72141-1

FILED
Jul 06, 2015
Court of Appeals
Division I
State of Washington

NO. 72141-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARREN MORRIS-WOLFF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where a jury instruction stated that "[a] court order violation may or may not be 'a crime against a person' depending on the facts and circumstances of the violation," and other instructions made clear that the jury would need to determine whether a court order violation occurred, should this Court reject the defendant's claim that the challenged instruction constituted a judicial comment on the evidence?

2. Where the defendant failed to object to the trial court's answer to a jury question directing the jury to "rely on all the evidence, instructions and argument you have received," in response to a jury question about a legal definition, and the asserted error is neither manifest nor of constitutional dimension, should this Court decline to review the defendant's claim for the first time on appeal?

3. Where the defendant failed to establish that the prosecutor's references in closing argument to a visitation provision in an admitted protection order were improper and prejudicial, did the trial court properly exercise its discretion in denying the defendant's motion for a new trial?

4. Where no errors occurred that prejudiced the defendant, should this Court reject the defendant's claim that the cumulative prejudice of multiple errors requires reversal of his conviction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Darren Morris-Wolff, by amended Information with one count of burglary in the first degree domestic violence, one count of residential burglary domestic violence, felony stalking domestic violence, misdemeanor harassment domestic violence, misdemeanor violation of a harassment no contact order, and domestic violence misdemeanor violation of a court order. CP 19-22. In his first trial, the jury acquitted Morris-Wolff of burglary in the first degree, but found him guilty of the lesser included offense of criminal trespass in the first degree, and found him guilty of domestic violence misdemeanor violation of a court order. CP 162-63, 169-70. The jury found that both were domestic violence offenses. CP 171-72. The jury could not reach a verdict on the charge of residential burglary, and acquitted Morris-Wolff of the remaining counts. CP 166-68, 176.

The State retried Morris-Wolff on the residential burglary domestic violence charge, and the second jury found him guilty of that offense. CP 225. At sentencing after both trials, the trial court dismissed the conviction for criminal trespass in the first degree from the first trial on double jeopardy grounds. CP 287; 1RP[1] 2652. The trial court imposed a standard range sentence of 11 months of confinement on the residential burglary charge, and the statutory maximum of 364 days of confinement on the domestic violence misdemeanor violation of a court order. CP 278, 282. Morris-Wolff timely appealed, challenging only his conviction for residential burglary. CP 288; Brief of Appellant at 23.

2. SUBSTANTIVE FACTS.

In August of 2013, Morris-Wolff was separated from his wife of ten years, Lisa Morris-Wolff,[2] and was no longer living in the family home. 19RP 100-07. There was a history of problems in the relationship, including methamphetamine use by Morris-Wolff, and

[1] The report of proceedings consists of 22 volumes. The first 16 volumes cover the first trial (March 17 through April 16, 2014) and the sentencing hearing for both trials (June 27, 2014), and are consecutively paginated; they will be collectively referred to as "1RP." Volumes 17 through 22 cover the second trial and the subsequent motion for a new trial. They are separately paginated, and will be referred to as 17RP (June 5, 2014); 18RP (June 9, 2014); 19RP (June 10, 2014); 20RP (June 11, 2014); 21RP (June 12-13, 2014); and 22RP (June 16-17 and June 27, 2014).

[2] For clarity, this brief will refer to Lisa Morris-Wolff by her first name. No disrespect is intended.

Lisa had considered seeking a divorce multiple times. 19RP 92-93, 113. In an incident in June of 2013, after Lisa said during a marriage counseling session that she was still considering divorce, Morris-Wolff "blew up," made a comment that he would "destroy" Lisa, and stormed out. 19RP 96. When Lisa left the counselor's office and got in her car, Morris-Wolff blocked her vehicle from leaving and shortly thereafter grabbed her keys and cell phone, throwing them across the parking lot. 19RP 97.

