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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31865-6-III

SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MYKEL T. STRASSER, PETITIONER

PETITION FOR REVIEW FROM THE COURT OF
APPEALS, DIVISION III

PETITION FOR REVIEW

December 29, 2015

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A. IDENTITY OF PETITIONER

Mykel T. Strasser respectfully asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

Mykel T. Strasser asks this court to review the decisions of the Court of Appeals determining:

1. That a baseball bat as used during the alleged robbery was a deadly weapon within the statutory definition;
2. That Mykel Strasser’s right to a fair trial was not violated by the State’s prosecutorial misconduct in anticipating his defense by mentioning the testimony of a potential defense witness and arguing to negate that testimony in the State’s opening statement;
3. That the Trial Court giving the Jury Instruction, formerly WPIC 401, that included the bracketed phrase “If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt”, to the jury

over objection by Mykel Strasser violated his right to a fair trial.

Issued on December 1, 2015 . A copy of the decision is in the Appendix at pages A- 1 to 14.

C. ISSUES PRESENTED FOR REVIEW

1. Was the bat as utilized in Mykel Strasser's case a deadly weapon as defined by statute and should the attendant weapons enhancement apply to his sentence?
2. Was Mykel Strasser's Constitutional right to a fair trial, and did the State impermissibly shift the burden of proof, by committing prosecutorial misconduct in anticipating the testimony of a potential defense witness and arguing to negate that evidence in its opening statement?
3. Did the Trial Court commit reversible error by giving the Jury Instruction, formerly 401, that included the bracketed phrase "If, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt", to the jury over objection of Mykel Strasser?

D. STATEMENT OF THE CASE

On June 10, 2013, Mykel Strasser's second trial for first degree burglary, armed with a baseball bat, a deadly weapon, first

degree robbery, armed with same baseball bat, a deadly weapon, began. RP 21. A retrial of the same case that resulted in a hung jury in February, 2013. Mr. Strasser's defense throughout both trials was he was not present at the robbery. RP 6, February 25, 2013, pretrial motions.

By November 3, 2011, Mykel Strasser and Sean Mustard had been friends approximately two and a half to three years. RP 258. On November 3, 2011, around 11:00 P.M., Mr. Strasser was accused of breaking down Mr. Mustard's door along with four unknown men and entering the house. RP 123. Mr. Mustard kept an aluminum baseball bat immediately next to the front door for "protection". RP 130, 275. One of the men grabbed the bat as they entered the house. RP 275. It was not Mr Strasser. RP 275. Several things were taken from Mr. Mustard's bedroom. RP 127, 154. Mr. Mustards mother, his step father, a neighbor and Mr. Mustard claimed at trial they were witnesses to the robbery and that Michael Strasser was there taking things from the bedroom. There was no indication that anyone was struck or injured in a physical manner.

At the beginning of the trial the court adopted the pretrial rulings from the February trial. RP 1. Those rulings had been made on February 25, 2013, and are the subject of a transcript that was provided later to this court. RP, February 25, 2014,

Pretrial Motions. The subject of those motions, substantially, pertained to several issues regarding ER 404(b) evidence. RP 4, 9, pretrial motions. Between approximately November 3rd, 2011, and roughly six months before the date of the alleged robbery, Mr. Strasser and the alleged victim in the trial, Mr. Sean Mustard, had smoked marijuana together on occasion, and went to a party at a friend of Mr. Strasser's. At that party one or the other of them had stolen a laptop computer and an I-pod. RP 10, 11, pretrial motions. To use the State's own words, the "victim" believed that theft was the primary motive for the robbery six months later at his house. RP 11-12, pretrial motions. The State claimed during the motions that getting back the laptop and the I-pod stolen in the earlier theft was the motive for the robbery at issue. RP 13, pretrial motions. Out of the blue, the court sua sponte asked "Is there an identity issue here." RP 14, pretrial motions. The State, realizing what it had just been handed, responded enthusiastically "Apparently there is, your honor". RP 13, pretrial motions. The defense, as stated above, was always Mr. Strasser was not there at the robbery. Defense counsel agreed to let in the both the previous theft of the laptop and the marijuana paraphernalia under 404(b), prior bad acts. RP 15-16 pretrial motions, and RP 2-3,7.

