102277-8

Supreme Court No. (to be set)
Court of Appeals No. 85047-4-I
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Bruce Clive Gingrich, Appellant

Thurston County Superior Court
Cause No. 21-1-01182-34

The Honorable Judge Indu Thomas

PETITION FOR REVIEW

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INTRODUCTION

At Bruce Gingrich's trial for first-degree burglary, the State did not prove that he was armed with a deadly weapon. His conviction must be vacated, and the charge dismissed with prejudice.

If the charges are not dismissed, the case must be remanded for a new trial. The prosecutor improperly misstated the role of the jury, diluted the presumption of innocence, and undermined the State's burden of proving guilt beyond a reasonable doubt. The State made arguments that conflicted with the law and the court's instructions, and relied on facts not in evidence. In addition, Mr. Gingrich was denied the effective assistance of counsel by his attorney's failure to object to the misconduct.

The court's instructions misled jurors as to how they should review the evidence. The court suggested that acquittal required a more stringent review of the evidence than was

required for conviction, violating Mr. Gingrich's Fourteenth Amendment right to due process.

DECISION BELOW AND ISSUES PRESENTED

Petitioner asks the Court to review the Court of Appeals opinion entered on July 24, 2023[1] This case presents six issues:

1. Did the prosecutor commit flagrant misconduct?
2. Was Mr. Gingrich deprived of his Sixth Amendment right to the effective assistance of counsel?
3. Was the evidence insufficient to prove the elements required for conviction of first-degree burglary and for imposition of a deadly weapon enhancement?
4. Did the court's instructions dilute the presumption of innocence and the State's burden, violating Mr. Gingrich's Fourteenth Amendment right to due process?

STATEMENT OF THE CASE

Travis Brown called the police when he heard Jackie Taylor outside his house, banging on the glass door with a metal object. RP 183, 186, 187, 192. Brown lived with Bruce Gingrich and several other people. RP 145-149, 163.

[1] A copy of the Opinion is attached.

Police arrived and spoke to Taylor, who made a statement and showed them a cell phone video. RP 136-139, 141. Based on this information, the police arrested Mr. Gingrich for burglary. RP 136-139, 141. The information also prompted them to search for a purse and its contents. They found nothing. RP 160-161, 164, 168, 171.

Mr. Gingrich was charged with Residential Burglary. An alternative charge of first-degree burglary was added just before trial. CP 1-2. Although the prosecutor and the police had not previously noticed anything in the burglar's hands, they rewatched the video and concluded he was armed with artificial knuckles. RP 9, 143-144, 328.

Jackie Taylor didn't testify at the trial. The State did present the testimony of multiple police officers. Deputy Rodes said that Taylor had provided a video that showed Mr. Gingrich taking her purse while she slept. RP 136-138, 143, 303, 307, 309-312. Others described how they found Mr. Gingrich in the woods. RP 200-203, 218-219.

The claimed artificial knuckles were never recovered, and Deputy Rodes admitted that he could not tell from the video if they were made from metal. RP 329. There was testimony about the availability of wooden knuckles, leather knuckles, carbon fiber knuckles, porcelain knuckles, and plastic knuckles. RP 326-329.

During voir dire, the prosecutor told prospective jurors that

> [Y]our sole job as jurors… is *to determine whether those acts occurred as they are alleged*, and whether they are consistent or inconsistent with the law as the court instructs you.
> …
> [Y]our sole duty as the trier of fact is *to determine if the allegations the State has made… are true, whether they occurred* and whether those events are consistent or inconsistent with the law as the judge instructs you.
> RP 50-51 (emphasis added).

During her closing argument, the prosecutor referred to a hypothetical juror who thinks "I really believe he did it, but I didn't feel like I had enough evidence, I wanted more evidence, but I do believe he did it." RP 469-470. According to the

prosecutor, such a juror might be applying the wrong standard. RP 470. She went on to say that she had met her burden if a juror thinks "I really believe he did that," but that "[i]f you don't believe it, then you have a reasonable doubt." RP 470.

The State also told the jury "I submit to you [Brown's] testimony is that he heard [Taylor] yelling about a purse." RP 518-519. Brown had not testified that Taylor was yelling about a purse.

Addressing Taylor's absence during closing arguments, the prosecutor told the jury "[y]ou don't get to guess why Ms. Taylor is not present." RP 529. She went on to say

> [Y]ou don't get to guess. You don't get to consider that. You get to consider the evidence that's in front of you, and that's what you get to consider.
> RP 529.

Mr. Gingrich was convicted of first-degree burglary, and sentenced to 60 months in prison. CP 38. This included a 24-month deadly weapon enhancement. CP 38. He timely appealed, and the Court of Appeals affirmed. CP 46.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT.

