100527-0

Supreme Court No. (to be set)
Court of Appeals No. 54335-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ROBERT JESSE HILL,
Appellant.

PETITION FOR REVIEW BY THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE FRANK E. CUTHBERTSON, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

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I. IDENTITY OF PETITIONER

Robert Jesse Hill, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Hill seeks review of the part published decision of the Court of Appeals, Division II, issued on September 28, 2021, attached. App. at 1-24. Division II denied reconsideration on December 2, 2021. App. at 25.

III. ISSUES PRESENTED FOR REVIEW

Should this Court grant review and reverse when:

1. Juror misconduct violated Mr. Hill's right to a fair and impartial jury after one juror threatened another?

2. The state failed to prove that Mr. Hill "unlawfully entered" the store, an alternative means of committing burglary, when he walked through the front door of a business open to the general public?

3. The sentencing court failed to consider a mitigating circumstance raised by Mr. Hill?

IV. STATEMENT OF THE CASE

On August 31, 2019, Robert Jesse Hill visited Urban Bud, a marijuana retail store in Tacoma, WA. RP 410, 412. Mr. Hill and a store security guard got into an altercation. RP 416-17. The security guard tackled Mr. Hill, pinned him to the ground, and choked him. RP 416-17, 421. Mr. Hill bit the security guard and damaged property in the store. RP 278, 422.

Mr. Hill was charged with second degree assault, second degree malicious mischief, felony harassment, and first degree burglary. CP 39-41. The amended information defined burglary as when a person "enter[s] or remain[s] unlawfully" in a building. CP 4, 40. The jury was instructed with this same "enters or remains unlawfully" language. CP 164.

During jury deliberations, things became heated. RP 534. Juror 2 reported to the court clerk that an unidentified juror (hereinafter "Juror X") threatened her. *Id*. Juror 2 said that "she had a problem and she wanted to leave because she did not want

to be talked to like that" and she "was getting threats." *Id*. The jury also indicated that it was deadlocked. RP 533-34.

The trial court judge approached the situation in two steps. First, the judge polled the jury to verify that they were deadlocked on one count. RP 536. The jury confirmed that they were deadlocked. RP 537-39.

Second, the judge questioned Juror 2, separate from the rest of the jury. RP 536, 541. According to Juror 2, Juror X threatened her with physical harm and wished someone would break into her house to hurt her:

> That it – karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that that happens to if I don't agree with her.

RP 542. Despite these threats, Juror 2 felt that she could continue deliberating. RP 543. The trial court judge did not question any other jurors, including Juror X. RP 542-47.

Mr. Hill moved for a mistrial. RP 545. The prosecutor was initially inclined to agree, but he opposed the motion after

consulting with his appellate unit. RP 546-47. The trial court judge did not believe that the threats "tainted the deliberations," and stated, "I don't think that it is that unusual for deliberations to get heated and people to say untoward things." RP 546. The trial court denied the motion for a mistrial because Juror 2 "indicated she can continue" deliberating. RP 547.

The jury did not reach a verdict and was deadlocked on the assault charge. *Id*. The jury convicted Mr. Hill on the remaining charges of second degree malicious mischief, felony harassment, and first degree burglary. RP 548-49.

Before the sentencing hearing, Mr. Hill filed a request for an exceptional sentence below the standard range. CP 242. He argued pursuant to RCW 9.94A.535(1)(a) that the "evidence presented at trial shows that to a significant degree, [the security guard] was a willing participant or aggressor." *Id*. At the sentencing hearing, Mr. Hill renewed his request for an exceptional sentence, arguing that "the physical contact was initiated by [the security guard]." RP 561. The sentencing court

did not mention Mr. Hill's request for an exceptional sentence and entered a sentence within the standard range. RP 564-68.

Mr. Hill appealed. CP 266. The Court of Appeals, Division II, disagreed with his arguments and affirmed his convictions. App. at 1-2. The Court also denied reconsideration. App. at 25. Mr. Hill seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Hill respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals, Division II. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under all four sections. This Court should grant review and reverse because Juror X committed misconduct, the state failed to prove an alternative means of committing burglary, and the sentencing judge failed to consider a mitigating circumstance raised by Mr. Hill.

A. Juror Misconduct Deprived Mr. Hill of his Constitutional Right to Due Process.

During deliberations, an unknown juror (Juror X) threatened Juror 2. Juror X wished her physical harm and told her that she hoped she was attacked in her home. RP 542. The Court of Appeals, Division II, correctly determined that this conduct did not inhere in the verdict. App. at 6. However, the Court erred by concluding that Juror X's actions did not amount to juror misconduct. *Id*. at 7.

The Court should grant review and reverse. Review is appropriate because juror misconduct deprived Mr. Hill of due process, raising a significant question of law under the U.S. and Washington Constitutions. RAP 13.4(b)(3). This type of

misconduct—threats against a fellow juror—also involves an issue of substantial public importance that this Court has not yet addressed. RAP 13.4(b)(4).

1. Juror X committed misconduct by threatening another juror during deliberations.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a fair trial by an impartial jury. "The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). Jury deliberations are generally secret, but they are not immune from review. *Matter of Lui*, 188 Wn.2d 525, 567-68, 397 P.3d 90 (2017).

Here, during deliberations, Juror X threatened and wished harm on Juror 2. RP 542. Juror 2 characterized the threats as follows:

> That it – karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that that happens to if I don't agree with her.

Id. Juror 2 felt that she could continue deliberating but was concerned enough to report the comment to the court clerk. RP 534, 543. She said that she considered the comment a threat. *Id*.

Washington courts do not appear to have squarely addressed whether threatening a fellow juror constitutes misconduct. In *State v. Earl*, the Court of Appeals held that "[a] personal remark, even a derogatory one, between jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury's deliberations." 142 Wn. App. 768, 775-76, 177 P.3d 132 (2008). However, *Earl* is distinguishable from this case for two reasons. First, the comment here was a threat, not a mere insult. *See State v. Kilburn*, 151 Wn.2d 36, 46, 48, 84 P.3d 1215 (2004) (threats can be made "directly or indirectly"). Second, the threat apparently occurred during deliberations, not during a break, and involved the substance of the jury's deliberations: Mr. Hill's alleged conduct. *See United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir.2004), *cert. denied*, 544 U.S. 990, 125 S.Ct. 1878, 161 L.Ed.2d 751 (2005) (juror

discussions during a break that do not involve a review of the evidence or debate culpability of the defendant are not jury misconduct).

Courts in other jurisdictions have routinely held that threatening another juror amounts to misconduct. For example, in *Avila v. City of New York*, a juror reported that her fellow juror was "intimidating and threatening" and had "physically threatened another juror." 73 A.D.3d 444, 445, 901 N.Y.S.2d 23 (2010). Without investigating or interviewing any jurors, the trial court dismissed the complaining juror. *Id*. at 445-46. On appeal, the Court held that the trial court should have "conducted an inquiry" into the juror's complaint before dismissing her. *Id*. at 446. The Court emphasized that the complaining juror "did not simply report a 'spirited dispute' or 'belligerent conduct' but instead alleged that one jury member had physically threatened another." *Id*. (internal citations omitted).