The State argued from the opening statement that the

robbery was some sort of “vendetta”. RP 110. That “[t]hey smoked marijuana together, stole together, and that Mr. Strasser took a laptop and I-pod from a party. RP 109. The State even anticipated the defense in his opening statement, “You’re going to hear from the defense that says that Mr. Strasser was not a part of this, that this didn’t happen”. RP 111. In addition, “The defense may call witnesses. The defense may call the defendant’s mother. And you’ll get to assess whether she’s biased in trying to protect, understandably so, trying to protect her son.” RP 113.

During the trial the State brought up the theft at the party with Mr. Strasser of the laptop and I-pod in testimony with the alleged victim Mr. Mustard. RP 263. Mr. Mustard testified that Mr. Strasser contacted him about picking up some of his property and that Mr. Strasser was angry. RP 268. When asked why Mr. Strasser was angry at him, Mr. Mustard said “I don’t know”. RP 268. Later, the prosecutor tried to get Mr. Mustard to mention the Laptop and I-pod as a basis for a vendetta again, but Mr. Mustard did not bite, and said, in effect, I don’t know why they broke into my house. RP 297.

Based upon this foundation, the State argued in closing that there was “a couple of possibilities” as motive for this robbery. RP 360. “And the State would submit it doesn’t

matter which one you believe”, that Mykel stole the laptop and when his friends found out he tried to blame it on Mr. Mustard. So this robbery resulted from the effort by Mr. Strasser to cover the fact that he was the one to actually take the laptop, or Mr. Mustard stole the laptop and Mr. Strasser committed this robbery to get it back. RP 360-361. “Either way ladies and gentleman, it doesn’t matter which version under the law. You don’t get to take matters into your own hands.” RP 361.

During the trial the subject of Mr. Mustard’s bat came up with all the witnesses. Karin Mustard, Sean Mustard’s mother, testified that she was “threatened by the baseball bat” when one of the guys who came with Mr. Strasser lifted it and she thought he was going to smash her flat screen monitor. RP 124-125. She also testified, without objection to speculation, that she saw Mr. Strasser hold the bat up to hit Mr. Mustard, but that the neighbor stepped between them. RP 129. This was after Mr. Strasser had left the house. RP 131. According to Ms. Mustard, Mr. Strasser had the bat while inside the house but he did not “brandish” it. RP 131. Mr. Moses, Mr. Mustard’s step father testified that there was a big kid standing in front of the computer and that he had a bat. RP 155. The neighbor, Ms. Hilde-Thomas, testified that she saw Mr. Strasser come out the front door with “something in his hand” and that Mr. Mustard

was behind him. RP 196. She did not know if it was a bat, or a stick, or a baton. RP 197. She said Mr. Strasser “kind of raised it” like he was going to hit someone with it but he didn’t hit anybody. RP 197. In response to further pressure from the prosecutor, she testified that “he [Mr. Strasser] had gone like this with whatever he had in his hand, he raised his hand. He didn’t raise it up to his head or anything but he raised it instead of his arm.” RP 199. Mr. Mustard testified that as Mr. Strasser was leaving the house he charged at Mr. Mustard with the bat “like he was going to hit me with it” and Mr. Mustard stepped out of the way. RP 280. Later he described the same conduct saying that Mr. Strasser “fast stepped” toward him “flinching” the bat. RP 282. No testimony established that Mr. Mustard’s bat had been raised to strike anything or to threaten anyone with a beating. The bat was not brought into the house by Mr. Strasser or any of the men claimed to have accompanied him.

At the conclusion of evidence defense counsel objected giving a weapons enhancement instruction to the jury, particularly number nineteen in the court’s packet. RP 336-337, 352. The trial court decided to instruct the jury on the weapons enhancement over that objection. RP 338.