In an incident in July of 2013, Morris-Wolff trapped Lisa's car in the driveway of their home and demanded in front of their children that she resume counseling with him. 19RP 103-04. When Lisa declined to discuss it in front of the children and asked him to move his car so that she could go to work and take their son to preschool, Morris-Wolff told her to either call a taxi or call the police, and to tell the police that he had a gun. 19RP 102-05. Fearing for her safety, Lisa called the police, and obtained a domestic violence protection order later that day protecting herself, their five-year-old son, and their ten-year-old daughter. 19RP 78, 105, 107, 138-39. Domestic violence no-contact orders were also independently put in place two days later by the Seattle Municipal Court, prohibiting all contact with Lisa and the children. 20RP

133-35. Both the protection order and the no-contact orders prohibited Morris-Wolff from entering the family home, with the protection order specifically restraining him from coming within 500 feet of the home. 20RP 134, 139.

In July and August of 2013, Morris-Wolff repeatedly violated the protection and no-contact orders by texting and calling Lisa, but she did not respond. 19RP 118, 125-29, 134. On the morning of August 13, 2013, Morris-Wolff texted Lisa and asked her to meet him at a coffee shop near the family home, but she did not respond and did not meet him. 19RP 137. Early that evening, he texted her asking to meet at a frozen custard shop, but she again did not respond and did not meet him. 19RP 137-38.

Throughout the rest of the evening, Lisa received nearly a dozen texts and from Morris-Wolff to both her cell phone and the house phone, but she did not answer them. 19RP 134-35. In the texts, Morris-Wolff asked her to talk to him, and talked about his intention to leave the area but maintain contact with the children. 19RP 138-39. Finally, late at night Lisa sent a single text back to Morris-Wolff, in which she acknowledged that their children needed and loved him, but stated, "Please stop texting and calling. This isn't the right way to resolve this and can only get you into trouble."

19RP 139-40. Morris-Wolff sent yet another text to her in response. 19RP 140.

The next morning, August 14th, Lisa began her normal routine of making lunches and getting the children ready for school. 19RP 143-44. Her daughter turned off the new house alarm system Lisa had installed and went out to the driveway to retrieve the lunchbox the daughter had left in the car. 19RP 144. Meanwhile, Lisa opened the back door to let the family cat out. 19RP 146. As she did so, Lisa saw Morris-Wolff running aggressively toward her through the backyard. 19RP 146-47.

Lisa closed and locked the door, and then frantically ran through the house to the front door to bring her daughter back into the house. 19RP 147-48. As she passed her five-year-old son eating breakfast in the kitchen, she told him to go upstairs. 19RP 147. After rushing her daughter into the house and locking the front door, Lisa sent her daughter upstairs to comfort her son, who was audibly crying. 19RP 147-48. By this point, Morris-Wolff was pounding on the back door, which was made of glass, as Lisa stood in the kitchen, right in front of the door. 19RP 148. As Lisa dialed 911, she watched Morris-Wolff grab a large sledgehammer and begin to break through the door. 19RP 148-49.

As pieces of glass started to fly into the kitchen, Lisa feared that Morris-Wolff was going to kill her. 19RP 151. Not wanting her children to see such a thing, Lisa ran out the front door, down the driveway, and into the street, still on the phone with 911. 19RP 151-52. Several neighbors heard Lisa screaming for help and came outside. 19RP 152. As Lisa told them what had happened, Morris-Wolff emerged from the house carrying his children and began to walk down the driveway. 19RP 152. Lisa hid in a neighbor's yard as the neighbors walked over to Morris-Wolff and convinced him to let the children, who were upset, go with them. 19RP 153-55; 21RP 46-47. Morris-Wolff then waited at the end of the driveway until police officers arrived and took him into custody. 19RP 156; 20RP 100.

At trial, Lisa testified to the facts set out above. 19RP 78-157; 20RP 9-97. She was frequently brought to tears as she recounted the burglary and the extreme fear she felt as Morris-Wolff was breaking through the back door. 19RP 148, 151. Morris-Wolff testified in his own defense. 21RP 55-126. His testimony largely corroborated Lisa's account of events, but varied in certain respects. 21RP 55-126.