The prosecutor improperly told prospective jurors that their "sole duty" was to determine if the allegations were true. She also told the jury that they should convict if they "believe [Mr. Gingrich] did it," even if they "wanted more evidence." She told jurors they could not consider the alleged victim's failure to testify, and she relied on "facts" not in evidence. The misconduct prejudiced Mr. Gingrich.

A. Prosecutorial misconduct can violate an accused person's due process right to a fair trial.

The right to a fair trial is "a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct can deprive the accused of a fair trial. *Id.*, at 703-704; U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §22.

A prosecutor does not fulfill the obligation to see justice done "by securing a conviction based on proceedings that violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system." *State v. Walker,* 182 Wn.2d 463, 476, 341 P.3d 976 (2015); *see also State v. Hawkins*, 14 Wn.App.2d 182, 188, 469 P.3d 1179 (2020).

Misconduct during argument can be particularly prejudicial: jurors may lend it special weight because of the prestige associated with the prosecutor's office. *Glasmann*, 175 Wn.2d at 706. The prejudicial effect is increased when misconduct occurs during the prosecutor's rebuttal closing. *State v. Lindsay,* 180 Wn.2d 423, 443, 326 P.3d 125 (2014). Such is the case here – the prosecutor committed misconduct in closing argument, including during rebuttal closing.

Reviewing courts examine the cumulative effect of improper conduct. *Glasmann,* 175 Wn.2d at 707-12. Prosecutorial misconduct may require reversal even where

ample evidence supports the jury's verdict. *Id.*, at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." *Id.*, at 711.

Absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Id.*, at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the misconduct. *Id.*, at 707. In addition, courts focus on "whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

B. The prosecutor misstated the role of the jury and undermined the State's burden of proof.

It is "an unassailable principle that the burden is on the State to prove every element [of a crime] and that the defendant is entitled to the benefit of any reasonable doubt." *State v. Warren*, 165 Wn.2d 17, 26–27, 195 P.3d 940 (2008). This

standard "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (internal quotation marks and citations omitted).

Misconduct during *voir dire*. The Supreme Court has said that "what occurs during voir dire is equally as important as what occurs during trial proceedings." *State v. Zamora*, 199 Wn.2d 698, 711, 512 P.3d 512 (2022) (discussing racial discrimination). Jury selection is "the potential juror's first introduction to the case, the courtroom, the proceedings, and their responsibility as a member of a jury." *Id.*, at 712. During this phase, the jury is "primed to view the prosecution through a particular prism." *Id.*

Here, the prosecutor committed misconduct during *voir dire*. She twice told jurors that their "sole duty" was to

determine if the allegations were true and that "they occurred" RP 50-51.

This was misconduct. *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011). It "miscast the jurors' role as one of determining what happened." *Id.* A juror's job is not to decide if they believe that something happened. *Id.* Instead, the jury's job is to determine if the State proved the elements of an offense beyond a reasonable doubt. *Id*.

Although the prosecutor also referenced the court's instructions, this did nothing to counter the improper argument misstating the jury's "sole duty." The prosecutor did not mention the presumption of innocence, the burden of proof, or the reasonable doubt standard.

Without explanation, the Court of Appeals found that the prosecutor "was appropriately examining the jurors in voir dire to identify any biases." Opinion, p. 4. But the language quoted in the Opinion does not include any question. It provided jurors

with a false explanation of their "sole duty." It amounted to misconduct.

Misconduct during closing arguments. The prosecutor built on her improper statements during closing arguments. She told jurors that she had met her burden if they could say "Man, I really believe he did that." RP 470. She combined this with argument that jurors could convict even if they wanted more evidence. She also told jurors "[i]f you don't believe it, then you have a reasonable doubt." RP 469-470.

This was misconduct.

Mere belief is insufficient for conviction: "A juror's mere belief that an accused individual is guilty does not automatically mean that the State has met its burden." *State v. Magallanez*, 290 Kan. 906, 914, 235 P.3d 460 (2010); *see also Tanner v. State*, 26 Ala. App. 277, 278, 158 So. 196 (1934). Nor is it proper to link reasonable doubt with "[not] believe[ing] it." RP 470.

Instead, jurors are required to believe *beyond a reasonable doubt* that the State has met its burden of proof. A jury "might, from the evidence, easily 'believe' (as the word is commonly understood) appellant guilty; and yet not 'believe it *beyond a reasonable doubt*.'" *Tanner*, 26 Ala. App. at 278 (emphasis in original). *Cf. State v. Clark*, 17 Wn.App.2d 794, 487 P.3d 549 (2021), *review denied*, 198 Wn.2d 1033, 501 P.3d 132 (2022) (prosecutor tied their arguments to the reasonable doubt standard and the burden of proof); *State v. Larios-Lopez*, 156 Wn.App. 257, 233 P.3d 899 (2010) (same); *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011) (same).