On June 13, 2013, Mr. Strasser was found guilty on all counts including two weapons enhancements. RP 388. On

December 1, 2015, the Court of Appeals, Division III, affirmed on all issues.

**E . ARGUMENT WHY REVIEW SHOULD BE
ACCEPTED.**

1. The Court of Appeals Decision that the Bat as Utilized in this Case is a Dangerous Weapon Under RCW 9.94A.825 is in Conflict with the Statute and Prior Supreme Court and Appellate Court Rulings Pursuant to RAP 13.4 (b) (1) & (2).

In order for a weapons enhancement to be appropriately charged, instructed and submitted to a jury, if the weapon alleged is not a firearm, it must have the capacity to inflict death and, from the manner in which it was used, is likely to produce or may easily and readily produce death. RCW 9.94A.825. A bat is not a deadly weapon per se. “. . . thus the inherent capacity and the circumstances in which it is used determine whether a weapon is deadly. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). More than mere possession is required where the weapon is neither a firearm or an explosive. In re Personal Restraint of Martinez, 171 Wn.2d 354, 366, 256 P.3d 277 (2011). The Supreme Court has specifically disapproved of the approach that an implement that has the mere

potential of causing great bodily harm is a deadly weapon.

Martinez, supra at 368 n.6, State v. Gamboa, 137 Wn. App. 650, 154 P.3d 312 (2007).

In looking at the facts set forth above relating to the bat in this case there is very scant evidence that the bat was a part of this alleged robbery. It belonged to the alleged victims, it was never raised over anyone as if to strike and it was not used as a means to procure any of the items that were taken. The trial court committed reversible error by instructing the jury on the weapons enhancement and in sentencing Mykel Strasser to two weapons enhancements for the bat.

Mykel Strasser respectfully request this court grant review, recognize this error, reverse the Court of Appeals decision, dismiss the weapons enhancements and remand the case for new trial or re-sentencing.

2. The Court of Appeals ruling that the State did not Commit Prosecutorial Misconduct when It Raised the Subject of a Potential Defense Witness and Argued to Rebut that Witnesses Potential Testimony in Opening Statemenent Makes Review by the Supreme Court Appropriate Under RAP 13.4 (1)(2) & (3).

In order to prove prosecutorial misconduct a defendant must prove both the prosecutor's conduct was improper and that

it deprived the defendant of a fair trial. State v. Jackson, 150 Wn. App. 877, 882, 209 P.3d 553 (2009). Where no objection was made at the time of the alleged misconduct, a defendant must show that there is a substantial likelihood that the misconduct affected the jury's verdict, and that the misconduct was so flagrant that no instruction could have cured the resulting prejudice. Jackson, supra at 883

In this case the State mentioned the witnesses the defense may call in his opening statement, and said that Mr. Strasser's mother would not be credible because she wanted to protect her son. He went on to say the defense in the case would be that this didn't happen. Finally, and throughout the proceedings, the state constructed a motive by repeatedly telling the court, and then the jury, that this burglary was about the laptop and an I-pod, but failed to produce any testimony at trial to substantiate these claims. He even argued specifically that Mr. Strasser's efforts to cover up his own theft of the laptop was the motive for the robbery. RP 360.

By arguing in the manner the State effectively shifted the burden to Mr. Strasser to produce witnesses and to put on a specific defense. In addition, the prosecutor attained the admission of objectionable evidence under 404(b), created a motive for the crime that was not later supported by the

evidence, and effectively argued to the jury on more than one occasion that retrieval of the laptop was the motive for the robbery.

If left in the present posture this case will stand for the proposition that it is acceptable for the State to anticipate testimony and potential defenses in its opening statement. To literally dictate the facts in a statement unsupported by the evidence. This would be absolutely unconscionable to the defendant's right to remain silent and perhaps choose not to put on witnesses or a defense. It begs the question, what if Mykel Strasser's mother did not think her son was an exemplary person and the defense had decided not to call her. Or decided not to put on a defense at all. The State would have left the Jury with the impression that Mykel Strasser was hiding something or could not produce witnesses. This would be a resounding comment on a defendant's right to remain silent, and would leave the concept of a fair trial completely gutted.

