabut, Vik, and Bruce. 5RP 116-17. He did not see Blunt. Two officers conducted an initial sweep of Davis's home, clearing every room, and did not find Blunt inside. 7RP 660-63; 8RP 707. The K-9 unit then searched the entire house, including the basement, and even Buddy the dog did not find Blunt inside. 5RP 145, 154-56. Sergeant Langdon believed it was very unlikely Buddy would not find someone present inside the house. 5RP 157-58. The reasonable inference from this evidence is Blunt was not inside the house. There is no other evidence in the record establishing that he ever entered the home.

Blunt was first seen walking out of Davis's carport, which leads only to the backyard and not inside the house. 5RP 243-45. Blunt told police he had gotten drunk and fallen asleep in the backyard with a woman named Teri. 5RP 191. Officers noted Blunt's clothing did not appear wet or wrinkled, even though there may have been dew on the ground that morning. 5RP 235-37; 7RP 666-67. Sergeant Sorensen did not recall smelling alcohol on Blunt, but acknowledged he was not really paying attention. 5RP 237-38. Blunt did not have any stolen property on his person or tools that could be used to gain access to Davis's home. 5RP 219.

Even if one can reasonably infer Blunt was lying about sleeping in the backyard, it does not establish he was involved in the burglary. Rather, it establishes only second degree criminal trespass—that Blunt was present in Davis’s backyard without permission. See RCW 9A.52.080(1) (knowingly entering or remaining unlawfully “upon premises of another under circumstances not constituting criminal trespass in the first degree”).

The State may argue Blunt must have known about the burglary because there were boxes of Davis’s property outside her house that appeared “staged” for theft. 6RP 419, 424. But, as established, assent to the crime is insufficient for accomplice liability, as is foreseeability that another might commit the crime. Roberts, 80 Wn. App. at 355; Stein, 144 Wn.2d at 246. The possibility that Blunt knew about the burglary is therefore not enough to sustain his conviction. Nor is accomplice liability established when the individual “should have known” about the crime. See State v. Allen, 182 Wn.2d 364, 374-82, 341 P.3d 268 (2015) (reversing where prosecutor repeatedly misstated the law by arguing Allen was an accomplice because he “should have known” the principal was going to murder four police officers). Instead, the State must prove the accomplice actually knew he was promoting or facilitating the crime. Id. at 374.

The only remaining evidence against Blunt is his backpack in the Jeep, where Bruce was found. There is no evidence the contents of Blunt’s

backpack belonged to anyone but him. 7RP 553-62. In fact, officers returned Blunt's backpack to the Jeep after concluding there was nothing of evidentiary value inside. 7RP 557-58. The simple presence of the backpack in the Jeep does not establish Blunt stole Davis's property found in the vehicle or that Blunt participated in the burglary. Only Bruce was seen placing stolen property in the Jeep. 5RP 99-101. Campbell also saw Bruce start the Jeep and drive away, further suggesting *Bruce*, not Blunt, was in control of the Jeep. 5RP 106, 114.

At most, Blunt's backpack in the Jeep established Blunt knew Bruce and possibly traveled to the location with him. But there is no evidence Blunt arrived at the location with knowledge of the burglary or that he planned to help carry it out. Even if Blunt knew Bruce was going to participate in a burglary, it does not establish accomplice liability: "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 61.

Thus, the only evidence against Blunt is his presence at the scene and his backpack in the Jeep. There is no evidence Blunt participated in the burglary, was ready to assist, or associated himself with it. Blunt's association with Bruce does not establish guilt. State v. Fuentes, 183 Wn.2d 149, 166, 352 P.3d 152 (2015) (González, J., concurring in part and dissenting in part) ("We do not indulge in guilt by association in our state,

and a person does not become a criminal simply by being with people or in places that are or are perceived to be associated with criminal activity.”).⁴ Because there is insufficient evidence to sustain Blunt’s conviction, this Court should reverse and dismiss the charge with prejudice.

Even if this Court considers evidence introduced by Blunt’s co-defendants, Blunt’s conviction is still not supported by sufficient evidence. Vik told police that Bruce and Blunt stopped by his house on September 26, the night before the burglary. 9RP 918-19. This establishes Blunt knew both Bruce and Vik, and saw them the night before the burglary. Again, however, it does not establish Blunt planned the burglary with Bruce and Vik, or agreed to help them carry it out. Any such conclusion would require impermissible speculation. Blunt is not an accomplice to burglary merely because he knew the men involved.