This misconduct requires reversal of Mr. Gingrich's convictions. *Evans*, 163 Wn. App. 635, 645. It was flagrant and ill-intentioned, because "[m]isstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." *Glasmann*, 175 Wn.2d at 713. Shifting the burden of proof in this way "is

improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct." *Id.*

Mr. Gingrich's convictions must be reversed, and the charges remanded for a new trial. *Id.*

C. The prosecutor misstated the law regarding an absent witness.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Jones*, 13 Wn.App.2d 386, 403, 463 P.3d 738 (2020). A prosecutor's misstatement of the law "is a serious irregularity having the grave potential to mislead the jury." *State v. Walker*, 164 Wn.App. 724, 736, 265 P.3d 191, 198 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012) (*Walker* II).

A prosecutor's arguments "must be confined to the law stated in the trial court's instructions." *Id.; State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). Here, the

prosecutor misstated the law and did not confine her argument to the law in the trial court's instructions.

In appropriate circumstances, jurors may draw an adverse inference from a witness's failure to appear. *See, e.g., State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). When the court gives a "missing witness" instruction, a party may properly ask jurors to assume the absent witness would have provided unfavorable testimony. *Id.*

Here, the prosecutor made the opposite argument, unsupported by the law or by the court's instructions. She told jurors they *could not* consider Taylor's absence during deliberations. According to her,

> You don't get to guess why Ms. Taylor is not present… [Y]ou don't get to guess. You don't get to consider that. You get to consider the evidence that's in front of you, and that's what you get to consider.
> RP 529.

The argument is inconsistent with the court's instruction on reasonable doubt. As the court told the jury, "[a] reasonable

doubt… may arise from the evidence *or lack of evidence*." CP 9 (emphasis added).

The argument is also contrary to the law. The prosecutor was free to suggest that the jury shouldn't consider Taylor's absence. She was not permitted to argue that they *couldn't* consider her absence.

The misconduct was particularly prejudicial because Taylor was the alleged victim. Her absence was significant, and the prosecutor should not have told the jury that they were affirmatively barred from considering her failure to testify.

The prosecutor's misconduct requires reversal. The case must be remanded for a new trial. *Davenport*, 100 Wn.2d at 760.

D. The prosecutor improperly argued "facts" not in evidence.

A prosecuting attorney "may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Perez-Mejia*, 134 Wn.App. 907, 916,

143 P.3d 838 (2006) (citing *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)). A prosecutor's "[r]eferences to evidence outside of the record… constitute[s] misconduct." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Here, the prosecutor argued "facts" not in evidence. She falsely said "I submit to you [Brown's] testimony is that he heard [Taylor] yelling about a purse." RP 518-519. There are no facts in the record supporting this assertion. It was especially critical given Taylor's failure to testify and the allegation that Mr. Gingrich stole her purse.

Without explanation, the Court of Appeals suggests that the prosecutor was arguing reasonable inferences from the evidence. Opinion, p. 7. This is simply not true. There was no evidence from which the jury could infer that Brown heard Taylor yelling about her purse.

This "[r]eference[ ] to evidence outside of the record" constituted misconduct. *Fisher*, 165 Wn.2d at 747. It was

prejudicial, because it related directly to evidence that could have been supplied by Taylor, had she appeared and testified.

The misconduct prejudiced Mr. Gingrich. His convictions must be reversed, and the case remanded for a new trial.

E. The combined effect of the prosecutor's misconduct prejudiced Mr. Gingrich.

A conviction must be reversed "where several errors combined to deny the defendant a fair trial." *Evans*, 163 Wn. App. at 647. Here, the prosecutor misstated the jury's role, undermined the presumption of innocence and the State's burden to prove the elements beyond a reasonable doubt, and argued "facts" not in evidence. Whether considered separately or cumulatively, this misconduct was flagrant and ill-intentioned. It violated professional standards and case law that was available to the prosecutor. *Glasmann*, 175 Wn.2d at 707.

The prejudice stemming from these repeated instances of misconduct could not have been cured by an instruction. The

misconduct requires reversal of Mr. Gingrich's conviction and remand for a new trial.

F. If the misconduct is not considered flagrant and ill-intentioned, Mr. Gingrich was denied the effective assistance of counsel.

An accused person is guaranteed the effective assistance of counsel. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, §22; *State v. Classen*, 4 Wn.App.2d 520, 422 P.3d 489 (2018). A person claiming ineffective assistance must show deficient performance resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo. State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018).

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at

109; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Prejudice is established when "there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal quotation marks and citations omitted). This standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

Mr. Gingrich's attorney did not object or request an instruction when the prosecutor committed misconduct. The prosecutor misstated the role of the jury, undermined the presumption of innocence and the State's burden to prove its case beyond a reasonable doubt, misstated the law, contradicted the court's instructions, and argued "facts" not in evidence.