Mykel Strasser respectfully requests the Court grant review of the Court of Appeals decision and reverse and remand the case for a new trial based on prosecutorial misconduct.

3. The Inclusion of the Bracket Language regarding
"Abiding Belief in the Truth of the Crime Charged" in
WPIC 401 Deprived Mykel Strasser of a Fair Trial

Making Review Appropriate Under RAP 13.4 (1)(2)(3) & (4).

Washington Pattern Jury Instruction 401, when including the bracketed material reads thus:

“The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. (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. Emery, 174 Wn.2d 741, 760, 278 P.2d 653 (2012), and State v. Berube, 286 P.3d 402, 411 (2012), both courts determined that the State’s argument that a jury’s job is to search for the truth is impermissible. The bracketed material in

WPIC 401 inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt. To argue or distinguish otherwise is to defy all logic. “If . . . you have an abiding belief in the truth of the crime charged you are satisfied beyond a reasonable doubt”. The State in this case confined its argument to reasonableness of the evidence, but how can a juror be expected to not equate reasonableness with his or her abiding belief in the truth of the crime charged when they are desperately searching for a definition for “reasonable doubt”, and the bracketed material gives them the only clear explanation.

Defense Counsel objected to the giving of the instruction. The court gave the instruction over that objection. The question must be asked why? The only reasonable explanation must be that the court deems the connection between belief in the truth of the crime charged and being convinced beyond a reasonable doubt. Which is only reasonable, but it is improper under current case law.

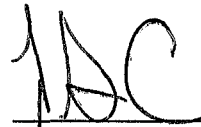
Based on the courts including the bracketed material in the final jury instructions over the objection defense counsel and the danger of infusing the search for truth vs reasonableness into the jury deliberations, Mykel Strasser respectfully requests this Court grant review and reverse the ruling by the Court of

Appeals.

F. CONCLUSION

Based on the foregoing, Mykel Strasser respectfully requests the Court grant review and reverse the Court of Appeals rulings on the grounds set forth above.

Respectfully Submitted this 29th, day of December, 2015.

A handwritten signature in black ink, appearing to read 'TSC', is written above a horizontal line.

TRACY SCOTT COLLINS

WSBA# 20839

Attorney for Mykel T. Strasser

APPENDIX A

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

STATE OF WASHINGTON,)	
)	No. 31865-6-III
Respondent,)	
)	
v.)	
)	
MYKEL THOMAS STRASSER,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, C.J. — Mykel Strasser appeals his judgment and sentence for first degree burglary and first degree robbery, making three assignments of error. He contends that the trial court erred by instructing the jury on deadly weapon enhancements that were not supported by evidence, that prosecutorial misconduct requires a new trial, and that the court’s inclusion of “abiding belief in the truth of the charge” language in its instruction on the burden of proof deprived him of a fair trial. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Mykel Strasser and Sean Mustard¹ were friends who enjoyed riding bikes and

¹ Because multiple members of the Mustard family are discussed, first names are used. No disrespect is intended.

partying together. Sean's mother, Karin, and her then-boyfriend, Thomas Moses, became acquainted with Mr. Strasser from his time spent with Sean at the Mustard home.

Late one evening in early November 2011, Mr. Strasser and four other individuals forced their way into the Mustard home, yelled at and threatened the inhabitants, rifled through Sean's bedroom, and left with a number of his belongings. Sean, Karin and Mr. Moses all witnessed the home invasion and recognized Mr. Strasser. Mr. Strasser and another individual wielded baseball bats during the intrusion, one of which belonged to Sean and was picked up after the intruders broke through the door and entered the home.

Karin called 911 during the fray and told the dispatcher that one of the intruders was "Mykel," whose last name she did not know. By the time police officers responded to the 911 call the intruders were gone, but the officers took Mr. Strasser's name and an arrest warrant issued.