Thus, even if this Court holds Blunt waived his ability to challenge the trial court’s denial of his halftime motion to dismiss, his conviction must nevertheless be dismissed for insufficient evidence.

⁴ See State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (“A person’s presence in a high-crime area at a ‘late hour’ does not, by itself, give rise to a reasonable suspicion to detain that person.” (quoting State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988))); State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980) (finding “mere proximity to others independently suspected of criminal activity does not justify the stop”).

2. THE TRIAL COURT ERRED IN DENYING BLUNT'S REPEATED MOTIONS TO SEVER HIS TRIAL FROM HIS CO-DEFENDANTS.

As discussed, Blunt moved to sever his trial from his co-defendants multiple times. Before trial, he moved to sever under Bruton, CrR 4.4(c)(1), and CrR 4.4(c)(2)(i). CP 111-16; 1RP 72-76. Blunt argued Vik's out-of-court statement inculpated him and there was a gross disparity of evidence against the other co-defendants compared to Blunt. CP 115-16. After the trial court ordered Vik's statement to be redacted if he elected not to testify, Blunt renewed his motion to sever during motions in limine based on antagonistic defenses and the disparity in evidence. 3RP 67-68. After the State rested its case, Blunt moved to dismiss for insufficient evidence and, alternatively, moved to sever particularly because of Vik's impending testimony. 8RP 832-34; CP 77-82. The trial court abused its discretion in denying each of Blunt's motions to sever. 1RP 77-78; 3RP 72; 8RP 836.

Joinder is "inherently prejudicial." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). The trial court "should grant a severance of defendants" when:

- (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

CrR 4.4(c)(2). If the defendant moves for severance after the State's case in chief, and there is insufficient evidence "to support the grounds upon which the moving defendant was joined or previously denied severance," then "the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant." CrR 4.4(d).

Severance is required under such circumstances even if the defendants were properly joined in one charging document. CrR 4.4(c); see also CrR 4.3(b) (permitting joinder when "each of the defendants is charged with accountability for each offense included"). A motion to sever "must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require." CrR 4.4(a)(1). A pretrial severance motion denied by the court may be renewed up until the close of all the evidence. CrR 4.4(a)(2). A trial court's decision on a motion for severance is reviewed for abuse of discretion. State v. Jones, 93 Wn. App. 166, 171, 968 P.2d 888 (1998).

A trial court abuses its discretion in denying a motion to sever when there is specific prejudice to the accused. Id. Courts infer specific prejudice from the following:

“(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant’s innocence or guilt; (3) a co-defendant’s statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.”

Id. at 171-72 (quoting State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)).

Considering each of the above factors demonstrates there was specific prejudice to Blunt in a joint trial. First, Blunt’s, Bruce’s, and Vik’s defenses were mutually antagonistic. See CP 82 n.3 (Blunt’s third motion to sever). Blunt’s defense was he was intoxicated and fell sleep in the backyard of Davis’s home. 5RP 191. He asserted he was merely present at the scene and was not associated with Vik or Bruce. 5RP 191; 10RP 1015-16. Bruce’s defense was he went to a nearby party earlier that evening with Scott McKay, and slept in the back of the Jeep after it broke down. 5RP 186-87; 8RP 843-47. Vik’s defense was he, Karabut, and Gorbunov went to Lake Serene to pick up Bruce because his car had broken down. 8RP 880. But Vik also testified Bruce and Blunt stopped by his house the night before. 9RP 918-19. Accordingly, these three defenses were irreconcilable. Blunt’s version of events could not be believed without the jury disbelieving Bruce’s

and Vik's, and vice versa. The disparate defenses also likely made one or all seem fabricated.

Second, there was a large and complex quantity of evidence that would make it difficult for the jury to separately discern Blunt's innocence. Voir dire began on November 23, 2015, and the jury did not reach a verdict until December 7, 2015. 3RP 84; 10RP 1061-62. The presentation of evidence alone took several days, not including closing argument by the prosecutor and three defense attorneys. Eight different police officers and detectives testified to their involvement at the scene or with the investigation. See, e.g., 5RP 126 (Langdon); 5RP 177 (Koster); 5RP 224-25 (Sorenson); 5RP 255-56 (Gillespie); 6RP 294-95 (Reid); 6RP 319 (Montgomery); 6RP 408 (Ainsworth); 7RP 639 (Sadro). Most witnesses were subjected to lengthy cross-examination by each of the three co-defendants, also making it more difficult to discern each defendant's specific defense.