The D.C. Court of Appeals addressed a similar issue in *Shotikare v. United States*, 779 A.2d 335 (D.C. Cir. 2001). In

that case, a juror threatened her fellow jurors with physical harm. *Shotikare*, 779 A.2d at 340-41. The Court held that the juror's "threat of physical violence and intimidation of her fellow jurors" constituted "extraordinary circumstances" and "just cause" to excuse her. *Id*. at 346 (internal quotations omitted). The Court noted that "the juror misconduct found in this case was not trivial"; it arguably amounted to "the criminal offense of threats to do bodily harm." *Id*.; *see also United States v. Thomas*, 116 F.3d 606, 624 (2d Cir.1997) ("we do not suggest, much less hold, that a juror's disruptive behavior—his reported 'hollering,' threatening to strike a fellow juror, or feigned vomiting—could not serve as grounds for dismissal"); *United States v. Beard*, 161 F.3d 1190, 1193 (9th Cir.1998) (just cause existed to excuse two feuding, distraught jurors whose conflict was "a major distraction to the deliberations of the jury and seriously distracted their attention from consideration of the case before them").

The Eleventh Circuit reached a similar conclusion in *Bostick v. State Farm Mut. Auto. Ins. Co.*, 774 Fed. Appx. 600

(11th Cir.2019). In that case, jurors reported that another juror "intimidated them," "threaten[ed] to use physical violence against them," "confront[ed] one juror," and "belittled them using gender-specific and racial epithets." *Bostick*, 774 Fed. Appx. at 604. Under these circumstances, the trial court properly dismissed the threatening juror for misconduct. *Id*. The Court held that a mistrial was not necessary because the threatening juror was removed. *Id*. at 605.

The Court of Appeals concluded that while Juror 2 "may have subjectively felt intimidated or threatened," the statement by Juror X "was not a threat." App. at 10. Instead, it was merely "an expression of frustration, temper, and strong conviction against the contrary views of another panelist." *Id*. (quoting *People v. Keenan*, 46 Cal. 3d 478, 540, 758 P.2d 1081 (1988)). The Court erred because threats do not need to be direct in order to convey intent.

Here, like in *Avila*, *Shotikare*, and *Bostick*, Juror X committed misconduct by threatening and intimidating another

juror. To a certain extent, disagreement is a normal part of jury deliberations. However, Juror X took things a step further by adding violence and intimidation. She made specific and violent threats, stating that someone should "come to [Juror 2's] house" and harm her. RP 542. The fact that these threats are indirect is irrelevant—everyone knows what it means to say, "I hope someone comes to your house and does this to you."

Juror X also used these threats to try to intimidate Juror 2 and get her to change her mind about the merits of the case. According to Juror 2, Juror X stated that she "hopes that I am the next person that that happens to ***if I don't agree with her***." RP 542 (emphasis added). The threats were not based on a personal disagreement or general antipathy—they were based on Juror 2's opinions about the case itself.

Mr. Hill was entitled to a fair and impartial jury. An impartial jury is one that "determines guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of

decision." *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir.2004). A jury cannot be impartial if one juror threatens another to get them to change their minds. Juror X committed misconduct, burdening Mr. Hill's right to an impartial jury. *See Avila*, 73 A.D.3d at 446; *Shotikare*, 779 A.2d at 346; *Bostick*, 774 Fed. Appx. at 604-05.

2. Denial of a fair and impartial jury was structural error, requiring reversal.

"Denial of the right to an impartial trier of fact is a classic structural error, requiring reversal without a showing of prejudice." *State v. Berniard*, 182 Wn. App. 106, 123-24, 327 P.3d 1290 (2014) (citing *Chapman v. California*, 386 U.S. 18, 24 n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (reversing the defendant's conviction despite clear evidence of guilt because "[n]o matter what the evidence was against him, he had the right to have an impartial judge")). Structural error includes error that denies a defendant his "right to an impartial adjudicator, be it

judge or jury." *Gomez v. United States*, 490 U.S. 858, 876, 109 S.Ct. 2237, 104 L.Ed. 2d 923 (1989) (internal quotations omitted).

By resorting to threats of physical violence, Juror X was neither fair nor impartial. Threatening physical harm on a fellow juror—in order to intimidate that juror into changing her mind—is a "structural error" because "it taints the entire proceeding." *See State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). It is thus not subject to harmless error analysis and requires "automatic reversal." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999)).

Even if this Court applies harmless error analysis, the error here was not harmless. Washington courts "may presume prejudice on a showing of misconduct." *State v. Fry*, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009) (citing *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009)). This "presumption can

be overcome by an adequate showing that the misconduct did not affect the deliberations." *Depaz*, 165 Wn.2d at 856.

Here, we have ample evidence that the misconduct did affect the deliberations. Juror 2 said that she felt threatened and wanted to leave due to Juror X's actions. RP 534, 543. She reported that Juror X threatened her based on the merits of the case, because "I don't agree with her." RP 542. Although Juror 2 felt she could continue deliberating, Juror X's actions clearly affected her enough to report the incident and take it seriously. RP 542-43. Additionally, because the trial court failed to question Juror X or anyone besides Juror 2, we have no idea whether the other jurors in this case could deliberate impartially. Juror X committed egregious misconduct, but the court took no steps to ensure she could be fair or impartial going forward. Her actions were presumptively prejudicial, and there is no evidence that "this misconduct did not affect the deliberations," requiring reversal. *Depaz*, 165 Wn.2d at 856.

B. The State Failed to Prove that Mr. Hill Committed Burglary by Both Alternative Means.

A person can commit burglary if he "enters or remains unlawfully" in a building. RCW 9A.52.020(1). All three Washington Court of Appeals Divisions have concluded that burglary is an alternative means crime. *See State v. Klimes*, 117 Wn. App. 758, 764-65, 73 P.3d 416 (Div. I, 2003), *overruled on other grounds by State v. Allen*, 127 Wn. App. 125, 110 P.3d 849 (Div. I, 2005); *State v. Cordero*, 170 Wn. App. 351, 365-66, 284 P.3d 773 (Div. III, 2012); *State v. Gonzales*, 133 Wn. App. 236, 243, 148 P.3d 1046 (Div. I, 2006); *State v. Johnson*, 132 Wn. App. 400, 409-10, 132 P.3d 737 (Div. II, 2006); *State v. Spencer*, 128 Wn. App. 132, 141-43, 114 P.3d 1222 (Div. I, 2005); *State v. Lawson*, 185 Wn. App. 349, 340 P.3d 979 (Div. II, 2014) (unpublished portion); *State v. Sony*, 184 Wn. App. 496, 500, 337 P.3d 397 (Div. I, 2014).

However, Division II recently changed course and held that "the phrase 'enters or remains unlawfully' does not create an

alternative means offense." App. at 16 (first-degree burglary as defined by RCW 9A.52.020) (citing *State v. Smith*, 17 Wn. App. 2d 146, 484 P.3d 550, *review denied*, 2021 WL 3929426 (2021) (residential burglary as defined by RCW 9A.52.025)).

This Court should grant review and reverse because Division II's decision in this case is in conflict with published decisions from other Divisions of the Court of Appeals. *See, e.g.*, *Cordero*, 170 Wn. App. at 365-66; *Sony*, 184 Wn. App. at 500. This Court should resolve this circuit split and provide guidance on the legal standard applicable to burglary. RAP 13.4(b)(2). Additionally, review is appropriate because Division II's decisions contradicts this Court's reasoning in *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988), which distinguished between unlawfully entering and unlawfully remaining. RAP 13.4(b)(1).