Morris-Wolff testified that he had been drunk when he repeatedly called and texted Lisa on the evening of August 13th. 21RP 95-97. Although Lisa had testified that she only responded to Morris-Wolff's attempts to reach her by sending a single text message asking him not to call or text her anymore, and had never spoken to him that evening or invited him over, Morris-Wolff claimed that Lisa had answered the phone shortly before midnight and had invited him to discuss their issues in person, without specifying a time. 19RP 136; 21RP 97-98. Phone records admitted at trial did not show any connected calls between Lisa's cell phone and either of Morris-Wolff's cell phones. 21RP 108-09.

Morris-Wolff testified that when he came to the house on the morning of August 14th, he knew that he was violating the protection and no-contact orders prohibiting him from contacting Lisa and the children or coming within 500 feet of the family home. 21RP 99-101. To avoid being seen and reported by one of the neighbors, he parked at the end of the block and walked to the back of the house. 21RP 99-100. Morris-Wolff told the jury that he was surprised when Lisa ran into the house and locked the door, because he believed that she was expecting him. 21RP 100. He said that he had only decided to break down the door after he

realized that Lisa was calling 911, and did so only because he believed he would be going to prison for violating the court orders and wanted to say goodbye to his children. 21RP 100-02.

Additional facts are set out below in the sections to which they pertain.

C. ARGUMENT

1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE WHEN IT INSTRUCTED THE JURY THAT VIOLATION OF A COURT ORDER MAY OR MAY NOT BE A CRIME AGAINST A PERSON.

Morris-Wolff contends that the trial court impermissibly commented on the evidence when it instructed the jury that a violation of a court order may or may not be a crime against a person. This claim should be rejected. The challenged instruction did not convey the judge's personal opinion of the credibility, weight, or sufficiency of the evidence introduced at trial. Furthermore, any error was harmless in light of the fact that it was undisputed that Morris-Wolff had entered the residence with the intent to violate court orders.

a. Relevant Facts.

Whether Morris-Wolff's violation of the protection and no-contact orders during the burglary constituted a crime against a person was the subject of uncertainty and dispute throughout the

second trial. In the first trial, the issue was not directly addressed in closing arguments and the jury then asked multiple questions during deliberations about whether the knowing violation of a protection order was a crime against a person. 1RP 2486-526, 2533-81; CP 156, 160.

During pre-trial motions for the second trial, the trial court *sua sponte* raised the question of whether the violation of a court order is a crime against a person.[3] 18RP 39. The court speculated that it was perhaps a mixed question of fact and law, and suggested that a jury instruction on the issue might be appropriate. 18RP 40. In opening statement and on the witness stand in the second trial, Morris-Wolff admitted that he had knowingly violated court orders by going to the house and contacting Lisa and the children. 19RP 61-62; 21RP 99-101. The State also presented independent evidence that Morris-Wolff had notice of the orders and had violated their restrictions by his actions. 20RP 133-34, 138-41.

At the close of the State's case in the second trial, Morris-Wolff brought a motion to dismiss, arguing in part that there was insufficient evidence for the jury to find that his intent to violate the

[3] The second trial was before a different judge than the first trial.

no-contact orders by contacting his children in the home constituted intent to commit a crime against a person. 21RP 29-30. The State argued that the violation of the no-contact and protection orders was a crime against a person, and that the evidence also supported the inference that Morris-Wolff intended to assault Lisa inside the home. 21RP 35-36. The trial court denied the motion. 21RP 37.

At the close of trial, the State proposed a jury instruction drawn from State v. Stinton[4] that stated, "A protection order violation can be 'a crime against a person.'" CP 384. Morris-Wolff objected, arguing that it was improper because no such instruction is included in the WPICs and because it would be a comment on the evidence for the court to highlight only one of the two crimes (assault and violation of a court order) that the State planned to offer to the jury as the crime Morris-Wolff intended to commit inside the home. 21RP 157-60. The State argued that the instruction was necessary because the jury in the first trial had asked questions about this issue, and it was important to foreclose the possibility that the jury might believe that violation of a court order could never be a crime against a person. 21RP 158-59. The State also argued

[4] 121 Wn. App. 569, 89 P.3d 717 (2004).

that the instruction was an accurate statement of the law under Stinton.[5] 21RP 158.