Several witnesses also testified at length, and in detail, about Davis's property found in the Jeep, the Dodge Caravan, at Vik's home, and staged in boxes outside Davis's home, making it confusing and difficult to remember what property was found where. 6RP 331-36 (Montgomery describing property in the Jeep); 7RP 508-23 (Ainsworth describing the same); 6RP 351-61 (Montgomery describing property in Vik's house); 7RP 527-33 (Ainsworth describing the same); 6RP 446-54 (Ainsworth describing

property in boxes outside Davis's home); 7RP 486-504 (Ainsworth describing property in the van); 8RP 752-75 (Davis describing property stolen in first and second burglary). This was particularly problematic for Blunt, who did not have any stolen property on his person or inside his backpack in the Jeep. But this could have easily been lost on the jury, given the massive amount of testimony regarding stolen property.

Third, Vik's statement that Blunt and Bruce came over to his house the night before the burglary implicated Blunt. 9RP 918-19. The trial court recognized Vik's statement was incriminating for Blunt, because it demonstrated all three men knew each other and possibly planned out the burglary that night. 1RP 66-67, 70-71. The court accordingly excluded Vik's reference to Blunt under Bruton if Vik elected not to testify. 1RP 70-71. But Vik did testify, and the jury heard the damning evidence. With Vik's testimony, Blunt could no longer legitimately argue he did not know Vik, and significantly undercut Blunt's ability to argue mere presence at the scene. If Blunt was tried separately, the State could not compel Vik to testify against Blunt, given Vik's continuing right not to incriminate himself. State v. Dictado, 102 Wn.2d 277, 287, 687 P.2d 172 (1984) (individuals have a "continuing right to claim a Fifth Amendment privilege" as long as their conviction is pending, including on appeal), overruled on other grounds by State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986).

Separate trials are required when “an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant.” State v. Campbell, 78 Wn. App. 813, 819, 901 P.2d 1050 (1995) (quoting State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)); see Jones, 93 Wn. App. at 172 (considering co-defendant’s statement elicited on cross-examination, but ultimately concluding it was not incriminating to the moving defendant). A limiting instruction is ineffective when testimony includes “powerfully incriminating extrajudicial statements of a codefendant.” Campbell, 78 Wn. App. at 819 (quoting State v. Dent, 123 Wn.2d 467, 486, 869 P.2d 392 (1994)). Such is the case here, necessitating severance.

Fourth, there was a gross disparity of evidence against Blunt’s co-defendants compared to Blunt. Campbell saw Bruce place a white bag in the back of the Jeep, which was later discovered to contain property stolen from Davis’s home. 5RP 99-101; 6RP 333-35; 7RP 519. Campbell then saw Bruce get into the driver’s seat of the Jeep. 5RP 101-01. A credit card belonging to Ansel Davis was found in the center console of the Jeep, next to the driver’s seat. 7RP 516-17. The State accordingly asked the jury to convict Bruce as a principal to the residential burglary. 9RP 975-76.

Campbell also saw Gorbunov, Karabut, and Vik get into the van, which contained property stolen from Davis’s home. 7RP 486-504. Vik

admitted he drove to Lake Serene with Gorbunov and Karabut, and admitted he saw Gorbunov carrying a box of silver bowls to the van. 6RP 421-22, 457-60. Police also found a significant amount of Davis's property in Vik's home. 6RP 351-58; 7RP 523-33. Mail addressed to Bruce was found in Vik's nightstand and Bruce's registered address was Vik's home, establishing Vik and Bruce knew each other. 3RP 360-61, 378-79; 7RP 610-11. Vik also admitted to prior convictions for making a false statement and third degree theft. 9RP 925. The State accordingly asked the jury to convict Vik as a principle to the residential burglary, as well as the separate charge of possession of stolen property. 9RP 976.

By contrast, Blunt was merely present at the scene. 5RP 243-45. He did not have any stolen property on his person, nor was he seen carrying any stolen property from the house. 5RP 116-17, 219. His backpack, though found in the Jeep, also did not contain any stolen property. 7RP 553-62. The State did not present any evidence of how Blunt arrived at the scene, of how his backpack ended up in the Jeep, or of his specific involvement in the burglary.⁵ Rather, the State relied on guilt by association. Blunt was the only co-defendant the State asked the jury to find guilty as an accomplice, demonstrating the gross disparity of evidence. 9RP 975.