This Court recently declined to review a Division II case holding that residential burglary was not an alternative means crime. *Smith*, 17 Wn. App. 2d 146, *review denied*, 2021 WL

3929426. However, in *Smith*, the Court of Appeals concluded that the prosecutor elected one of the alternative means in closing. *Id*. at 160. Thus, even if burglary was an alternative means crime, the defendant's right to a unanimous jury verdict was not violated. *Id*. Here, the prosecutor did not elect one of the alternative means. As explained below, the evidence was not sufficient to prove that Mr. Hill entered the store unlawfully, and thus the state failed to prove one of the alternative means.

1. Burglary is an alternative means crime.

Burglary is an alternative means offense. *Klimes*, 117 Wn. App. at 768. Specifically, "enters unlawfully" and "remains unlawfully" describe separate acts and are "alternate means of committing burglary." *Id*. This interpretation is consistent with both the legislative history of the burglary statute and with Washington case law, which has long recognized a distinction between unlawfully entering a building and unlawfully remaining in that building. *See Collins*, 110 Wn.2d at 261.

To determine if a statute describes an alternative means crime, courts begin with the statute's language. *State v. Barboza-Cortes*, 194 Wn.2d 639, 646, 451 P.3d 707 (2019). First-degree burglary is defined as follows:

> A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she ***enters or remains unlawfully*** in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1) (emphasis added). This statute was originally enacted in 1975, when the legislature overhauled the definition of burglary. 1975 1st ex.s. c 260 § 9A.52.020.

Prior to 1975, first-degree burglary was limited to either (1) residential burglary at nighttime, or (2) when a person "with intent to commit some crime therein, shall break and enter" into certain specified businesses. RCW 9.19.010 (superseded effective July 1, 1976 by RCW 9A.52.020); *see also State v. Christensen*, 17 Wn. App. 922, 926, 567 P.2d 654 (1977). When the legislature enacted the modern version of the burglary statute,

RCW 9A.52.020, it specifically chose to replace the "break and enter" framework with "enters or remains unlawfully" into a building.

In its Opinion, Division II concluded that "[t]he actual conduct the statute prohibits is being present in a dwelling *unlawfully*." App. at 15 (emphasis in original) (quoting *Smith*, 17 Wn. App. 2d at 156). This reasoning is not consistent with the legislative history of RCW 9A.52.020. If the legislature intended to criminalize "being present [in a building] unlawfully", it could have replaced "break and enter" with "presence". Instead, the legislature chose to specifically criminalize entering or remaining.

Washington case law also supports the conclusion that burglary is an alternative means crime. In *State v. Sandholm*, this Court explained that neither "use of the disjunctive 'or'" nor "structuring the statute into subsections" is dispositive proof that a definitional statute creates an alternative means. 184 Wn.2d 726, 734, 364 P.3d 87 (2015). Instead, "the statutory analysis

focuses on whether each alleged alternative describes '*distinct acts* that amount to the same crime.'" *Id*. (quoting *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)) (emphasis in original).

The burglary statute describes two distinct acts. A person may "enter" a building unlawfully in a variety of different ways. *State v. Sanchez*, 166 Wn. App. 304, 310, 271 P.3d 264 (2012) (defendant "entered unlawfully" even though he was invited in by the resident because entering the home violated a no-contact order); *State v. Moran*, 181 Wn. App. 316, 322-23, 324 P.3d 808 (2014) (defendant unlawfully entered a residence by crawling underneath a house, even though the crawlspace was not accessible from inside and was not used for storage).

By contrast, unlawfully remaining in a building can only occur after a person has lawfully entered. For example, Division II outlined a four-part test to determine what it means to "unlawfully remain" in a building:

> (1) a person has lawfully entered a building pursuant to invitation, license or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the building.

State v. Thomson, 71 Wn. App. 634, 640-41, 861 P.2d 492 (1993) (citing *Collins*, 110 Wn.2d 253).

In other words, a person "remains unlawfully" in a building when the resident specifically tells them to leave. *See State v. Davis*, 90 Wn. App. 776, 780-81, 954 P.2d 325 (1998) (resident told the defendant to leave the house; thus the defendant's "license to enter the apartment was specifically revoked"). A person also "remains unlawfully" when they exceed the express or implied limitations on their presence a building. *Collins*, 110 Wn.2d at 261.

The "fundamental nature" of each "criminal act" is distinct. *Sandholm*, 184 Wn.2d at 735. Unlawfully entering a building means that the accused broke in, snuck in, forced their way in, or in some other way entered without consent.

Unlawfully remaining requires none of these things. By definition, the accused has entered the building lawfully. *See Collins*, 110 Wn.2d at 256 n1, 261 (defendant entered lawfully but remained unlawfully). He did not need to break in, sneak in, or force his way in. *Id*.; *see also Davis*, 90 Wn. App. at 780-81. Unlawfully remaining occurs in an entirely different context, with a very different relationship between the accused and the victim or building.

The distinction between unlawful entering and unlawful remaining was critical to deciding *Collins*. 110 Wn.2d at 261. In that case, the accused was invited into the home of two women after he asked to use the telephone. *Id*. Collins then grabbed the women, dragged them into another room, and sexually assaulted them. *Id*. at 255. This Court held that Collins lawfully entered the house, but unlawfully remained by exceeding the implied limitation on his entry (merely using the phone) and by remaining while the women attempted to fight him off, impliedly revoking his invitation. *Id*. at 261.

The central issue in *Collins* was whether the defendant committed burglary by remaining in the home unlawfully, after he entered lawfully. *Id*. at 259. *Collins* did not specifically decide that burglary is an alternative means crime, but it clearly distinguished between entering and remaining. *Id*. at 255, 261; *see also Thomson*, 71 Wn. App. at 640 ("*Collins'* significance here is that it illuminates the difference between felonious entry and felonious remaining."). The *Collins* Court described entering and remaining as two distinct acts and found that only one supported a burglary conviction. *Collins*, 110 Wn.2d at 256 n1, 261.

If both entering and remaining were merely aspects of the same conduct—unlawful presence in a home—this distinction would not have been so critical to deciding *Collins*. The *Collins* Court would not have needed to detail exactly how and when the defendant's invitation was revoked, rendering his remaining in the home unlawful. *See Collins*, 110 Wn.2d at 256 n1, 260-61. *Collins* supports the interpretation that burglary is an alternative

means crime because it describes entering and remaining as distinct conduct, either of which can amount to burglary. *Id*. at 256 n1, 261; *Thomson*, 71 Wn. App. at 640.

This Court should grant review and reverse. The legislative history of the burglary statute, prior decisions from all three Divisions of the Court of Appeals, and this Court's reasoning in *Collins* all support the interpretation that burglary is an alternative means crime. Division II erred by concluding otherwise.

2. The state failed to prove that Mr. Hill "unlawfully entered" the store.

In this case, Division II held that there "was sufficient evidence to prove that Hill remained unlawfully", and because "burglary is not an alternative means crime" the state "did not have to present sufficient evidence that Hill entered unlawfully." App. at 21. This Court should reverse, because the state failed to prove that Mr. Hill unlawfully entered the store.