The trial court noted that it would be willing to instruct the jury on assault as well, to avoid the problem Morris-Wolff was concerned about, though the court didn't think jurors needed assistance in determining that assault was a crime against a person; however, Morris-Wolff never asked the court to give such an instruction. 21RP 160. The court also suggested that the Stinton instruction be modified to say that the violation of a court order "may or may not be" a crime against a person. 21RP 160. Morris-Wolff agreed that if the court was going to give an instruction from Stinton, such a change would be an improvement. 21RP 160.

In the end, the trial court gave the jury Instruction 17, stating, "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 trial court also instructed the jury on the definitions of violation of a court order and assault. CP 246, 250.

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[5] It appears that the State was mistaken on this point, as Stinton analyzed whether the violation of a court order is a crime against a person as a matter of law, and held that it is. Stinton, 121 Wn. App. at 574. The State thus could have properly asked the trial court to instruct the jury that a court order violation is a crime against a person, rather than leaving that issue for the jury. See State v. Kindell, 181 Wn. App. 844, 851, 326 P.3d 876 (2014) (whether particular crime is a "crime against property" in context of burglary statute is a question of law that cannot be deferred to the jury).

b. The Challenged Instruction Did Not Constitute A Comment On The Evidence.

Article 4, section 16 of the Washington State Constitution prohibits a judge from making a comment that conveys to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A jury instruction challenged as a judicial comment on the evidence is reviewed de novo, in the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). In evaluating whether a trial court's words or actions amount to a comment on the evidence, the appellate courts look at the facts and circumstances of the particular case. Jacobsen, 78 Wn.2d at 495.

Instruction 17, when viewed in the context of the instructions as a whole, did not convey to the jury the judge's personal opinion regarding the credibility, weight, or sufficiency of the evidence presented at trial. The court instructed the jury on the elements of both violation of a court order and assault, as was necessary for the jury to determine whether Morris-Wolff entered the residence with the intent to commit either of those crimes, as the State had argued. CP 246, 250; 22RP 32-33. These instructions

communicated to the jury that they would need to determine whether Morris-Wolff committed or intended to commit those crimes in the residence. Instruction 17 merely gave the jury another necessary piece of information—that if they determined Morris-Wolff had violated or intended to violate a court order, they would then need to determine whether that violation was a crime against a person under the circumstances.[6]

Morris-Wolff claims that this constituted a comment on the evidence because it highlighted one particular "issue" for the jury. Brief of Appellant at 11. However, every instruction, when viewed in isolation, highlights one particular issue for the jury—this alone does not cause an instruction to communicate to the jury the judge's personal feelings about the case. Here, the only reason the court did not also issue an instruction regarding whether assault is a crime against a person was because such an instruction was

[6] Instruction 17 was necessary in the sense that the trial court and both parties apparently believed, based on a misreading of Stinton, that whether a violation of a court order was a crime against a person was an issue of fact that must be decided by the jury. In truth, Stinton held that domestic violence violation of a court order is a crime against a person as a matter of law. 121 Wn. App. at 574 (holding, "as a matter of law," that "a protection order violation is 'a crime against a person' as the residential burglary statute uses that term"); see also Kindell, 181 Wn. App. at 851 (meaning of "crime against property" in context of burglary is issue of law that trial court must decide). The other divisions of this Court have not directly addressed the issue in published opinions, but have cited Stinton with approval on related issues. State v. Sanchez, 166 Wn. App. 304, 308-09, 271 P.3d 264 (2012); State v. Spencer, 128 Wn. App. 132, 138, 114 P.3d 1222 (2005).

unnecessarily obvious. 21RP 160. The absence of such an instruction, which would have stated the obvious proposition that assaulting another person is a crime against a person as a matter of law, would not have caused a reasonable juror to interpret Instruction 17 as an indication of the trial court's personal opinion of the evidence. See State v. Barnett, 139 Wn.2d 462, 469, 987 P.2d 626 (1999) (assault is a crime against a person).