Karin would later testify that during the course of the crime, Sean pleaded with Mr. Strasser and the other intruders as if they were engaged in some misguided revenge. According to her,

[Sean] kept saying, Mykel, why are you doing this? Mykel, tell them straight up what's going on. Tell them the truth. You know, don't do this to me. Tell them the truth. And he was saying to the other guys, Do you not know that this guy is shining you on? He's not believable.

Report of Proceedings (RP) at 127. She also testified that when one of the intruders raised his bat as if to smash the family's flat screen television, Karin screamed "no" and the intruder responded, "You better tell your F'ing [son] not to F with us or we will come

back and F with you.” RP at 125.

Mr. Strasser was charged with first degree burglary and first degree robbery, and deadly weapon enhancements were sought in connection with both counts based on Mr. Strasser’s or another participant’s being “armed with a baseball bat, a deadly weapon.” Clerk’s Papers (CP) at 1-2. The State’s theory of the motive for the crime was that several weeks earlier, Mr. Strasser and Sean had been at a house party at which Mr. Strasser stole someone’s laptop and iPod. The State theorized that in an effort to deflect suspicion from himself, Mr. Strasser told the victim that Sean stole the items. The State suggested that the burglary and robbery was an effort by the victim and his accomplices to recover the stolen items or punish Sean for his theft.

Mr. Strasser denied being present on the night of the burglary and robbery. He claimed that it was Sean, not him, who stole a laptop and iPod from someone at the house party. He accused Sean of falsely implicating him in the Mustard home invasion as an act of revenge.

The jury found Mr. Strasser guilty as charged and returned special verdicts finding that he or another participant had used a deadly weapon in the course of the crime. Mr. Strasser appeals.

ANALYSIS

We address in turn Mr. Strasser’s three assignments of error: that the trial court erred by instructing the jury on a deadly weapon enhancement, that prosecutorial

misconduct requires a new trial, and that the court's inclusion of "abiding belief in the truth of the charge" language in its instruction on the burden of proof deprived him of a fair trial.

Instruction on deadly weapon enhancement

Mr. Strasser objected to the giving of an instruction on use of a deadly weapon "because of the way the evidence came out." RP at 332. He argued that because a baseball bat is not identified by RCW 9.94A.825 as a per se deadly weapon for purposes of a sentence enhancement, instruction should not have been given unless there was evidence that the bats used met the statute's definition as "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." RP at 336. While Mr. Strasser conceded in the trial court that a baseball bat has the capacity to inflict death, he argued that because a bat was never used to strike anyone during the home invasion, it was not used in a manner likely, easily, or readily to produce death.

In *State v. Peterson*, 138 Wn. App. 477, 157 P.3d 446 (2007), the court distinguished between the capacity of a non-per se deadly weapon to inflict death and its use in a way likely, easily, or readily to produce death. The weapon in that case was a locking knife with a blade that was only three inches, and at that length was not a per se deadly weapon for purposes of the sentencing enhancement. On appeal, the court assumed without deciding that the folding blade had the capacity to produce death. *Id.* at

484. But because it was used during the commission of the charged crime (malicious mischief) only to pry loose and cut wires on a car stereo, the court concluded that it had not been used in a way that was likely, easily, or readily to produce death.

It was significant to the court in *Peterson* that no one was around during Peterson's removal of the car stereo against whom he could have used or threatened to use the knife. The only individual who witnessed the knife arrived as Peterson completed the crime and fled. The court reasoned:

Th[e] second criterion—"from the manner in which it is used, is likely to produce or may easily and readily produce death["]—implies the presence of another person against whom Peterson could have readily used the knife while committing the malicious mischief. But there is no evidence that any other person was present or nearby while Peterson was using the knife to cut the stereo wires or, from Peterson's "manner of use" of the knife, that he would have used it to assault [the individual who arrived as Petersen was completing the crime] had he approached Peterson while still in [the] car cutting the stereo wires.

On the contrary, when [the individual approached the] car, Peterson jumped out of the car, fled across the parking, and attempted to escape capture and confrontation by leaping into the bushes; Peterson did not threaten [the individual] with the knife [during his initial flight with the stereo].