Each instance of misconduct should have drawn an objection and a request for a curative instruction. Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: "At a minimum, an attorney…

should request a bench conference… where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005).

Here, counsel did not take this minimum step. He should have objected to the prosecutor's improper statements, asked the court to strike the remarks, asked for a curative instruction, and (possibly) requested a mistrial. The prosecutor's misconduct denied Mr. Gingrich a fair trial.

By failing to protect his client from the prejudicial impact of multiple instances of misconduct, Mr. Gingrich's attorney deprived him of the effective assistance of counsel. Counsel's failure to object created a probability sufficient to undermine confidence in the outcome.[2] *Lopez*, 190 Wn.2d at 116. Mr. Gingrich's convictions must be reversed. *Id.*

[2] Because the Court of Appeals found no misconduct, it concluded that Mr. Gingrich was not denied the effective assistance of counsel. Opinion, pp. 9-10.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. GINGRICH WAS ARMED WITH A DEADLY WEAPON.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction.[3] U.S. Const. Amend. XIV; *Winship*, 397 U.S. at 364; *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). Here, the State did not prove the essential elements of first-degree burglary.

Evidence is insufficient for conviction unless a rational jury could find guilt beyond a reasonable doubt. *State v. D.R.C.*, 13 Wn.App.2d 818, 824, 467 P.3d 994 (2020). Although a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that can be drawn from it,[4] the existence of a fact cannot rest upon guess, speculation, or

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[3] The same is true regarding a sentencing enhancement. *See State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

[4] *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

conjecture. *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006) .

To prove first-degree burglary, the State was required to prove that Mr. Gingrich committed burglary while armed with a deadly weapon. RCW 9A.52.020; RCW 9A.52.025; CP 18, 22. The State was also required to prove that Mr. Gingrich was armed with a deadly weapon for purposes of an enhancement; however, the standards for a deadly weapon enhancement differ from the standards for first-degree burglary.

Deadly weapon - burglary. To convict Mr. Gingrich of first-degree burglary, the State was obligated to prove that Mr. Gingrich was armed with a "deadly weapon" during the offense. CP 13, 18. RCW 9A.52.020. For this purpose, a deadly weapon is one "which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 17; RCW 9A.04.110(6). As an element of the offense, there is no

per se rule regarding deadly weapons. *Compare* RCW 9A.04.110(6) *with* RCW 9.94A.825.

The State did not prove this element. The video shows a person wearing artificial knuckles. It does not show use, attempted use, or a threat to use them. Nor did any such use, attempt, or threat create "circumstances [making the weapon] readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). The evidence was insufficient for conviction of first-degree burglary.

The Court of Appeals did not address the definition of deadly weapon. Opinion, pp. 2-3. Instead, the court's focus was on evidence that Mr. Gingrich was *armed*. Opinion, pp. 2-3. It does not matter if the burglar was armed with something that was not a deadly weapon.

The evidence was insufficient to prove that Mr. Gingrich was armed with a deadly weapon, an element of first-degree burglary.

Deadly weapon – enhancement. For purposes of the enhancement, metal knuckles qualify as a deadly weapon per se, and the court told jurors that "[m]etal knuckles are a deadly weapon." CP 23; *see* RCW 9.94A.825. However, the video does not show what the claimed artificial knuckles were made of. The police did not recover any, and Deputy Rodes admitted that he did not know if the knuckles in the video were made of metal. RP 329.

There was testimony about the availability of wooden knuckles, leather knuckles, carbon fiber knuckles, porcelain knuckles, and plastic knuckles. RP 326-329. Any inference that the knuckles were made of metal rests upon guess, speculation, or conjecture. *Colquitt*, 133 Wn.App. at 796.

According to the Court of Appeals, the evidence was sufficient because Deputy Rodes has only seen metal knuckles and because he believed there was a "glint" in the security footage. Opinion, p. 3; *see* RP 312, 328. But Rodes acknowledged that he did not know what the knuckles were

made of. RP 329. Furthermore, artificial knuckles that glint could be made of carbon fiber, porcelain, or plastic. RP 326-329.

If the implement was not made of metal, it did not qualify as a deadly weapon *per se.* Instead, the State was required to show that the knuckles were a deadly weapon in fact. This required proof that they "ha[d] the capacity to inflict death." CP 23; RCW 9.94A.825. The State was also required to prove that they were used in a manner "likely to produce… death." CP 23; RCW 9.94A.825.

Nothing in the record shows that they had the capacity to inflict death, or that they were used in a manner likely to produce death. Accordingly, the evidence was insufficient to prove that Mr. Gingrich was armed with a deadly weapon for purposes of the enhancement. If the charges are not dismissed, the enhancement must be vacated, and the case remanded for resentencing.