As explained above, burglary is an alternative means crime. The state pled both alternative means, and the jury did not specify which means it found to convict Mr. Hill. CP 4, 40, 164, 192. Thus, Mr. Hill's burglary conviction can only be upheld if both alternatives are supported by sufficient evidence. *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (when the state pleads alternative means of committing an offense, a conviction will be upheld "only if sufficient evidence supports each alternative means"). The alternative means determination derives from the required unanimous jury verdict under article I, section 21 of the Washington Constitution. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

The state failed to prove both alternative means in this case because Mr. Hill did not enter the store unlawfully. He entered a store that was open for business through the front door, just like any other customer. *See Klimes*, 117 Wn. App. at 771 (defendant did not enter junkyard unlawfully because "the junkyard was a business that was open to the public at the time of the charged

offense" and he "entered the junkyard through the front gate"). It was only after Mr. Hill was inside the store, when employees told him to leave, that he allegedly remained unlawfully.

Even if Mr. Hill entered the store with intent to commit a crime, this does not mean that he entered "unlawfully." *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998) (reversing burglary conviction and holding that it was "immaterial" whether the defendant "formulated the intent to steal" before or after entering a car wash). "Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime," otherwise all shoplifting convictions could be elevated to burglary. *Id*.

Sufficient evidence does not support the conclusion that Mr. Hill entered unlawfully just by walking through the door of a business open to the public. *Klimes*, 117 Wn. App. at 771. The state elected to charge both alternative means of committing burglary: entering ***and*** remaining unlawfully. CP 4, 40. Because sufficient evidence does not support one of these means, this

Court should reverse Mr. Hill's conviction for burglary. *Kintz*, 169 Wn.2d at 552.

C. The Sentencing Judge Failed to Consider the Mitigating Factor Raised by Mr. Hill.

Finally, this Court should grant review because the sentencing court failed to consider a mitigating circumstance raised by Mr. Hill. The Court of Appeals concluded that the court "impliedly considered an exceptional sentence and rejected it". The Court erred, and its conclusion contradicts a prior decision by this Court in *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), justifying review. RAP 13.4(b)(1).

Both before and during sentencing, Mr. Hill raised the mitigating factor that the victim in this case was, to a large extent, an aggressor in this altercation. CP 242; RP 561. He asked for an exceptional sentence below the standard range. *Id*. At sentencing, the judge did not address this mitigating factor at all and entered a standard range sentence. RP 564-68.

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative *actually considered*." *Grayson*, 154 Wn.2d at 342 (emphasis added). In *Grayson*, this Court reversed "on the limited grounds that the trial judge did not appear to *meaningfully consider* whether a sentencing alternative was appropriate. *Id*. at 343 (emphasis added).

This Court should grant review and reverse because silent consideration is not "meaningful" consideration at all. It is indistinguishable from failing or refusing to consider the mitigating circumstance. Meaningful consideration must have some tangible definition in order to protect the due process rights of defendants. At a minimum, this must include addressing the raised mitigating circumstance, if only to reject it. Here, the sentencing court failed to consider or mention the mitigating factor in any way, and thus failed to meaningfully consider it when sentencing Mr. Hill.

VI. CONCLUSION

Mr. Hill respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 4957 words, excluding the caption, signature blocks, appendix, and certificates of compliance and service (word count by Microsoft Word).

RESPECTFULLY SUBMITTED this 3rd day of January, 2022.

STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Robert Jesse Hill

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

September 28, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JESSE HILL, Appellant.	No. 54335-4-II PART PUBLISHED OPINION

VELJACIC, J. — Robert Hill appeals his conviction for malicious mischief in the second degree, felony harassment, and burglary in the first degree. The charges stemmed from an incident where Hill was denied service at Urban Bud dispensary and refused to leave. Subsequently Hill engaged in a physical altercation with the security guard and then purposefully destroyed display cases and merchandise.

Hill argues that his right to a fair trial was tainted by jury misconduct and that the trial court abused its discretion by denying his motion for a mistrial. Hill also argues that the State violated his right to a unanimous verdict by failing to prove both alternative means of committing burglary, that the prosecutor committed misconduct by urging the jury to speculate about evidence outside the record and by misstating the burden of proof, and that cumulative error denied his right to a fair trial. Hill asserts that the trial court abused its discretion by failing to consider his request for an exceptional sentence. In his statement of additional grounds (SAG), he also argues that the State failed to present sufficient evidence of burglary in the first degree, he received ineffective assistance of counsel, and the prosecutor committed misconduct.

In the published portion of this opinion, we conclude that the court did not abuse its discretion in denying Hill's motion for a mistrial because Hill failed to show juror misconduct. In the unpublished portion, we conclude that burglary in the first degree is not an alternative means crime, and the State produced sufficient evidence to support the conviction. Additionally, we conclude that the prosecutor did not commit misconduct, Hill was not prejudiced by cumulative error, and the trial court did not abuse its discretion because it did not categorically refuse to consider mitigating evidence at sentencing. Finally, we conclude that Hill's SAG claims have no merit. Accordingly, we affirm.

FACTS

I. INCIDENT AT URBAN BUD

On August 31, 2019, Hill walked into Urban Bud dispensary. Hill had consumed several alcoholic drinks that afternoon and evening. Upon entering Urban Bud, Hill stopped just inside the door at a podium that acted as a "security check-in station." 3 Report of Proceedings (RP) at 214. Hill began to write on a clipboard on the podium, erroneously believing it was a sign-in sheet. Alvaro Salaverry, in his position as security guard, was in charge of checking customer identification before allowing them in the store. Salaverry was not at the station when Hill entered, but returned and asked Hill to leave, Hill refused, and eventually attempted to walk past Salaverry into the store. Salaverry grabbed Hill by his back pocket, pulling him backwards, and causing him to fall. They struggled and at one point Salaverry attempted to drag Hill out of the front door. Eventually, Salaverry restrained Hill by kneeling on his back or shoulder.

After hearing shouting from the front of the store, the store manager Christian Muridan walked over and saw Salaverry on the ground struggling to restrain Hill, who was "incoherent [and] screaming." 3 RP at 203. Muridan smelled alcohol when he approached and told Hill that he needed to leave "at least five times in his face," but received no response or acknowledgement that Hill had heard him. 3 RP at 203. Muridan called the police. Another employee, Ashlyn Thomas, also smelled alcohol when she approached and saw Hill "sprawled out on the ground screaming." 4 RP at 346. Thomas heard Hill yell for someone to call the police because someone was hurting him. Muridan told Salaverry to let Hill up to allow him to leave. Hill stood up and ran toward the back of the store and tried to kick open the unmarked door of the employee breakroom.

Salaverry tackled Hill in the breakroom doorway and attempted to restrain him with his arm around Hill's neck. Hill continued to shout and eventually turned his head and bit Salaverry's forearm, causing Salaverry to release him. Hill kicked out at Salaverry, grazing his nose. Hill got up off the floor, picked up the jug and base of a water dispenser from inside the breakroom and threw it into the middle of the store. He then began kicking nearby display cases containing glass paraphernalia, damaging the display's glass, doors, and contents.

Urban Bud had significant security measures including a security camera system that captured the incident from multiple angles.

The police eventually arrived and placed Hill under arrest. The State charged Hill by amended information with assault in the second degree, malicious mischief in the second degree, felony harassment, and burglary in the first degree. The matter proceeded to a jury trial.

II. JURY DELIBERATIONS

After the close of evidence, the jury began deliberating in the afternoon and continued into a second day. At 10:03 AM, the jury submitted a questions to the court.[1] At 10:42, the jury informed the judicial assistant (JA) that it was deadlocked on one of the counts. At 10:51, juror 2 informed the JA that they wanted to leave, and when the jury was excused for a break 20 minutes later, juror 2 further informed the JA that they were "getting threats." 6 RP at 534.

