No 31865-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MYKEL T. STRASSER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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CASES

STATUTES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it instructed the jury on deadly weapons enhancements over the objection of counsel and sentenced including the deadly weapon enhancement.

2. The State committed prosecutorial misconduct when it argued facts not in evidence and unconstitutionally shifted the burden of proof onto Appellant.

3. The trial court committed reversible error when it allowed the use of the controversial Washington Pattern Jury Instruction 401 including the bracketed "abiding belief in the truth of the crime charged language" over both the objection of the State and the Appellant.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when instructing the jury on the deadly weapon allegations contained in Counts I and II of the information?

2. Has the defendant met his burden of establishing prosecutorial misconduct?

3. Did the trial court err when instructing the jury on reasonable doubt by including the "abiding belief" language in the instruction?

III. STATEMENT OF THE CASE

The appellant/defendant, Mykel Strasser, was charged by information in the Spokane County Superior Court with First Degree Burglary under Count I, and First Degree Robbery under Count II. CP 1. Each crime included a deadly weapon enhancement allegation. CP 1. The first trial was declared a mistrial because the jury was deadlocked. CP 36.

Evidence at the second trial established Karen Mustard and her son, Sean Mustard[1], were at their home during the evening hours of November 3, 2011. RP 118-122; RP 210. Ms. Mustard heard a loud boom as someone kicked in a door to the residence around 11:00 pm. RP 123; 126-27; RP 235. Three to four large males dressed in black and the defendant entered the home uninvited. RP 123. The attackers were yelling and screaming. RP 124. Several of the assailants used bats that evening. RP 143. At one point during the incident, one of the individuals raised a baseball bat. RP 124-25. Ms. Mustard felt threatened. RP 124. She also believed the individual was going to smash some of the home computer equipment. RP 125. Ms. Mustard also observed the defendant raise a baseball bat into the air and her son contemporaneously "duck and cover." RP 132.

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[1] For ease of reference, Sean Mustard will be referred to as Sean.

During this event, and as he was digging through the family's personal items in the house, he asked Sean for the "laptop." RP 277. As the defendant left the doorway to the home, he charged Sean with a baseball bat and he acted as if he was going to hit Sean. RP 270-80. Outside, Sean was trying to convince one of the attackers that the defendant had the "laptop." RP 280.

A neighbor observed one of the attackers with an object in his hand outside the residence after the incident. RP 197. RP 206-07. She described it as similar to a bat; stick or a baton. RP 197. She further identified the object as a weapon. RP 207. One of the bats used during the incident was collected at the scene as evidence. RP 241.

Ms. Mustard also identified the defendant as "stealing" items from the home. RP 125. Another witness at the Mustard residence that evening, Thomas Moses, described the attackers as "carting" items out from Sean's bedroom and out of the house. RP 155. Specifically: snow skiing equipment; clothing; a guitar, and marijuana. RP 127.

As the assailants left the residence, they threw a concrete block through the windshield of Seas's car. RP 133; RP 160.

Ms. Mustard; Sean, and Mr. Moses recognized the defendant as one of the assailants. RP 121; RP 123-126; RP 154-57; RP 258-274.

Prior to this event, Sean and the defendant had developed a friendship. RP 259. Approximately one to two months before the incident, Sean and the defendant were at a party at a friend's house. The defendant showed Sean a laptop and an iPod in his backpack he had taken from someone at the party. RP 263-65. Sean believed one of the assailants at the burglary was at the party from where the laptop was taken a month earlier. RP 272.

Approximately one month later, the defendant left some personal items[2] in Sean's car. RP 266-67. Approximately two weeks later, the defendant contacted Sean and demanded the return of his personal items. RP 268. Sean placed the items on the front porch to his mother's residence so the defendant could retrieve the items. RP 269.

Thereafter, the matter proceeded to trial and the defendant was convicted of First Degree Burglary and First Degree Robbery by a jury on June 13, 2013. CP 57; CP 59. The jury also found the defendant used a deadly weapon during commission of both offenses. CP 58; CP 60. The defendant was sentenced to a standard range sentence on both offenses. CP 61.

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[2] The items consisted of a pair of sunglasses; a sweatshirt, and a bottle of homemade liquor. RP 267.