III. THE COURT'S INSTRUCTIONS VIOLATED MR. GINGRICH'S RIGHT TO DUE PROCESS.

In its "to convict" instructions, the court used two different standards telling jurors how to approach the evidence. For conviction, the standard for reviewing the evidence was less onerous than the standard for acquittal. This violated Mr. Gingrich's right to due process.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." *Winship*, 397 U.S. at 364. A jury instruction "that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process." *Victor v. Nebraska*, 511 U.S. 1, 29, 114 S. Ct. 1239, 1254, 127 L. Ed. 2d 583 (1994) (Blackmun, J., concurring).

In reviewing a challenge to instructions, "courts must read [the instructions] as would an ordinary, reasonable juror." *State v. Killingsworth*, 166 Wn. App. 283, 285, 269 P.3d 1064 (2012). Whether an accused person "has been accorded full

constitutional rights depends on the way a reasonable juror *could have* interpreted the instruction." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (emphasis added); *see also State v. Walden*, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

The court correctly instructed jurors that they had a "duty to return a verdict of not guilty" if they had a reasonable doubt. CP 18, 22; *see State v. Smith*, 174 Wn. App. 359, 369, 298 P.3d 785 (2013); *State v. Brown*, 130 Wn. App. 767, 770, 124 P.3d 663 (2005). Similarly, the court properly told jurors that they had a duty to convict if the elements had been proved beyond a reasonable doubt. CP 18, 22.

However, the court differentiated between conviction and acquittal in how jurors were to examine the evidence. To convict, jurors were to reach a verdict "from the evidence." CP 18, 22. By contrast, a decision to acquit could only come after "weighing all of the evidence." CP 18, 22.

This suggested that a guilty verdict could come from a less stringent review of the evidence. The court did not instruct jurors that they were to "weigh[] all the evidence" before convicting Mr. Gingrich. CP 18, 22. Instead, they could convict based on a finding "from the evidence." CP 18, 22.

Due process requires a jury to review and weigh all the evidence before reaching a guilty verdict. By suggesting otherwise, the court violated Mr. Gingrich's right to due process.

By contrast, a jury need not weigh all the evidence to acquit. If a partial review of the evidence shows that the State has not met its burden as to one or more elements, the jury must acquit and has no duty to weigh the remainder of the evidence.

Here, a reasonable juror could believe the court's use of different language meant different things. Comparing the phrase "from the evidence" with "after weighing all the evidence," a reasonable juror might believe that conviction was permissible on a less stringent review of the evidence, and that if the jury

were to acquit, they could not do so without a more thorough review.

This is incorrect. An instruction should not require jurors to acquit only upon a deeper look at the evidence than that required for conviction. The instruction suggested an "improperly high" level of examination of the evidence to acquit, and an "improperly low" level to convict. *Victor*, 511 U.S. at 29 (Blackmun, J., concurring) (addressing doubt and certainty).

According to the Court of Appeals, "[t]he Supreme Court approved this instruction" in *State v. Bennett*, 161 Wn.2d 303, 309, 165 P.3d 1241 (2007). This is false. The *Bennett* court did not address a "to convict" instruction and did not discuss the different standards used in this one.[5]

[5] *Bennett* involved a challenge to the so-called *Castle* instruction defining reasonable doubt.

The court's "to convict" instructions violated Mr. Gingrich's right to due process. His conviction must be reversed, and the case remanded for a new trial.

IV. THE SUPREME COURT SHOULD GRANT REVIEW UNDER RAP 13.4(B)(3) AND (4).

The Supreme Court will grant review of a Petition that raises a significant question of constitutional law or "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3) and (4). Both criteria are met here.

First, the prosecutor's misconduct directly undermined the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Winship*, 397 U.S. at 363. The Supreme Court should address this constitutional error to provide guidance regarding the impact of misconduct such as that presented here.

Second, Mr. Gingrich's sufficiency argument involves the interplay between the definition of deadly weapon as an

element of a substantive offense and as an element of a sentencing enhancement. The Supreme Court can provide guidance on this issue, which is also a matter of substantial public interest.

Third, no published opinion has ever addressed the pattern "to convict" instruction's use of differing standards for review of the evidence. These standards suggest that acquittal requires a more stringent review of the evidence than that required for conviction. This is a significant question of constitutional law that is also of substantial public interest.

The Supreme Court should grant review under RAP 13.4(b)(3) and (4).

CONCLUSION

Mr. Gingrich's first-degree burglary conviction must be vacated, and the charge dismissed because the State presented insufficient evidence. If the charge is not dismissed, the deadly weapon enhancement must be stricken and the case remanded for resentencing.

In the alternative, the case must be remanded for a new trial. The prosecutor committed egregious misconduct, Mr. Gingrich was denied the effective assistance of counsel, and the court's instructions deprived him of due process.