Because the challenged instruction did not convey to the jury the judge's personal opinion of the credibility, weight, or sufficiency of evidence introduced during a trial, it was not a comment on the evidence, and Morris-Wolff's claim should be rejected.

c. Any Error Was Harmless.

If an improper judicial comment on the evidence is found to have occurred, Washington courts presume it to be prejudicial, and reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010). In this case, even if this Court finds that Instruction 17 did constitute a judicial comment on the evidence, Morris-Wolff's conviction should nevertheless be affirmed because

the record affirmatively shows that no prejudice could have resulted.

The challenged instruction did not in any way indicate the trial court's opinion of whether a violation of a court order would be a crime against a person in Morris-Wolff's case. CP 249 ("A court order violation may or may not be 'a crime against a person' depending on the facts and circumstances of the violation."). Thus, if this Court finds it to be a comment, it would presumably be on the theory that the instructions as a whole somehow suggested that the trial court believed the evidence established that Morris-Wolff had violated, or had intended to violate, a court order.

However, Morris-Wolff freely admitted in opening statement, on the witness stand, and in closing argument that he entered the residence with the intent to contact his children inside, and did in fact contact them inside, despite knowing that it was a violation of court orders to do so. 19RP 62; 21RP 101-02; 22RP 51-54. Indeed, his entire argument to the jury was that his sole intent in entering the house was to talk to his children in violation of court orders, but that this did not constitute a crime against a person

because his motives for wanting to talk to them were benign. 22RP 51-57.

In light of the complete agreement between the parties that Morris-Wolff violated court orders protecting his children when he contacted them inside the residence, and had entered the home unlawfully with the intent to do so, no prejudice could have resulted from a judicial comment suggesting to the jury that the trial court, like the parties, believed that Morris-Wolff had violated the court orders. Furthermore, the trial court instructed the jury not to ascribe any meaning to potential comments on the evidence:

> It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated in any way my personal opinion in any way, either during trial or in giving these instructions, you must disregard this impression entirely.

CP 232. Jurors are presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). For these reasons, any comment on the evidence in Instruction 17 was harmless.

2. MORRIS-WOLFF MAY NOT RAISE FOR THE FIRST TIME ON APPEAL HIS CLAIM THAT THE TRIAL COURT ERRED WHEN IT RESPONDED TO A JURY QUESTION ABOUT A LEGAL DEFINITION BY DIRECTING THE JURY TO "RELY ON THE EVIDENCE, INSTRUCTIONS AND ARGUMENT YOU HAVE RECEIVED."

Morris-Wolff contends that the trial court committed reversible error when its response to a jury question about the definition of "crime against a person" told the jury that no additional instructions would be forthcoming, and that they should rely on "the evidence, instructions and argument you have received." This claim should be rejected. Because Morris-Wolff has not demonstrated that the alleged error is a manifest constitutional error, he may not raise it for the first time on appeal. Furthermore, even if this Court were to reach the merits of his claim, the trial court's response to the jury question was not erroneous when taken in context, and the record demonstrates that any error was harmless.

a. Relevant Facts.

During deliberations, the jury submitted a question, stating, "Can a more comprehensive or a legal definition be offered for 'a crime against a person' vis-a-vis instruction no. 17?" CP 229. The trial court consulted with the parties in open court to determine how

to answer the question. 22RP 68-69. Morris-Wolff proposed that the court instruct the jury to look at the instructions they had already received. 22RP 69. The State concurred. 22RP 69. The trial court agreed, and read to the parties the answer it planned to give the jury: "There will be no additional jury instructions. Please rely on all the evidence, instructions and argument you have received." CP 229; 22RP 69. Neither party objected or offered any further input. 22RP 69.

Without further comment, the trial court moved on to address an unrelated issue with the parties. 22RP 69. At the end of that discussion, the trial court made the proposed written answer to the jury's question available to the parties, stating, "Here's the answer if you want to take a look over it, otherwise it will go back to the jury." 22RP 72. The State affirmatively stated its approval; the record does not reflect an audible response by the defense. 22RP 73. The trial court then stated, "All right. Thank you," and adjourned the proceedings. 22RP 73. At no point did Morris-Wolff object to the trial court's proposed answer to the jury question.

b. Morris-Wolff May Not Raise This Claim For The First Time On Appeal.