We agree with Peterson that (1) at the time he was using the knife to cut the stereo wires, there were no other persons present against whom he could have used the knife in a deadly manner; and (2) his manner of use of the knife during the malicious mischief was not likely or easily and readily able to produce death.

Id. at 484-85.

State v. Cook, 69 Wn. App. 412, 848 P.2d 1325 (1993) also supports the proposition that an actual injury is not required to satisfy the criterion that a non-per se

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deadly weapon “be used in a manner likely to produce or that may easily and readily produce death”—threatened injury will suffice. *Peterson*, 138 Wn. App. at 484-85. In *Cook*, the defendant held a pocket knife with a blade shorter than three inches to the throat of a robbery victim. Rather than give the pattern instruction defining a deadly weapon for purposes of a special verdict, the trial court fashioned its own instruction, which was found on appeal to be erroneous. The instructional error was found to be harmless, however, because while the victim was not injured, it was undisputed that the pocket knife had been held to his throat, and “[c]learly, under these facts, the knife had the ‘capacity to inflict death’, and was used in a manner which would ‘likely . . . or [might] easily and readily produce death.’” *Id.* at 418 (second and third alterations in original) (quoting former RCW 9.94A.125 (1981)).

In this case, some of the trial testimony about the intruders’ use of baseball bats addressed the threatened use of the bats to break property. But Karin testified that in the course of the chaos and confusion, “I was threatened by a baseball bat.” RP at 124. She testified that as the intruders were leaving the home and Sean followed in an effort to get a license plate number from their car, Mr. Strasser tried to block him and “at one point held a bat up and was going to hit Sean, and [a] neighbor stepped in between.” RP at 129. She later reiterated that Mr. Strasser “went to hit my son. He brought [the bat] up to bring it down on my son.” RP at 131.

Mr. Moses testified that as the intruders were stealing items from Sean’s bedroom,

[T]here was a—there was a big kid standing in front of the computer and he had a baseball bat. And—and now, you know, I’m—I’m pretty good size but a high schooler with a baseball bat can take care of me, no problem at all. I’m not stupid. And—and so I just kind of watched.

RP at 155.

Sean testified to being threatened with a baseball bat both at the inception and toward the conclusion of the crime. He testified that one of the first things that happened was that one of the intruders “comes right in the door and grabs my baseball bat and comes right for me, and I step out of the way.” RP at 275. As the intruders left the home with his belongings, he testified that he was at the doorway, yelling, when Mr. Strasser “grabbed my baseball bat”:

And I’m in the doorway and he, like, charged me like he was going to hit me with it and I, like, stepped out of the way, like onto the front porch. And he comes down the stairs, and that’s when my—my neighbor is, like, right there because she heard all the yelling and stuff. She’s, like, between my yard and her yard, like right there on the grass, and he charged at me like he was going to hit me and he went up to her, like, stood in her face and said something like, Do something, or something. I don’t even know what he said to her. Then he took off.

RP at 280.

As Mr. Strasser conceded below, a baseball bat has the capacity to inflict death. There was sufficient testimony about the threatening manner in which baseball bats were used during the burglary and robbery to support the trial court’s decision to instruct the jury on the deadly weapon enhancement.

Prosecutorial misconduct

Mr. Strasser complains that during opening statements, the prosecutor told the jury that Mr. Strasser's mother would testify but that she would not be credible because she wanted to protect her son. The prosecutor also told the jury that Mr. Strasser's defense would be that he wasn't involved and "this didn't happen." Br. of Appellant at 10. Finally, Mr. Strasser complains that the prosecutor "constructed a motive" by repeatedly telling the court and the jury that the burglary was linked to an earlier theft of a laptop and iPod "but failed to produce any testimony at trial to substantiate these claims." *Id.* at 17. Taken together, he claims, the State "effectively shifted the burden to Mr. Strasser to produce witnesses and put on a specific defense." *Id.* He argues that the misconduct requires a new trial.

A defendant claiming prosecutorial misconduct bears the burden of proving "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)). Where, as here, no objection was made to the prosecutor's statements during the trial, the defendant is deemed to have waived any error unless the prosecutor's misconduct "is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940

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P.2d 546 (1997)). In analyzing prejudice, we do not look at a prosecutor's comments 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).