After consulting with the parties about juror 2's complaints, the judge polled the jury on whether it could reach a verdict on the remaining count and the jury unanimously agreed that it could not. Hill and the State agreed that the jury was deadlocked and agreed to voir dire juror 2 to determine whether they could continue to deliberate. The court then engaged in the following colloquy with juror 2:

> THE COURT: . . . I am going to ask that you not disclose anything about the—who's voted how or what the actual vote is on any count at this point.
>
> Based on my polling of the jury, I understand that the jury is unable to agree on one of the counts. I don't know what that is. I don't want to know at this point.
>
> JUROR NO. 2: Okay.
>
> THE COURT: But I was concerned about the fact that you indicated to [the JA] that at one point you felt like you needed to leave
>
> JUROR NO. 2: Uh-huh. (Juror answers affirmatively.).
>
> THE COURT: And we[']re concerned about the way another or other jurors had been addressing you.
>
> JUROR NO. 2: Yes.
>
> THE COURT: And I think that you had indicated to [the JA] that it was threatening or felt?
>
> JUROR NO. 2: Yes.
>
> THE COURT: Could you go into a little more detail without letting us know how the jury has voted or who has voted?

[1] The jury asked, "Is it necessary that the defendant spoke a threat to kill Salaverry for it to be a threat? Can the threat be a perceived act or behavior?" 6 RP at 530. The court responded, "Please review Instruction 22." 6 RP at 530. The jury also asked, "If defendant is guilty of criminal trespass, can he also claim self-defense?" 6 RP at 531. The court answered, "Please refer to Instruction 31." 6 RP at 532.

> JUROR NO. 2: That it—karma should come back at me, and someone should come to my house and do that to me, and [juror X] hopes that I am the next person that that happens to if I don't agree with [them].
>
> THE COURT: . . . Do you think at this time you can continue[?]
>
> JUROR NO. 2: Yes, I can.

6 RP at 541-43.

Hill's counsel also questioned the juror and confirmed what juror X said, and that juror 2 had felt threatened by it.

The court opined that it did not believe it needed to dismiss or replace juror 2 because they indicated that they could continue, and the presiding juror indicated that the jury had been able to reach a verdict on three of the counts. The State agreed. Defense counsel moved for a mistrial, arguing, "Because we don't know when in the deliberation process those threats occurred, we don't know if that was for a particular count. . . . And it's clear that [Juror 2] feels intimidated; although, [the juror] felt that [they] could continue. You know, we can't unring that bell." 6 RP at 545. The court opined that it was not "that unusual for deliberations to get heated and people to say untoward things." 6 RP at 546. The court then denied the motion for a mistrial.

The jury found Hill guilty of malicious mischief in the second degree, felony harassment, and burglary in the first degree, but did not reach a verdict on assault in the second degree. The court polled the jury and confirmed the verdict. Hill appeals.

ANALYSIS

I. JUROR MISCONDUCT

Hill argues that juror X committed misconduct that violated his right to a fair trial by an impartial jury when they threatened another juror. He also argues that the trial court erred by failing to grant a mistrial or ensuring that he was not prejudiced by interviewing other jurors. Hill contends that because the error was structural, it was not harmless.

The State argues that we should not consider the alleged misconduct because it inhered to the verdict, and therefore, the court did not abuse its discretion in denying the motion for a mistrial. The State also argues that Hill fails to prove that the juror's comment was misconduct, rather than just a heated discussion. We agree that Hill failed to prove juror misconduct.

A. Juror 2's Testimony Does Not Inhere to the Verdict

Central to the jury system is the secrecy of jury deliberations. *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131, 368 P.3d 478 (2016). Courts will not consider allegations of jury misconduct that inhere in the verdict. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 568, 397 P.3d 90 (2017). "'[F]acts linked to the juror's motive, intent, or belief, or describ[ing] their effect upon the jury' or facts that cannot be rebutted by other testimony without probing any juror's mental processes" are matters that inhere to the verdict. *Id*. (internal quotation marks omitted) (quoting *Long*, 185 Wn.2d at 131). "'Only if a court concludes that juror declarations allege actual facts constituting misconduct, rather than matters inhering in the verdict, does it proceed to decide the effect the proved misconduct could have had upon the jury.'" *Id*. (internal quotation marks omitted) (quoting *Long*, 185 Wn.2d at 132).

Further,

> [i]t is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine . . . the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors.

State v. Reynoldson, 168 Wn. App. 543, 548, 277 P.3d 700 (2012) (quoting *State v. Parker*, 25 Wash. 405, 415, 65 P. 776 (1901)); *see also State v. Marks*, 90 Wn. App. 980, 986, 955 P.2d 406 (1998) ("Jurors may provide only factual information regarding actual conduct alleged to be misconduct, not about how such conduct affected their deliberations."); *State v. Forsyth*, 13 Wn.

App. 133, 138, 533 P.2d 847 (1975) ("[T]he trial court may consider statements of *fact* set forth in the affidavit, but may not consider a juror's statement of the *effect* such facts had upon the verdict.").

The testimony of juror 2 did not probe into their own or others' mental process. Juror 2 stated what juror X said to them and that they felt threatened. They provided factual information regarding the conduct alleged. Juror 2 did not state what effect juror X's statements had on their deliberations or other jurors' thought processes. Further, the fact could be rebutted by testimony without probing into other jurors' mental states. The court could have called juror X, who could have confirmed or denied that they made the threat alleged without discussing their mental process. The fact specifically alleged here does not inhere to the verdict, so we will consider whether juror X's statement was misconduct.

B. The Statement Does Not Rise to the Level of Misconduct

Under the United States Constitution, the Sixth and Fourteenth Amendments guarantee persons accused of a crime the right to a fair trial by an impartial jury. *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Article I, section 22 of the Washington State Constitution provides a similar right. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 851, 456 P.3d 869, *review denied*, 195 Wn.2d 1025 (2020). However, the right to a fair trial does not require a "perfect" trial. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

A party alleging juror misconduct has the burden to show misconduct occurred. *Reynoldson*, 168 Wn. App. at 547; *State v. Hawkins*, 72 Wn.2d 565, 568, 434 P.2d 584 (1967). A strong, affirmative showing of misconduct is required to "overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). A new trial is warranted "only where juror

misconduct has prejudiced the defendant." *Reynoldson*, 168 Wn. App. at 548; *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009).

There is a lack of Washington case law concerning a claim of misconduct based specifically on one juror threatening another, and none that establish what level the challenged behavior must reach in order to be misconduct. Accordingly, we glean principles from similar Washington cases as well as out-of-state authority to resolve the issue.

In a similar case, *State v. Earl*, a juror asked to be dismissed from deliberations and presented a letter from her psychologist indicating that she should not continue because she was in "psychological crisis" based on the fact that another juror had "verbally attacked her, called her insulting names, and impugned her integrity." 142 Wn. App. 768, 771, 177 P.3d 132 (2008). The court questioned the presiding juror, and determined that there were no problems with the jury. *Id*. at 773. It also questioned the juror, determined that she could not continue, and dismissed her. *Id*. The court elected not to identify or question the juror who made the insulting comment and told the jury to begin deliberations anew with an alternate juror. *Id*. at 771-73. Earl appealed, arguing in part that the trial court abused its discretion in failing to grant a mistrial, and in limiting the scope of the inquiry into the misconduct. *Id*. at 774. We disagreed, holding that Earl failed to meet his burden to show misconduct and that "[a] personal remark, even a derogatory one, between jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury's deliberations." *Id*. at 775-76.