IV. ARGUMENT

A. THERE WAS SUFFICENT EVIDENCE TO INSTRUCT THE JURY ON THE DEADLY WEAPON ENHANCMENT-SPECIAL VERDICT.

Appellant argues the evidence was insufficient to instruct the jury on the deadly weapon enhancements.

Standard of Review

The standard of review applicable to jury instructions, if based upon a factual determination, is abuse of discretion. *State v. Walker,* 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find guilt beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068(1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* at 201. Matters pertaining to credibility of witnesses, conflicting testimony, and persuasiveness of the evidence are the exclusive province of the fact finder. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

The deadly weapon allegation statute states, in relevant part,

> [A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger,

> pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

Baseball bats are not on the statutory list of per se deadly weapons. Thus, the defendant argues the baseball bat does not qualify as a "deadly weapon" for sentencing enhancement purposes because there was insufficient evidence that he used the baseball bat in a manner that was likely to produce or may easily and readily produce death. Whether a weapon is deadly is a question of fact, which the State must prove beyond a reasonable doubt. *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

The trial court's Jury Instruction No. 19[3] stated in relevant part:

> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances

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[3] The trial court used 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.07. RP 352; CP 49.

> surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.
>
> If one person is armed with a deadly weapon, all accomplices are deemed to be so armed, even if only one deadly weapon is involved.
>
> A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

At the time of trial, the defense objected to this instruction. RP 335-337. The trial court found sufficient evidence had been produced to give the instruction. RP 337-338. The trial court did not abuse its discretion.

Common sense supports the view that a baseball bat has the capacity to inflict death. Moreover, a baseball bat is sufficiently similar to a "metal pipe or bar used or intended to be used as a club," which could be recognized as a deadly weapon as a matter of law.

Here, Ms. Mustard testified one of the assailants raised a bat and she felt threatened. RP 124. She also believed the individual intended on smashing some of the family's personal items. RP 125. She also witnessed this individual raise the bat into the air and her son simultaneously "duck

and cover." RP 132. In addition, Sean observed the defendant charge him with a baseball bat as if he was going to strike him as the defendant left the home. RP 270-280. In addition, Sean observed one of the participants grab a bat upon entry into the house and charge toward him. RP 275.

The appellant and the other perpetrators did not sit idly with bats in hand during this encounter. They used the bats to intimidate and threaten the residents of the home. The bats could have easily and readily caused the death of one of the inhabitants of the home.

The trial court did not abuse its discretion by instructing the jury with respect to the deadly weapon enhancements.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN THE CONTEXT OF THE ENTIRE TRIAL.

The standard of review for a trial court's ruling on prosecutorial misconduct is abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

A defendant alleging prosecutorial misconduct has the burden of showing the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Where a defendant raises the issue for the first time on appeal, the defendant must also show "that the misconduct was so flagrant and

ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. Prejudice occurs only if " 'there is a *substantial likelihood* the misconduct affected the jury's verdict.' " *State v. Monday*, 171 Wn.2d 667, 675, 257 P.2d 551 (2011). (Emphasis in the original.)

Opening Statement

A prosecutor is permitted to outline the anticipated testimony and reasonable inferences in his or her opening statement so long he or she believes in good faith that such testimony will be produced at trial. *State v. Kroll*, 87 Wn.2d 829, 834-835, 558 P.2d 173 (1977); *State v. Grisby*, 97 Wn.2d 493, 498-499, 647 P.2d 6 (1982), *cert. denied*, *Frazier v. Washington*, 459 U.S. 1211, (1983), *review denied*, 153 Wn.2d 1024 (2005).

The defense never objected to any statement made by the State at the time of opening statement. RP 108-113. Any objection to misconduct of the prosecutor in opening statement is waived by failure to make a timely objection and request a curative instruction unless the statement is so flagrant that no instruction could cure it. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978); *State v. Morris*, 70 Wn.2d 27, 33, 422 P.2d 27 (1967).

In the case at bar and during opening statement, the prosecutor remarked the jury could hear from defense witnesses to include the defendant's mother. RP 113. The prosecutor further commented that the jury would be able to assess whether she was biased. RP 113. The defense also commented during opening statement as to what it anticipated the testimony of defendant's mother to be at the time of trial. RP 115–116. As projected, the defendant's mother testified at the time of trial. RP 303-310.