The Supreme Court should grant review. RAP 13.4(b)(3) and (4).

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4906 words, as calculated by our word processing software.

Respectfully submitted August 17, 2023.

BACKLUND AND MISTRY

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Bruce Gingrich DOC# 282772
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on August 17, 2023.

_____
Jodi R. Backlund, No. 22917
Attorney for the Appellant

FILED
7/24/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent BRUCE CLIVE GINGRICH, Appellant	No. 85047-4-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Bruce Clive Gingrich seeks reversal of his conviction and sentence for burglary in the first degree while armed with a deadly weapon. Because the facts of this case are known to the parties, we do not repeat them here except as relevant to the arguments below. We reverse in part and remand the matter with instructions that the judgment and sentence be amended to remedy a double jeopardy violation. In all other respects, we affirm.

A. Sufficiency of the Evidence

Gingrich argues that there is insufficient evidence from which a jury could find him guilty of burglary in the first degree while armed with a deadly weapon. We disagree.

To decide whether sufficient evidence supports the jury's verdict, the court must determine "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan*, 181 Wn.2d 102, 105, 330

P.3d 182 (2014). Additionally, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Under RCW 9A.52.020(1), "[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." Thus, we must consider three elements: "intent to commit a crime against a person or property therein," "enters or remains unlawfully," and "armed with a deadly weapon."

A rational juror could properly find that Gingrich entered or remained unlawfully and did so "with intent to commit a crime against a person or property therein." *Id.* The evidence includes home security video footage showing that an individual who matched Gingrich's description: entered the residence where Jackie Taylor was sleeping at 12:31 a.m., stood over Taylor and did not wake her up while looking around the room, was wearing metal knuckles (as discussed below), and grabbed a brown leather purse before exiting the residence. Following these events, Taylor was visibly upset. And when police attempted to locate Gingrich, he was found hiding in the forest behind his residence. This is more than sufficient evidence from which a rational juror could have found both the entry and intent elements beyond a reasonable doubt.

The record also includes sufficient evidence from which a rational juror could find that Gingrich was "armed with a deadly weapon." Under Washington

law, the State must show that the defendant is "within proximity of an easily and readily available deadly weapon" and that a "nexus is established between the defendant, the weapon, and the crime." *State v. O'Neal*, 159 Wn. 2d 500, 503-04, 150 P.3d 1121 (2007). Here, Deputy Sheriff Benjamin Rodes testified that if metal knuckles are on someone's hand—as the home security video footage shows—they are immediately available for use and that he has seen only metal knuckles (a "deadly weapon" under RCW 9.95.040) used in criminal activity and had not seen knuckles made of non-metal material. Deputy Rodes also identified a "glint" in the home security video footage, which is additional evidence that the knuckles were made of metal. Gingrich's sufficiency of the evidence argument thus fails.

B. Prosecutorial Misconduct

Gingrich argues that he is entitled to a new trial because the prosecutor committed misconduct by misstating the role of a juror, misstating the law, arguing facts not in evidence, and arguing that defense counsel made "inaccurate" statements of the law. We disagree.

Significantly, Gingrich failed to object at trial to *any* of these purported instances of prosecutorial misconduct. Under controlling precedent, his failure to do so "constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). Additionally, the "court considers the prosecutor's arguments in the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *Id*.

1. Misstating the role of a juror

Gingrich argues that the prosecutor misstated the role of the juror during voir dire when she told jurors "your sole duty as the trier of fact is to determine if the allegations the State has made . . . whether those allegations are true, whether they occurred." Properly viewed in context, here is what the prosecutor said:

> What we want to know, though, obviously, is if you are able to take the information that's provided to you in the court, you're going to get evidence, whether it is from the witness testimony or exhibits, evaluate that evidence, and then compare it to law that the court instructs you on. And your sole job as jurors, if you end up sitting in the jury panel, is to determine whether those acts occurred as they are alleged, *and whether they are consistent or inconsistent with the law as the court instructs you.*

(Emphasis added.) Contrary to Gingrich's assertion that the prosecutor misstated the role of the jury, the prosecutor was appropriately examining the jurors in voir dire to identify any biases.

Gingrich also argues that the prosecutor misstated the role of the juror during the State's closing argument when she told jurors that "she had met her burden if they could say 'Man, I really believe he did that,' . . . combined . . . with [the statement that the] jurors could convict even if they want[] more evidence." Properly viewed in context, here is what the prosecutor said:

> So if you're saying that to yourself at the end of the case, after fully, fairly evaluating the evidence and discussing with your peers, if you're saying, "Man, I really believe he did that," then I submit to you that I have met my burden, because you didn't know anything about the case, and somehow you have now arrived at a place where you believe he did the things that the State has accused him of and has charged him with. If you don't believe it, then you have a reasonable doubt . . .
>
> But I submit to you if you're saying you believe it but you'd like more evidence, that's a natural reaction. Everybody always wants more evidence . . . I submit to you it's not possible to have 100

> percent certainty when you have 12 people sitting together in a room with a lifetime of different experiences . . . But unanimously, *if you have an abiding belief in the truth of the charge, then I submit I have met my burden beyond a reasonable doubt.*

(Emphasis added.) Gingrich also complains that the prosecutor told the jury that there was no numerical value or litmus test for reasonable doubt and that reasonable doubt is a "really high" standard.