Other jurisdictions have similarly held that the court must balance the interest in maintaining the secrecy of jury deliberations with the right of the defendant to a fair trial. In order to affect that balance, courts will generally overturn a jury verdict for misconduct only if juror conduct is egregious enough to effect a juror's ability to engage in free and frank deliberation.

For example, in Colorado, courts have held that a juror's acts constitute misconduct "only if the alleged coercive acts [first] rise to the level of continuous violent, abusive, and profane language and conduct threatening or amounting to physical violence against a juror." *People v. Mollaun*, 194 P.3d 411, 418 (Colo. App. 2008). "To warrant a new trial, the evidence must reveal more than expressions of frustration, impatience, annoyance, or empty threats." *People v. Rudnick*, 878 P.2d 16, 22 (Colo. App. 1993). Similarly, Minnesota courts have held that a juror's acts rise to misconduct when one juror commits or threatens actual physical violence towards another juror. *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000). However, "[e]vidence of *psychological* intimidation, coercion, and persuasion" may not be used to establish a claim of juror misconduct in Minnesota. *Id*. (emphasis added).

Likewise, in Oregon, a juror commits misconduct when their actions "'amount[] to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offend[ing juror] to a criminal prosecution.'" *Hill v. Lagrand Indus. Supply Co.*, 193 Or. App. 730, 735, 91 P.3d 768 (2004) (quoting *Carson v. Brauer*, 234 Or. 333, 345-46, 382 P.2d 79 (1963)).

Finally, in *People v. Keenan*, the California Supreme Court reviewed a claim of misconduct arising from one juror stating to another: "'If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there'll be another defendant out there—it'll be me.'" 46 Cal. 3d 478, 540, 758 P.2d 1081 (1988). There, the court concluded that the statement "was but an expression of frustration, temper, and strong conviction against the contrary views of another panelist," and rejected the defendant's motion for a new trial. *Id*. at 541.

As discussed above, the party alleging juror misconduct maintains the burden to show that misconduct occurred. *Reynoldson*, 168 Wn. App. at 547. Based on the foregoing authorities, we hold that a juror commits misconduct only if the alleged coercive acts rise to the level of actual or

threatened physical violence or abuse. But mere expressions of frustration, temper, empty threats, and strong conviction against the contrary views of another panelist are insufficient to establish a claim of juror misconduct.[2]

Here, juror X, obviously disagreeing with some position taken by juror 2, told juror 2 that "karma should come back at [them], and someone should come to [juror 2's] house and do that to [them], and [juror X] hopes that [juror 2 is] the next person that that happens to." 6 RP at 542.

While at the time, juror 2 may have subjectively felt intimidated or threatened, the statement was not a threat. *See Anderson v. Miller*, 346 F.3d 315, 329 (2d Cir. 2003) (holding that a *reasonable* juror, standing in the shoes of the jurors who had been threatened by another juror, would not have thought themselves to be facing a physical assault if they refused to vote for conviction). There is no indication that the statement was more than "an expression of frustration, temper, and strong conviction against the contrary views of another panelist." *Keenan,* 46 Cal. 3d at 541. Juror X was telling juror 2 to put themselves in the victim's place, albeit in an extremely offensive and disrespectful way. Furthermore, although juror 2 felt threatened, they were able to continue deliberating. The actions were not misconduct.

We conclude that Hill has failed to meet his burden of a strong, affirmative showing of misconduct that is "necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *Balisok*, 123 Wn.2d at 117-18.

[2] We note that, even if a party successfully demonstrates juror misconduct, such misconduct must nevertheless be prejudicial to warrant reversal. *See Reynoldson*, 168 Wn. App. at 548; *See also Depaz*, 165 Wn.2d at 856.

C. The Court Did Not Abuse its Discretion by Failing to Conduct Further Inquiry into the Allegation of Juror Misconduct

A trial judge has broad discretion to conduct an investigation of jury problems and may investigate accusations of juror misconduct in the manner most appropriate for a particular case. *Elmore*, 155 Wn.2d. at 773-75; *see also Earl*, 142 Wn. App. at 774-76 (holding that the trial court may limit the scope of its inquiry where the moving party does not satisfy its burden of proving juror misconduct or prejudice).

"We review a trial court's investigation of juror misconduct for abuse of discretion," which occurs when the trial court "acts on untenable grounds or its ruling is manifestly unreasonable." *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). We also apply the same standard in reviewing the trial court's denial of a mistrial, finding an abuse of discretion only when "'no reasonable judge would have reached the same conclusion.'" *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The court appropriately questioned the juror to which the statement had been made and confirmed that the juror was able to continue deliberating. Both parties were given the opportunity to question juror 2, and Hill did not ask the court to question juror X. Because Hill failed to make any affirmative, prima facie showing of misconduct, the trial court's limitation of its inquiry into the alleged misconduct was not an abuse of discretion. Accordingly, the trial court also did not abuse its discretion in denying Hill's motion for a mistrial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

FACTS RELATING TO UNPUBLISHED PORTION OF OPINION

I. TRIAL

At trial, Salaverry and Hill testified about their versions of events. Urban Bud employees Muridan and Thomas, and general manager Errol Franada also testified; as did the 911 dispatcher and the arresting police officers.

Salaverry testified that he had a background training in mixed martial arts. He testified that when he first approached, Hill was incoherent and smelled of alcohol. The men got into an argument over why Hill was writing on his perimeter report paperwork. Salaverry told Hill that they were not going to sell to him because he was intoxicated and he needed to leave. Salaverry testified that he had his arm around Hill's neck when they were struggling on the breakroom floor but he used a "side choke" so that one side of Hill's neck was still exposed, leaving him able to breathe and talk. 3 RP at 277. At some point during the struggle, Hill said to Salaverry, "I'm going to . . . kill you." 3 RP at 283.

Hill testified that when Salaverry first approached him, he did not identify himself as security or an employee of the store. Although Hill was aware that he would be required to show identification (ID) to enter the store, he testified that he asked Salaverry to talk to a manager to get an exception because he did not have ID. Hill walked further into the store despite being asked to leave because he wanted to speak to a manager. He testified that he ran to the back of the store looking for an exit and didn't use the front door because he was afraid of Salaverry who was standing in his way. Hill testified that he bit Salaverry because "he was hurting [him] . . . and [he] was worried about being killed or at least being made unconscious." 4 RP at 459. He denied threatening Salaverry. Hill testified that he threw the water jug because he was afraid, and he

kicked and damage the display case because he was "under the emotional drama . . . of the moment." 4 RP at 424.

Franada testified to the cost of the damages to the merchandise and display case. The court admitted exhibits from Franada listing the wholesale and retail value of the items damaged, as well as invoices and quotes of the replacement glass, doors, and lights of the display cases.