⁵ However, the prosecutor improperly urged the jury to speculate that Blunt's role was to gain access to Davis's property. See infra argument 3.

A joint trial resulted in specific prejudice to Blunt because of the antagonistic defenses, the complex quantity of evidence, Vik's incriminating statement, and the gross disparity evidence. The trial court accordingly abused its discretion in denying Blunt's multiple motions to sever. This Court should reverse and remand for a new trial.

3. PROSECUTORIAL MISCONDUCT DEPRIVED BLUNT OF HIS RIGHT TO A FAIR TRIAL.

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

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192

(1968). A prosecutor has a special duty to act impartially in the interests of justice and not as a “heated partisan.” Reed, 102 Wn.2d at 147. He may “strike hard blows, [but] he is not at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

While “the State has wide latitude to argue inferences from the evidence,” “a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.” State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012); accord State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (finding flagrant and ill-intentioned misconduct where prosecutor “introduced ‘facts’ not in evidence”).

It is also impermissible for a prosecutor “to assert in argument his personal belief in the accused’s guilt.” Reed, 102 Wn.2d at 145. Such misconduct violates the so-called advocate-witness rule, which “prohibits an attorney from appearing as both a witness and an advocate in the same litigation.”” State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (quoting United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir.1985)). A prosecutor’s improper comments are reviewed in the context of the entire argument. Fisher, 165 Wn.2d at 747.

In rebuttal, the prosecutor argued facts not in evidence and expressed a personal opinion on Blunt’s guilt. He began by asserting Blunt was an accomplice because, “why else would you be in there if you’re not an

accomplice? Why else would you get out of the vehicle and go onto the property, if you're not an accomplice?" 10RP 1047. But the prosecutor continued: "I have my own theory. He's probably the guy that had the crowbars, opened the door. I don't know that for sure, of course. I don't have pictures, I don't have video." 10RP 1047. Then, in his final rebuttal remarks, he asserted: "You know these three are involved. You can even kind of decipher the roles that each of them played, if you think about it. And after you do all that, I'd ask that you find all three of them guilty of residential burglary." 10RP 1048.

There was no evidence in the record that Blunt was the one who handled the crowbars or was responsible for gaining access to Davis's home. No fingerprints were obtained from the two recovered crowbars. 5RP 262. Blunt was seen walking out of Davis's carport and told officers he had been sleeping in the backyard. 5RP 243-45. No stolen property, burglary tools, or access devices were found on his person. This, at most, established Blunt was on Davis's property. It does not allow the inference that Blunt used a crowbar to pry open Davis's gate or booted in her door.

Deputy Sadro testified Blunt is a tall, large man. 7RP 666-67. The State may argue the jury could infer Blunt was therefore the one who gained access to Davis's property and home. But such an inference would be entirely speculative and is therefore not a reasonable inference. See

Vasquez, 178 Wn.2d at 16 (“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.”). Furthermore, other co-defendants were large enough to kick in a door: Vik is 6'3", Gorbunov is 5'10" with a medium build, and Bruce is 5'8" and 190 pounds. 5RP 164; 6RP 372, 378-79. Of course, the State did not argue any of them handled the crowbars or booted in the door, because such argument would also be entirely speculative. The State also likely did not make any such argument with regards to the other co-defendants, because it actually had enough evidence to convict them of burglary, unlike Blunt.

By asserting his personal belief that Blunt was “that guy that had the crowbars, opened the door,” the prosecutor urged the jury to decide the case based on facts not in the record. 10RP 1047. This is misconduct under Washington law. Pierce, 169 Wn. App. at 553. The prosecutor also implied he had special knowledge of the facts, outside the evidence introduced at trial. United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009) (noting it is misconduct for the prosecutor to imply he “has special knowledge of evidence not presented to the jury”); United States v. Beaman, 361 F.3d 1061, 1065 (8th Cir. 2004) (recognizing the prosecutor should not suggest he “knows more than the jury has heard”). Such an argument could have invited the jury to speculate as to whether evidence about Blunt’s role in the burglary was ultimately excluded at trial.

Given the dearth of evidence against Blunt, the prosecutor's comment, made in rebuttal, was extremely prejudicial. Courts recognize that when prosecutors make improper comments in rebuttal, it "increas[es] their prejudicial effect." Lindsay, 180 Wn.2d at 443; accord United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding it significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations").