Appellate courts generally will not consider an issue that is raised for the first time on appeal. Kirkman, 159 Wn.2d at 926. In order to have a claim reviewed for the first time on appeal, a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5.

Morris-Wolff does not contend that the error he alleges is of constitutional dimension, and the State is aware of no authority that would support such a contention. Brief of Appellant at 14-15. He has thus failed to establish that the trial court's answer to the jury question was a manifest constitutional error, and this Court should not review his claim.

Even if this Court were to find that the alleged error were of constitutional dimension, not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) ("[I]t is important that 'manifest' be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals."). A manifest error is "an error that is 'unmistakable, evident or

indisputable,'" and that has "practical and identifiable consequences in the trial of the case." State v. Hayes, 165 Wn. App. 507, 514-15, 265 P.3d 982 (2011) (quoting State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)).

The mere possibility of prejudice is insufficient—the defendant must show that the alleged error actually affected his rights at trial. Kirkman, 159 Wn.2d at 926-27. To determine whether a defendant's claim raises a manifest constitutional error, "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

Here, the trial court's answer to the jury question neither was obviously erroneous nor can be shown to have actually affected Morris-Wolff's rights at trial. Nothing in the answer allowed the jury to substitute the arguments of counsel for the court's instructions on the law if the two conflicted, and the jury had already been instructed to disregard any argument by the attorneys that was not supported by the evidence or the law as set out in the jury instructions. CP 229, 232. The court's answer simply told the jurors that they would not be receiving the additional instruction they had requested, and to make use of the evidence, instructions,

and arguments they had already received to decide the case. CP 229.

Furthermore, Morris-Wolff cannot show that this answer actually prejudiced him. He contends that it allowed the jury to rely on the prosecutor's arguments for the meaning of "crime against a person," but if so, he benefitted equally from the jury being allowed to rely on defense counsel's contrary arguments on the same topic. Brief of Appellant at 14-15; 22RP 54-57. It is entirely possible that, in reliance on defense counsel's closing argument, the jury decided that Morris's violation of the court orders protecting his children were not crimes against a person in this case, but in the end convicted him anyway because it found that he also entered with the intent to assault his wife inside the residence. Furthermore, Morris-Wolff had affirmatively argued that whether a court order violation was a crime against a person was a question of fact for the jury to decide. 21RP 29-30. Under that theory, the prosecutor's arguments about whether the intended court order violations constituted a crime against a person in this case were arguments about issues of fact, not issues of law. Morris-Wolff should not be allowed to now paint them as arguments about

issues of law to create the appearance of conflict with the trial court's instructions on the law.

Because Morris-Wolff has failed to establish that the trial court's jury question response was obviously erroneous, caused him prejudice, and was an error of constitutional dimension, this Court should not allow him to raise his claim for the first time on appeal. If this Court does decide to review his claim on the merits, then it should nevertheless find the trial court's answer to be proper or harmless, for the reasons stated above.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING MORRIS-WOLFF'S MOTION FOR A NEW TRIAL BECAUSE MORRIS-WOLFF FAILED TO ESTABLISH THAT PROSECUTORIAL MISCONDUCT OCCURRED.

Morris-Wolff contends that the trial court abused its discretion in denying his motion for a new trial, which was based on assertions of prosecutorial misconduct in closing argument. This claim should be rejected. Because the prosecutor's remarks referred only to facts in evidence and were proper when viewed in context, the trial court properly exercised its discretion in denying the motion for a new trial.

a. Relevant Facts.

Testimony at trial established that when Lisa obtained the civil protection order that prohibited Morris-Wolff from contacting her or the children, a temporary order was put in place at an initial hearing of which Morris-Wolff had no notice. 19RP 109-10. A final protection order was put in place two weeks later, at a hearing of which Morris-Wolff had notice but chose not to attend. 19RP 110; 20RP 112, 118; 21RP 91-92. A provision of the final protection order permitted Morris-Wolff to have professionally supervised visitation with his children on Saturday afternoons. 20RP 140.