“A prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom.” *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). “Testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial.” *Id.* at 16 (citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). The trial court has wide discretion in determining the good faith of the prosecutor and the burden of showing bad faith is upon the defendant. *Id.*

Statements about Mr. Strasser's anticipated defense—both his mother's support and his claim that he wasn't involved—were potentially problematic, because a defendant is under no obligation to put forward evidence on his or her own behalf, and the statements might be understood by the jury to suggest he needs to do so.² *United States v. Hall*, 165 F.3d 1095, 1115 (7th Cir. 1999) (“We believe it to be a rare situation where it would be appropriate for a prosecutor to comment on anticipated defense evidence

² The prosecutor said:

You're going to hear from the defense that says that Mr. Strasser wasn't a part of this, that this didn't happen.

RP at 111.

because a defendant is under no obligation to put forward evidence on his or her own behalf”); 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4204 at 218-19 (3d ed. 2004) (“The prosecutor may not state what he thinks the defense will be, and he may not tell the jurors what he expects to offer in rebuttal.”). But because Mr. Strasser did not object, we evaluate the statements for flagrant, ill-intentioned conduct and enduring prejudice, none of which is present here. The prosecutor’s statement in opening that Mr. Strasser would deny being present was followed within moments by Mr. Strasser’s own opening statement, in which the defense argued, “The theory of our case is very simple: that Mykel Strasser was not involved in this incident at the Mustard house.” RP at 116. It is understandable that the defense did not object to the prosecutor’s anticipation of that defense.

The statement about Mr. Strasser’s mother’s credibility that the prosecutor made during his opening was not an outline of anticipated material evidence, it was argument, and it should have been deferred to the end of the case.³ But the premature and very brief argument about a mother’s bias in favor of her child presented no risk of enduring

³ The prosecutor said:

The defense may call the defendant’s mother. And you’ll get to assess whether she’s biased in trying to protect, understandably so, trying to protect her son. But as the jury, you’re here to determine what happened. What was the truth of that night.

RP at 113.

prejudice. Had Mr. Strasser objected, his objection would presumably have been sustained and the premature presentation of argument would have been neutralized.

The prosecutor's anticipation of evidence of the theft of the laptop and the iPod was not problematic; it was borne out by evidence and argument later presented by both sides. Mr. Strasser referred to the theft in opening statement. Sean testified at trial to *Mr. Strasser's* theft of the items from the house party. Mr. Strasser testified at trial to *Sean's* theft of the items from the party. In support of the State's theory of motive, Sean testified that he recognized one of the men who broke into his house as someone from the house party—a possible victim of the theft—and that the individual he recognized from the house party rummaged through Sean's belongings saying, "Where's the laptop, where's the laptop, where's it at?" RP at 277.

The theft at the house party was material, supporting the State's theory of a motive for the burglary and robbery. The fact that evidence of the theft was presented during trial and that both parties argued inferences from the evidence demonstrates that the prosecutor's anticipation of the evidence was in good faith.

Burden of proof instruction

Finally, Mr. Strasser complains that the court provided the jury with the pattern burden of proof instruction for criminal trials including its bracketed, optional final sentence. The last paragraph of the instruction read:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in

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the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 38; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008) (WPIC). Relying on cases holding that the State may not argue that a jury's job is to search for the truth, Mr. Strasser argues that the final sentence of the instruction "inexorably connects the concepts of truth and being satisfied beyond a reasonable doubt." Br. of Appellant at 19.