The prosecutor's remarks, properly viewed in context, are consistent with 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 at 98 (5th ed. 2021) (WPIC), which likewise states: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), the Supreme Court approved WPIC 4.01 as the required jury instruction regarding reasonable doubt. Here again, the prosecutor's remarks are not flagrant or ill intentioned nor did they cause an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

2. Misstating the law

Gingrich argues that the prosecutor improperly inverted the relationship between knowledge and intent—and thereby misstated the law—when she said, "[i]f you find that they're doing it knowingly, then they're acting with intent." Properly viewed in context, here is what the prosecutor said:

> Intent is what you think it is, doing something with intent, intentionally. If you find that they're doing it knowingly, then they're acting with intent. When acting with the objective or purpose to accomplish a result that constitutes a crime.

The prosecutor's remark is consistent with the applicable jury instruction, which

states that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." WPIC 10.01, at 225. Proof of knowledge tends to show objective or purpose, which in turn shows intent. There was no improper inversion here.

Gingrich also argues that the prosecutor misstated the law when she "told jurors they *could not consider* Taylor's absence during deliberations." Properly viewed in context, here is what the prosecutor said:

> You don't get -- I submit to you, you don't get to assume. You don't get to guess why Ms. Taylor is not present. Whether it's Ms. Taylor, whether it's the State, or whether it's the defendant, you don't get to guess. You don't get to consider that. *You get to consider the evidence that's in front of you, and that's what you get to consider. And I submit to you, based on all of the evidence that you have seen, all of these things are consistent with what the State has charged.*

(Emphasis added.) The prosecutor was telling jurors that they should decide the case based on the evidence before them. This, too, is consistent with the controlling jury instruction. WPIC 1.02, at 26. In this respect as well, the prosecutor's remarks are not flagrant or ill intentioned nor did they cause an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

3. Arguing facts not in evidence

Gingrich next argues that the prosecutor improperly argued facts not in evidence when she stated during her closing argument, "I submit to you [Brown's] testimony is that he heard [Taylor] yelling about a purse" and "Ms. Taylor went directly to Mr. Gingrich's home and directly confronted him." "In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the

evidence, including evidence respecting the credibility of witnesses." *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). The prosecutor here was arguing such reasonable inferences from the home security video footage, photographic evidence, and testimony at trial. Here again, Gingrich fails to establish that the prosecutor's remarks were so flagrant and ill intentioned that they caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

4. Arguing defense counsel made "inaccurate" statements of law

Gingrich argues that the prosecutor improperly argued that defense counsel had misstated the law regarding reasonable doubt. Viewed in context, here is what the prosecutor said:

> So when we talk about this, I want to be very clear, one of the things I said at the very beginning is that the jury instructions are the rule of the case. You are the triers of fact. So there may be times where myself or counsel misspeaks, and that -- I submit to you that is exactly what Mr. Hack did repeatedly. Absolutely, the jury instruction on reasonable doubt is the law of the case. The jury instruction is an abiding belief in the truth of the charge, 100 percent. Mr. Hack is inaccurate, and it is an inaccurate statement of the law to tell you that even if you have an abiding belief but you'd like more evidence, you have to find him not guilty. That is an inaccurate statement of the law.

While prosecutors can properly argue that the evidence does not support the defense's theory, they cannot "impugn the role or integrity of defense counsel." *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). The prosecutor here appropriately responded to defense counsel's arguments and did not impugn the role or integrity of defense counsel. As before, the prosecutor's remarks are

not flagrant or ill intentioned nor did they cause an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury

5. Cumulative error

The cumulative error doctrine "requires reversal where a combination of . . . errors denies the defendant a fair trial." *State v. Ritchie*, 24 Wn. App. 2d 618, 644 n.9, 520 P.3d 1105, 1120 (2022), *review denied*, 526 P.3d 851 (1 Wn.3d 1006, 2023). But "where there are few or no errors, and the errors, if any, have little or no effect on the outcome of the trial, reversal is not required." *Id.* Having carefully reviewed each instance of alleged prosecutorial misconduct "in the context of the case, the arguments as a whole, the evidence presented, and the jury instructions" (*Slater*, 197 Wn.2d at 681), we find no cumulative error that would necessitate a new trial.