The defense has provided no authority that bars the prosecutor from commenting during opening statement as to the anticipated testimony of an identified defense witness.

Moreover, the prosecution's opening statement followed the evidence that was introduced at trial and can in no way be characterized as so flagrant, persistent, and ill-intentioned or wrongly inflicted so as to unduly prejudice the defendant. The jury heard the evidence and was instructed counsel's argument was not evidence. RP 342.

Finally, appellant waived any argument with respect to the prosecutor's opening statement because he did not object at the time of trial and he did not request a curative instruction.

Allegation of Facts Not in Evidence and the State's Burden of Proof

Appellant next claims the State never produced any evidence of a missing laptop or iPod as a motive for the crimes. He does so with a cursory statement in his brief.

Contrary to the defendant's allegation, Sean Mustard testified he observed a laptop and iPod in the defendant's backpack several months prior to the incident. RP 263-65. At the time of the incident, the defendant asked Sean for the "laptop." RP 277. Sean also believed one of the assailants was at the party from where the laptop was taken. RP 272.

Accordingly, the prosecutor argued at the time of closing argument that the defendant concocted a story that Sean stole the laptop and iPod from the party, and the defendant went to Sean's house on a ruse to convince the owner the laptop and iPod were at Sean's house.

In closing argument, prosecutors are afforded wide latitude to draw and express reasonable inferences from the evidence. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When analyzing prejudice, the court does not view the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates,* 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied,* 554 U.S. 922 (2008).

Here, the prosecutor was certainly allowed to draw inferences from the testimony and evidence produced at trial. Appellant has not demonstrated the remarks were improper, much less that "the [alleged] misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice."

Appellant did not object to the prosecutor's argument. If appellant had objected and if the court found a basis, the trial court could have struck the prosecutor's arguments regarding the electronic devices from the record and instructed the jury to disregard any arguments the evidence did not support. This would have cured any claimed prejudice.

The appellant has not met his burden of demonstrating a substantial likelihood of misconduct that affected the jury's verdict. Moreover, he waived his claim because he did not object and request a curative instruction. *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012).

C. THE WASHINGTON SUPREME COURT HAS EXPRESSLY AFFIRMED THE ABIDING BELIEF LANGUAGE IN THE REASONABLE DOUBT INSTRUCTION PROVIDED TO THE JURY.

The appellant challenges the trial court's Jury Instruction No. 3 that "[i]f from such consideration, you have an abiding belief in the truth

of the charge, you are satisfied beyond a reasonable doubt."[4] He contends the "abiding belief" language encouraged the jury to undertake an impermissible search for the truth.

Contrary to his argument, the Supreme Court has expressly affirmed the use of the abiding belief language in the reasonable doubt instruction in *State v. Bennett*, 161 Wn.2d 303, 308, 165 P.3d 1241 (2007). In *Bennett*, the Supreme Court stated:

> *In [State v.] Tanzymore*, [54 Wn.2d 290, 340 P.2d 178 (1959)] written almost half a century ago, we observed, "[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit." *Id.* at 291, 340 P.2d 178.

Bennett 161 Wn.2d at 308. *See also, State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Fedorov*, 181 Wn.App. 187, 200, 324 P.3d 784 (2014); *State v. Kinzle*, 181 Wn.App. 774, 784, 326 P.3d 870 (2014).

In the present case, the State did not argue it was the jury's job to search for the truth as suggested by the appellant. Furthermore, the State did not argue the merits of the trial court's Instruction No. 3 or how to apply it to the facts of the case. RP 353-367; RP 380-384.

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[4] The trial court used 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01. RP 344-45; CP 49.

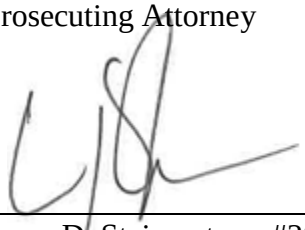
The trial court did not error when instructing the jury on reasonable doubt.

V. CONCLUSION

The respondent respectfully requests the court affirm the defendant's convictions and sentences for the reasons stated above.

Dated this 2nd day of FebruaryFebruary, 2015.

LARRY H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. MYKEL T. STRASSER, Appellant,	NO. 31865-6-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 2, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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2/2/2015	Spokane, WA	*Crystal McNees*
(Date)	**(Place)**	**(Signature)**