We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Language speaking of an "abiding belief" or an "abiding conviction" in "the truth of the charge" has withstood challenge in Washington for more than a half century. In *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988), this court upheld the almost identical concluding statement in WPIC 4.01, as revised in 1982, the only difference being the former instruction's use of the expression "*after* such consideration" rather than "*from* such consideration." *Id.* The court observed that the instruction "was approved essentially in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959),⁴ and was also

⁴ The instruction given in *Tanzymore* included the statement, "If, after a careful consideration and comparison of all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." 54 Wn.2d at 291, n.2. In rejecting the defendant's argument that his own proposed instruction should have been given, the court said that the standard instruction given by the court, "has been accepted as a correct statement of the law for so many years, we find

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approved as modified in *State v. Walker*, 19 Wn. App. 881, 578 P.2d 83 [1978].” *Id.* It pointed out that “[w]hen reviewing ‘reasonable doubt’ instructions, courts have refused to isolate a particular phrase and have instead construed them as a whole.” *Id.*

In *Pirtle*, our Supreme Court addressed a challenge to a trial court’s modification of the concluding sentence to sharpen the focus on a juror’s doubt by stating, “If, after such consideration you *do not* have an abiding belief in the *truth* of the charge, you *are not* satisfied beyond a reasonable doubt.” 127 Wn.2d at 656 (emphasis added). The revised instruction was still upheld:

Without the last sentence, the jury instruction here follows WPIC 4.01, which previously has passed constitutional muster. The addition of the last sentence does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01. WPIC 4.01 adequately defines reasonable doubt. Addition of the last sentence was unnecessary but was not an error.

Pirtle, 127 Wn.2d at 658.

Mr. Strasser contends that more recent decisions in *State v. Emery*, 174 Wn.2d 741, 278 P.2d 653 (2012) and *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012) require us to reconsider this longstanding precedent. In *Emery*, our Supreme Court held that it was prosecutorial misconduct for the State to suggest in argument that the jury’s job is to solve the case, because “[t]he jury’s job is not to determine the truth of what happened; a jury therefore does not speak the truth or declare the truth.” 174 Wn.2d at

the assignment without merit.” *Id.* at 291.

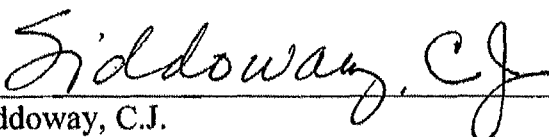
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760 (internal quotation marks omitted). Similar improper argument was made in *Berube*, in which this court stated that “[A]rguing that the jury should search for truth and not for reasonable doubt both misstates the jury’s duty and sweeps away the State’s burden. The question for any jury is whether the burden of proof has been carried by the party who bears it.” *Id.* at 120.

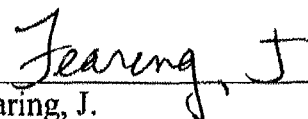
The last sentence of WPIC 4.01 is not tantamount to telling the jury that it must “solve the case” or “find the truth.” *Pirtle* remains controlling authority that without the last sentence, the pattern instruction adequately defines reasonable doubt and that inclusion of the optional sentence “does not diminish the definition.” 127 Wn.2d at 658.

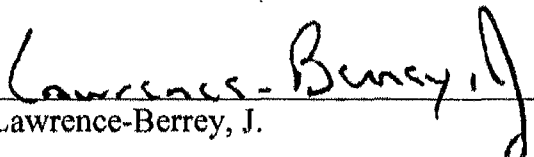
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Siddoway, C.J.

WE CONCUR:


Fearing, J.


Lawrence-Berrey, J.

FILED

DEC 29 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
MYKEL T. STRASSER,)
)
Petitioner.)

No. 31865-6-III

CERTIFICATE OF SERVICE

COMES NOW Tracy Scott Collins, attorney for Petitioner, and certifies that on December 29, 2015, I served a copy of the Petition for Review to the Washington Supreme Court on the Spokane County Prosecuting Attorney at 1100 W. Mallon, Spokane, WA 99260 by personal service at that office, and on Mykel T. Strasser by personal service at my office.

CERTIFICATE OF SERVICE - 1

**TRACY SCOTT COLLINS
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(509) 326-1020**

*I certify under penalty of perjury under the law of the State of
Washington that the foregoing is true and correct.*

DATED this 29, day of DEC., 2015, at Spokane,
Washington.



TRACY SCOTT COLLINS
Attorney at Law, WSBA #20839