C. Jury Instructions

Gingrich argues: "In its 'to convict' instructions, the court used two different standards telling jurors how to approach the evidence. For conviction, the standard for reviewing the evidence was less onerous than the standard for acquittal. This violated Mr. Gingrich's right to due process." Challenges to jury instructions are reviewed de novo. *State v. Imokawa*, 194 Wn.2d 391, 396, 450 P.3d 159 (2019). "Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, [and] are not misleading . . ." *Id.* (quoting *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)). Because the challenged instruction properly informs the jury of the applicable law, we reject Gingrich's argument.

The trial court's "to convict" instruction provides as follows:

> To convict the defendant of the crime of burglary in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt. That on or about December 11th, 2021, the defendant entered or remained unlawfully in a building; that the entering or remaining was with intent to commit a crime against a person or property therein; that in so entering or while in the building or in immediate flight from the building, the defendant was armed with a deadly weapon; and that any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The Supreme Court approved this instruction in *Bennett*. 161 Wn.2d at 318. Contrary to Gingrich's argument, it does not provide inconsistent standards for conviction and acquittal. In both instances, the jury must consider the evidence and return a verdict based on that evidence. There was no due process violation.

D. Ineffective Assistance of Counsel

Gingrich asserts that his trial counsel provided ineffective assistance in two respects. We disagree.

"Both the United States and Washington Constitutions guarantee a criminal defendant the right to effective assistance of counsel." *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021). "To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result

of the proceeding would have been different." Id. at 247-48.

First, Gingrich argues that his trial counsel provided ineffective assistance by failing to object to the alleged instances of prosecutorial misconduct discussed in section B of this opinion. As section B shows, Gingrich has failed to establish prosecutorial misconduct. For much the same reasons, Gingrich also fails to show that his counsel's performance fell below an objective standard of reasonableness. Nor has he established "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 248 (quoting *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018)).

Second, Gingrich argues that his trial counsel provided ineffective assistance by failing to request a missing witness instruction. This argument fails because a party is not entitled to a missing witness instruction if the absence of the witness can be reasonably explained. *See State v. Reed*, 168 Wn. App. 553, 571, 278 P.3d 203 (2012). Here, the explanation is that Taylor had failed to appear to testify despite the state's best efforts to procure her testimony. Thus, even if Gingrich's trial counsel had requested a missing witness instruction, the outcome of the proceedings would not have been any different. Gingrich's ineffective assistance arguments thus fail.

E. Offender Score Calculation

Gingrich argues that the trial court erred by sentencing him with an offender score of three. We disagree.

When determining offender scores for sentencing purposes, federal convictions "shall be classified according to the comparable offense definitions and

sentences provided by Washington law." RCW 9.94A.525(3). Although the State bears the burden of ensuring that the record supports the existence and classification of federal convictions, "we have stated a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies [Sentencing Reform Act] requirements." *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004).

Gingrich and his counsel provided such an affirmative acknowledgment. The prosecutor prepared a statement of criminal history that included "Robbery . . . 1[,] while armed," in bold print. The document included an acknowledgment that "[t]he defendant and the defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled cause." Both Gingrich and his attorney signed the acknowledgment.

Additionally, the offender score was also discussed at sentencing and Gingrich's counsel once again provided the required acknowledgement:

> THE COURT: Do you agree with the State that it's 55 to 65 months for the range?
>
> MR. HACK: Apparently, the robbery in the first degree in Nevada would -- would at least qualify. I don't think it would be a serious violent, but it would be a violent offense. So it would be a doubler [sic] as a class A. It does not wash out. We have the other PSP one, that was a class B. Mr. Gingrich has not gone ten full years in the community totally crime-free, so a class B would not also wash out. *So it appears to me that the State is correct that his score would be three*.

(Emphasis added.) Given Gingrich's "affirmative acknowledgment that his prior . . . federal conviction [is] properly included in his offender score" (*Ross*, 152 Wn.2d at 230), the trial court did not err in sentencing him with an offender score of three.

F. Double Jeopardy

Although Gingrich was charged with both burglary in the first degree while armed with a deadly weapon and residential burglary while armed with a deadly weapon, the trial court properly merged the charges as required to avoid a double jeopardy violation. *See State v. Turner*, 169 Wn.2d 448, 462 n.9, 238 P.3d 461 (2010) ("trial courts, where appropriate, are required to either merge convictions or enter judgment and sentence on only one of multiple convictions so as to avoid double jeopardy"). Yet as Gingrich notes, section 2.1 of the judgment and sentence indicates that he was convicted of both burglary in the first degree and residential burglary. Gingrich correctly argues, and the State concedes, that this violates Gingrich's double jeopardy rights. To remedy this violation, we remand the matter with instructions to remove all references to the residential burglary conviction in the judgment and sentence. In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Birk, J.

Mann, J.

BACKLUND & MISTRY

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