The comment was also prejudicial in the context of the prosecutor's entire closing and rebuttal arguments. In closing, the prosecutor only briefly discussed Blunt, arguing there were "too many coincidences" with Blunt's presence in the backyard and his backpack in the Jeep. 9RP 966-67. But "coincidences" were all the State had against Blunt. As such, the prosecutor argued Blunt was an accomplice to the burglary, rather than a principal like Vik and Bruce. 9RP 975-76. Blunt's counsel then emphasized mere presence and knowledge of criminal activity are not sufficient to establish accomplice liability. 10RP 1014-15.

Left with little to argue in rebuttal and knowing Blunt's mere presence was not enough for a valid conviction, the prosecutor resorted to improper speculation about Blunt's involvement in the burglary. This Court must "closely examine[]" any argument from the State that its improper

argument was harmless where it “result[ed] from the deliberate effort of the prosecution to get improper evidence before the jury.” State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990).

No instruction could have cured the resulting prejudice. The jury had no actual evidence or indication of Blunt’s role in the burglary, or if he even had a role in the burglary. Even if this Court determines there was sufficient evidence that Blunt was an accomplice to the burglary, the evidence is thin. It would have to be based on Blunt’s presence at the scene and guilt by association. The prosecutor’s argument that Blunt was “the guy that had the crowbars, opened the door,” gave the jury something to grasp on to. Then, in his final rebuttal statements to the jury, the prosecutor argued, “You know these three are involved. You can even kind of decipher the roles that each of them played, if you think about it.” 10RP 1048. The prosecutor was clearly referring back to his speculation that Blunt’s role was to gain access to the house, and asked the jury to find him guilty on that basis. 10RP 1048.

During deliberations, the jury asked, “Does an accomplice have to have entered the house to be guilty of Residential Burglary?” CP 28. This suggests the jury accepted the State’s speculative theory regarding Blunt’s involvement, particularly because the State argued accomplice liability only as to Blunt. 9RP 975-76; see State v. Allen, 182 Wn.2d 364, 341 P.3d 268

(2015) (recognizing a jury question during deliberations revealed the jury was influenced by the prosecutor's improper statement of law). A curative instruction could not have made the jury forget the clear image the prosecutor planted in their minds of Blunt prying Davis's gate open with a crowbar and kicking in her door. "The bell once rung [could not] be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1977).

The State's flagrant and ill-intentioned misconduct deprived Blunt of his due process right to a fair trial. This Court should reverse and remand for a new trial. Fisher, 165 Wn.2d at 749.

4. APPELLATE COSTS SHOULD NOT BE IMPOSED.

If Blunt does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts "may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for costs).

As discussed, Blunt's ability to pay must be determined before discretionary legal financial obligations (LFOs) are imposed.⁶ The trial court made no such finding, instead waiving all discretionary LFOs. CP 6; 12RP 1124. Though the evidence was ultimately excluded at trial, inside Blunt's backpack was a letter from the government regarding food assistance and Blunt's level of assistance. 6RP 443; see State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (directing courts to look to GR 34 for guidance in determining whether to impose LFOs, which requires a finding of indigency if the person "receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps.").

The trial court also entered an order finding Blunt indigent for purposes of the appeal. CP 16. If an individual qualifies as indigent, "courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. Moreover, there has been no order finding Blunt's financial condition has improved or is likely to improve. RAP 15.2(f) specifies "[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial

⁶ See State v. Duncan, 185 Wn.2d 430, 436, 374 P.3d 83 (2016) (recognizing "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations," and a "constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements," including "[t]he financial resources of the defendant must be taken into account" (quoting State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992))).

condition has improved to the extent that the party is no longer indigent.” This Court must therefore presume Blunt remains indigent and give him the benefits of that indigency. RAP 15.2(f).

For these reasons, this Court should not assess appellate costs against Blunt in the event he does not substantially prevail on appeal.

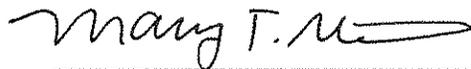
D. CONCLUSION

For the reasons discussed above, this Court should reverse and dismiss Blunt’s conviction because it is not supported by sufficient evidence. Alternatively, this Court should reverse and remand for a new trial because a joint trial and prosecutorial misconduct denied Blunt a fair trial.

DATED this 29th day of September, 2016.

Respectfully submitted,

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