At closing, Hill pointed out five separate times that the surveillance footage did not have audio. He stated that it was "surprising" that there is no audio, despite having a state-of-the-art surveillance video system. 5 RP at 503. Hill also argued that the jury only had Salaverry's word as to the nature of their argument and as to whether Hill threatened to kill Salaverry. In regard to the testimony by Franada concerning the cost of the damages to the display cases and merchandise, Hill argued:

> And he's not the owner, he's the general manager. And he used to work at a gym as a personal trainer, apparently. But his recordkeeping system is not a model of clarity. You saw pictures of a bunch of broken stuff that was most likely thrown away. It wasn't brought in here, wasn't matched up to the inventory list. We couldn't go through it, this is what was broken, this is not broken, this is what was broken, so you do have to take Mr. Franada at his word. And he's probably doing the best he can. But, again, we got a picture of broken stuff. If memory serves, we do not have pictures of the lights in the display case as being broken. They weren't brought in here. So that's why there's evidence to support a conviction of malicious mischief in the third degree. The dollar amount, it's below $750.

5 RP at 512-13.

In rebuttal, the State responded to Hill's assertions about Franada's credibility:

> I would submit to you there's no evidence, other evidence, as to the value of the property or that these bongs were sold anywhere else. Certainly, they've all been damaged. The receipt shows with some—specifically shows the numbers, and Mr. Franada went through them in establishing the loss and the amounts. And there's no evidence to contradict that except for defense saying you should not take him as credible, and I submit that is not sufficient.

5 RP at 515.

The State continued, addressing the lack of audio from the surveillance videos, stating: "And I would submit to you that no audio in the video, there's lots of explanations. I mean, nothing was brought out as testimony. Who knows what the regulations are." 5 RP at 516. The court overruled Hill's subsequent objection.

II. SENTENCING

At sentencing, Hill requested an exceptional sentence below the standard range. He argued pursuant to RCW 9.94A 535(1)(a) that the "evidence presented at trial shows that to a significant degree, Mr. Salaverry was a willing participant or aggressor." Clerk's Papers (CP) at 242. At the sentencing hearing, Mr. Hill renewed his request for an exceptional sentence, arguing that "the physical contact was initiated by Mr. Salaverry." 7 RP at 561.

The court explained to Hill that it found the video very concerning and noted that Hill had been in and out of custody constantly over the last seven years and now had over nine felony points. The court asked Hill to comment on how this criminal behavior was going to stop. Hill was unable to provide insight into how he would restrain his criminal behavior. After hearing argument from Hill and his counsel, the court chose to follow the State's recommendation of 87 months. The court did not acknowledge Hill's request for an exceptional sentence on the record. Hill did not object or request that the court expand on its rationale.

The court entered a standard range sentence of a total of 87 months incarceration and 18 months of community custody. At a restitution hearing, the court ordered Hill to pay $1,803.23. The court calculated this amount based on: "$500 for the glass for the display case; $460 for the broken paraphernalia; $603.23 for the lights and the display case; and $240 for the doors that were destroyed." 8 RP at 578. Hill appeals.

III. ALTERNATIVE MEANS

"A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime . . . assaults any person." RCW 9A.52.020(1)(b). Hill argues that the State failed to prove both alternative means of committing burglary because no evidence supported the allegation that he entered the store unlawfully.

Some crimes "may be committed in different ways (i.e., via alternative means)." *State v. Woodlyn*, 188 Wn.2d 157, 163, 392 P.3d 1062 (2017). In these cases, a guilty verdict will be upheld "only if sufficient evidence supports each alternative means." *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010). Evidence is sufficient if, viewed in the light most favorable to the state, "any rational trier of fact could have found guilt beyond a reasonable doubt." *Id*. at 551.

Recently in *State v. Smith*, we held that residential burglary is not an alternative means crime. 17 Wn. App. 2d 146, 484 P.3d 550, *review denied*, 2021 WL 3929426 (2021).

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person *enters or remains unlawfully* in a dwelling other than a vehicle." RCW 9A.52.025(1) (emphasis added). In *Smith*, we reasoned that the residential burglary statute "identifies two separate acts: entering and remaining in a dwelling. But the focus of the statute is the unlawfulness of the defendant's conduct. The actual conduct the statute prohibits is being present in a dwelling *unlawfully*. Entering and remaining are merely 'nuances inhering in the same [prohibited] act' and 'facets of the same criminal conduct.'" *Smith*, 17 Wn. App. 2d at 156 (internal quotation marks omitted) (quoting *State v. Barboza-Cortes*, 194 Wn.2d 639, 646, 451

P.3d 707 (2019)). Thus, we concluded that the phrase "enters or remains unlawfully" does not create an alternative means offense. *Smith*, 17 Wn. App. 2d at 157.

Here, the State charged Hill with burglary in the first degree. "A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime . . . assaults any person." RCW 9A.52.020(1)(b).

As in *Smith*, the statutory language "enters or remains unlawfully in a building" does not create alternative means of committing burglary in the first degree. Therefore, the State was not required to present sufficient evidence to show that Hill unlawfully entered *and* unlawfully remained in Urban Bud. And because it is undisputed that the State provided sufficient evidence that Hill remained unlawfully, we reject Hill's argument.

IV. PROSECUTORIAL MISCONDUCT

Hill argues that the prosecutor committed misconduct by urging the jury to speculate about evidence outside the record and by misstating the burden of proof. He contends that the prosecutor argued facts not in the evidence when he speculated about "regulations" being responsible for the lack of audio in the security. Br. of Appellant at 26. Hill argues that the prosecutor argued that he was required to disprove the value of the property damaged. Hill asserts that he was prejudiced by the misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of showing that the comments were improper and prejudicial. *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020).

If the defendant fails to object to the improper statement at trial, the error is waived "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). To prevail, the defendant must show (1) no curative instruction would have removed any prejudicial effect on the jury and (2) there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 761. We focus less on whether the State's misconduct was flagrant and ill-intentioned and more on whether the resulting prejudice could have been cured. *Id.* at 762.

We review a prosecutor's remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Remarks in direct response to a defense argument are generally not improper as long as they do "not go beyond what is necessary" to respond to the argument or argue evidence not in the record. *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

It is generally improper for the prosecutor to argue that the burden of proof rests with the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). However, the mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. *State v. Jackson*, 150 Wn. App. 877, 885–86, 209 P.3d 553 (2009).

Hill argued during closing that Franada's testimony was not credible. He argued that Franada "used to work at a gym as a personal trainer . . . [and] his recordkeeping system is not a model of clarity." 5 RP at 512. He also argued that the broken items were not brought into court and matched up with the inventory list, so the jury "ha[d] to take Mr. Franada at his word." 5 RP at 513.

In response, the prosecutor noted to the jury that there was no other evidence as to the value of the property as testified to by Franada. He asserted that Franada went through the numbers and produced receipts, and "there's no evidence to contradict that except for defense saying you should not take him as credible, and I submit that is not sufficient." 5 RP at 515.

This argument was not improper. The prosecutor was responding to Hill's argument during closing, and in doing so pointed out that defense evidence was lacking to contradict Franada's testimony and the documents he provided.

Furthermore, because no objection was raised, Hill must show that the comment was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. The prosecutor reiterated during closing that the State carries the burden of proof generally. Also, when going through the elements of malicious mischief listed in instruction 16, the prosecutor specifically stated that "again, what we have to prove, the date of the crime and that the defendant caused physical damage of property . . . exceeding $750." 5 RP at 488. We conclude that the statement was not improper, and Hill fails to show that it was prejudicial and could not be cured with a remedial instruction.

