72141-1

No. 72141-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARREN MORRIS-WOLFF,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court improperly instructed the jury that violation of a court order "may or may not be a 'crime against a person.'"

Instruction No. 17[1] constituted an improper comment on the evidence by singling out and emphasizing a contested issue. *See State v. Lewis*, 6 Wn. App. 38, 41-42, 491 P.2d 1062 (1972) (circumstances of the case "should [not] be singled out and emphasized"). The court did not provide any parallel instructions to the effect that an attempted assault may or may not be a crime against a person or that breaking into the house may or may not be a crime against property therein. In addition, the court did not provide an instruction that defined "crime against a person" in general terms, similar to the definitional instructions for terms or phrases such as "building," "intent," and "protection order." *See* CP 242 (Instruction No. 10); CP 243 (Instruction No. 11); CP 247 (Instruction No. 15). Thus, in context, the court highlighted the contested issue and implicitly bolstered the State's argument that the alleged violation of a court order established Mr. Morris-Wolff's intent to commit a crime against a person.

[1] Instruction No. 17 provided, "A court order violation may or may not be a 'crime against a person' depending on the facts and circumstances of the violation." CP 249.

The State contends Instruction No. 17 was based on a "misreading" of *State v. Stinton*, 121 Wn. App. 569, 574-77, 89 P.3d 717 (2004), in which the Court ruled that violation of a court order "can" serve as a predicate "crime against a person" for residential burglary. Br. of Resp. at 14 n.6. "An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16." *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988). Conversely, to the extent the instruction inaccurately stated the law, it further constituted an impermissible comment on the evidence.

The State also argues any error was harmless because Mr. Morris-Wolff admitted he entered the house unlawfully. Br. of Resp. at 15-17. This argument conflates intent to violate a court order with intent to commit a crime against a person. Accordingly, the State's argument does not overcome the presumption of prejudice. *See State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006) ("Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.").

2. The trial court improperly responded to a jury inquiry for a legal definition that it could rely, *inter alia*, on counsels' arguments.

It is the duty of the court, not counsel, to define terms or words used in jury instructions when necessary. *State v. Stacy*, 181 Wn. App. 553, 572, 326 P.3d 136 (2014). In addition, "a conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir.1971) (citing *Bollenbach v. United States*, 326 U.S. 607, 613, 66 S.Ct. 402, 90 L.Ed. 350 (1946)). Contrary to these principals, when the jury requested a "more comprehensive or a legal definition" for "crime against a person," the court responded, "Please rely on all the evidence, instructions *and argument* you have received." CP 229 (emphasis added). This response improperly invited the jury to substitute counsels' arguments for the law provided by the court and was inconsistent with the court's introductory instruction that the jury "must" disregard any argument that was not supported by the law set forth in the instructions. *See* CP 232.

Article IV, section 16[2] of the Washington Constitution directs the court to declare the law. Nonetheless, the court neglected this directive by allowing the jury to rely on counsel's arguments for a legal definition.

[2] Article IV, section 16 provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Thus, the court's improper response involves a manifest constitutional error that is properly before the Court pursuant to RAP 2.5(a)(3).

The State's contention that the response did not invite the jury to rely on argument of counsel in lieu of the court's instructions on the law is simply incorrect. Br. of Resp. at 21-22. The jury specifically requested an instruction on the law, which is solely within the authority of the court.

The State argues there was no prejudice because the jury could have relied on defense counsel's argument regarding "crime against a person," and defense counsel affirmatively stated whether a court order violation constituted a crime against a person was a jury question. Br. of Resp. at 22. These arguments confuse the court's duty to instruct on the law with defense counsel's duty to advocate for her client. Moreover, these arguments do not address the inconsistency between the court's original instruction regarding its duty to provide the law and its response which invited the jury to rely on counsels' argument for the law. *See State v. Lewis*, 6 Wn. App. at 40 (prejudicial error in inconsistent instructions requires reversal).

3. The prosecutor's rebuttal argument that Mr. Morris-Wolff failed to attend supervised visitation was improper and prejudicial.

Mr. Morris-Wolff contended he did not enter the house with the intent to commit a crime against a person or to commit an assault, but, rather, to say good-bye to his children, tell them he loved them, and explain that he not abandoning them but he was going to be arrested for violating the order protecting their mother. 6/16/14 RP 46-48, 50, 55. In this context, the prosecutor's repeated insinuation in rebuttal that Mr. Morris-Wolff failed to participate in supervised visits with his children was inflammatory and prejudicial misconduct.

a. The prosecutor's statements during rebuttal were improperly based on facts not in evidence.

Argument intended to encourage a verdict based on facts not in evidence is improper. *State v. O'Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005). In rebuttal, the prosecutor incorrectly referred to "the supervised visitation that was ordered with his children," and "[h]e had supervised visitation." 6/16/14 RP 63, 64. The reference to supervised visits incorrectly implied there was a way for Mr. Morris-Wolff to see his children without violating a court order when, in fact, that was not true. At the time of the incident, visits had not yet been arranged at the time of the

incident and three separate no-contact orders prohibited Mr. Morris-Wolff from all contact with his children. Ex. 5, 6, 7, 8.

The prosecutor's misrepresentation of the evidence was made knowingly. In his opening statement, the prosecutor stated, "On August 14, 2013, there were multiple orders issued by King County courts prohibiting the defendant from having any contact with Lisa, the children, their home or the children's schools." 6/10/14 RP 45. In addition, throughout the trial, the prosecutor elicited testimony that Mr. Morris-Wolff could not have any contact with his children. *See* 6/10/14 RP 123-24; 6/11/14 RP 135.

The State argues the reference to "the supervised visitation that was ordered" was not improper because it was "merely the third in a list of less alarming ways" Mr. Morris-Wolff could have violated the court order to see his children. Br. of Resp. at 34. The fact that Mr. Morris-Wolff could have violated the court orders in any number of ways is irrelevant to whether his actual conduct was a court-order violation.

The State also argues the prosecutor's statement "[h]e had supervised visitation" was not improper because it did not suggest Mr. Morris-Wolff "could have lawfully seen the children through supervised visitation." Br. of Resp. at 35. This argument is contrary to the plain meaning and context of the prosecutor's statement.

b. The improper statements were prejudicial.

The improper statements were made during rebuttal, when the defense could no longer address the jury. Significantly, the first jury was unable to reach a verdict on the charge of residential burglary and the prosecution obtained a conviction only after improper rebuttal argument alleging facts not in evidence.

The State argues the statements were not prejudicial because "no ... attorney suggested that the protection order's visitation provision controlled over the no-contact order's prohibition of all contact." Br. of Resp. at 38. But that is exactly what the prosecutor suggested when he walked along the jury box holding the protection order in front of the jurors. The State's argument is unsupported by the record and should be rejected.

B. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Morris-Wolff respectfully requests this Court reverse his conviction for residential burglary.

DATED this 5th day of August 2015.

Respectfully submitted,

s/Sarah M. Hrobsky

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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF AUGUST, 2015.

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