Hill also argued several times during closing about the lack of audio on the security footage, at one point saying that it was "surprising" that there was no audio, given the "state of the art" surveillance system. 5 RP at 503. He asserted that due to the lack of audio, in order for the jury to accept the State's case, it had to "believe everything that [the State has] built upon testimony of Mr. Salaverry." 5 RP at 499.

Hill asserts that the prosecutor offered "regulations" as the reason why there was no audio. In fact, in responding to the defense's emphasis on the lack of audio, the prosecutor stated, "who knows what the regulations are[?]" 5 RP at 516. He did not argue facts outside of the record by

arguing that regulations did or did not require audio. He specifically stated that "nothing was brought out as testimony." 5 RP at 516. The argument was not improper.

Hill also fails to explain how this statement prejudiced him. He asserts that he "was entitled to explain why he was credible, and question the [S]tate's video evidence, without the prosecutor implying there was a legal explanation for the lack of audio. This bolstering and speculation prejudiced Mr. Hill." Br. of Appellant at 28. Even if the prosecutor did argue that there was a legal explanation for the lack of audio, Hill fails to explain what effect it had on the verdict. The video still had no audio, and the jury was left to determine who was more credible. Hill has failed to show that the prosecutor's statement was either improper or prejudicial and his prosecutorial misconduct claim fails. Because we have found no error or prejudicial error, Hill's cumulative error argument also fails.

V. FAILURE TO CONSIDER MITIGATING EVIDENCE

Hill argues that the trial court abused its discretion by failing to consider the mitigating circumstance he raised at his sentencing.

When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). When a defendant requests an exceptional sentence, appellate review is limited to circumstances when the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Impermissible bases for declining a request for an exceptional sentence include race, gender, or religion, for example. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

"A trial court errs when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances' or when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *McFarland*, 189 Wn.2d at 56 (quoting *Garcia-Martinez*, 88 Wn. App. at 330). "[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." *Garcia–Martinez*, 88 Wn. App. at 330.

In his sentencing memorandum and at the sentencing hearing, Hill argued that Salaverry, was, "[t]o a significant degree . . . a willing participant or aggressor."" CP at 242 (citing RCW 9.94A.535(1)(a)). The State did not address the exceptional sentence argument. Hill addressed the court and asked it to consider "the unique circumstances of [his] actions." 7 RP at 563. In response, the court discussed how it was concerned about Hill's conduct after watching the video. The court then discussed Hill's high offender score and what Hill could do to turn his situation around. It issued a standard range sentence but did not address Hill's request on the record.

Although the court did not explicitly state on the record that it was denying Hill's request for an exceptional sentence, it did discuss what it thought after viewing the video. The record does not indicate that the court categorically refused to exercise its discretion to consider an exceptional sentence under any circumstance. We conclude that the court impliedly considered an exceptional sentence and rejected it, rather than categorically refusing to exercise its discretion.

VI. SAG

A. Insufficient Evidence

Hill argues that there was insufficient evidence for either entering or remaining unlawfully, because no one testified at trial that Salaverry had authority to expel or physically remove a customer from the store. We disagree.

The to convict instruction for burglary in the first degree read:

> To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 31st day of August, 2019, the defendant entered or remained unlawfully in a building;
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
> (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and
> (4) That any of these acts occurred in the State of Washington.

CP at 166 (Instr. 25).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id*. We defer to the trier of fact on issues of credibility of witnesses and the persuasiveness of the evidence. *Id*. at 874-75.

Although there was no explicit testimony that Salaverry had the authority to expel Hill, testimony from the store manager, Muridan, shows that he also told Hill to leave "at least five times [to] his face." 3 RP at 203. There was sufficient evidence to prove that Hill remained unlawfully. As stated above, burglary is not an alternative means crime, and therefore the State did not have to present sufficient evidence that Hill entered unlawfully.

Hill also argues that there was insufficient evidence to show "intent to commit a crime against persons or property." The intent required for burglary is intent to commit *any crime* inside the burglarized premises. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

Based on the cases cited in his SAG, Hill appears to argue that the State improperly relied solely on a permissive inference of criminal intent based on the proof that he unlawfully remained within Urban Bud. RCW 9A.52.040 provides that intent to commit a crime may be inferred when a person enters or remains unlawfully. In cases where this permissive inference is relevant, jury instructions are given to inform the jury that it may, but is not required to, infer intent. *See* e.g. *State v. Grayson*, 48 Wn. App. 667, 670, 739 P.2d 1206 (1987). However, the jury was not given the permissive inference instruction, and the State did not argue that the jury should infer his intent solely based on the fact that he remained unlawfully. The cases cited by Hill are inapplicable here.

After being asked to leave several times, Hill chose to move towards the back of the store, rather than exiting out of the front door. He attempted to kick open the door to the employee breakroom and proceeded to purposefully destroy property within the store. Viewing the evidence and circumstances in a light most favorable to the State, and drawing all reasonable inferences therefrom, any rational trier of fact could have found that Hill had the intent to commit a crime when he remained unlawfully. Although Hill provided an alternate explanation for his actions, we defer to the trier of fact on issues of credibility of witnesses and the persuasiveness of the evidence.

B. Ineffective Assistance of Counsel

Hill argues that he received ineffective assistance of counsel because his attorney failed to interview juror X to determine if they needed to be removed from the jury and for failing to object to "50+ instances of leading questions" by the prosecutor. SAG at 2.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). "Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.'" *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)).

Hill cannot show that this his counsel's failure to question juror X fell below an objective standard of reasonableness based on all of the circumstances. The jury had already completed deliberation on three of the four counts and had informed the court that it was deadlocked on the fourth. His counsel questioned the affected juror and moved for a mistrial. Additionally, given that juror X's statement was not a threat, there was no reason to demand further inquiry. His counsel's performance was not deficient. In regard to his assertion that he received ineffective assistance because his counsel failed to object to the prosecutor's leading questions, he fails to state what effect, if any, this failure had on the verdict. Because he fails to show prejudice, his claim of ineffective assistance fails.

C. Prosecutorial Misconduct

Hill asserts that the prosecutor committed misconduct by asking "50+" leading questions. SAG at 2.

To show prosecutorial misconduct, the defendant bears the burden to establish that a prosecutor's conduct was improper and that it resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 759–61. Hill fails to explain what effect, if any, the prosecutor's conduct had on the verdict. This argument is without merit and we do not consider it.

We affirm.

Veljacic, J.

We concur:

Sutton, J.

Glasgow, A.C.J.

Filed
Washington State
Court of Appeals
Division Two

December 2, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JESSE HILL, Appellant.	No. 54335-4-II ORDER DENYING MOTION FOR RECONDERATION

Appellant, Robert Jesse Hill, moves this court for reconsideration of its September 28, 2021 opinion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Sutton, Glasgow, Veljacic

FOR THE COURT:

Veljacic, J.

Supreme Court No. (to be set)
Court of Appeals No. 54335-4-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On January 3, 2022, I electronically filed a true and correct copy of the Petition for Review by the Appellant, Robert Jesse Hill, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Andrew Yi, Pierce County Prosecuting Attorney's Office	(X) via email to: andrew.yi@piercecountywa.gov, PCpatcecf@piercecountywa.gov
Robert Jesse Hill DOC #359440 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362	(X) via U.S. mail

SIGNED in Tacoma, Washington, this 3rd day of January, 2022.

STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant

NEWBRY LAW OFFICE

January 03, 2022 - 1:56 PM

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Address:
623 DWIGHT ST
PORT ORCHARD, WA, 98366-4619
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