The final protection order was in effect at the time of the burglary, as were three domestic violence no-contact orders that prohibited all contact with Lisa and the children. 20RP 133-35, 138-41. The no-contact orders did not permit visitation. Ex. 5-7. Morris-Wolff had notice of both the final protection order and the no-contact orders at the time of the burglary. 21RP 141. At the time of the burglary, Morris-Wolff had not seen his children since the orders were put in place, except for one incident in early August in which he violated the court orders with Lisa's consent by sitting with the family after encountering them at an ice-cream shop. 19RP 72, 130-33; 21RP 86-90. Copies of the protection order and

the no-contact orders were admitted at trial. Supp. CP __ (sub 130); Ex. 5-8.

In closing argument, defense counsel argued that Morris-Wolff's sole intent when he broke into the family home was to see his children in violation of the court orders so that he could explain that he was going to jail, and that this violation was not a crime against a person because he didn't intend to harm or frighten the children. 22RP 43-57. In rebuttal, the prosecutor argued that even if that really were Morris-Wolff's intent, the circumstances made the intended violation a crime against a person. 22RP 62-63. The prosecutor pointed out that Lisa had personally requested the protection order for her safety and the safety of her children, and Morris-Wolff chose to violate it by visiting the children in Lisa's presence against her will, rather than violating the orders by seeing the children outside of Lisa's presence or in a less alarming way, such as through a supervised visit:

> Lisa Morris-Wolff petitions the court for a protection order preventing the defendant from having any contact with her children. The defendant enters even with only the intent to contact the children in front of her is intent to commit a crime against a person. That's it; that's all. All right. And in this case, according to his own testimony, even taken just at his word, he's showing up there for the purpose of speaking with Lisa. And he certainly knows that she's

> standing at the door when he sees her as he's breaking it down. This isn't a circumstance where the defendant went to the kids' daycare, all right. He didn't go to the kids' school, all right. Although the testimony was that he was familiar with those processes, all right, he lived there and he went to the same daycare and the same school and he certainly did not go on August 14th as defined in State's Exhibit 8, the order for protection that Lisa asked for, to the supervised visitation that was ordered with his children.

22RP 62-63.

As the prosecutor made the statement that a supervised visit was not the reason Morris-Wolff went to the family home on August 14th, he displayed Exhibit 8, the protection order, to the jury. 22RP 67-68. Morris-Wolff objected to the mention of supervised visitation as "misleading"; the trial court overruled the objection, remarking that "this is argument" and that the jury had already heard the jury instructions and all the evidence. 22RP 63.

Later in rebuttal, the prosecutor responded to a point defense counsel had raised in her closing argument regarding the jury's duty to not decide the case based on sympathy or prejudice. 22RP 64. The prosecutor told the jury that this meant they also should not be influenced by sympathy for a father's desire to see his children, and reminded them that Lisa was not the person who denied Morris-Wolff complete access to his children:

> [Defense counsel] mentioned you shouldn't be deciding this case based on sympathy, prejudice. I'll echo that sentiment, all right. And it's not a defense to residential burglary that someone just wanted to see their children. It's not a defense in this case.
>
> Because while Lisa followed a court process, she petitioned for a protection order, the defendant didn't show up for those hearings. He had supervised visitation.

22RP 64. Morris-Wolff objected, stating in the jury's presence, "That's misleading because of the other orders." 22RP 64. The trial court sustained the objection, but Morris-Wolff did not request that the prosecutor's remark be stricken or that a curative instruction be given. 22RP 65.

Following the State's rebuttal argument, the jury was excused to begin their deliberations. 22RP 65-66. Defense counsel then articulated for the record the prosecutor's display of exhibit eight during his first reference to supervised visitation, but stated that she was not raising any further objections or argument at that time. 22RP 67-68.

Later that day, the parties returned to the courtroom to discuss the response to a question from the jury. 22RP 68. After that issue was resolved, Morris-Wolff asked the court to instruct the jurors that he was not legally permitted to have supervised or unsupervised visits with his children in the month leading up to

August 14th because the no-contact orders did not allow it. 22RP 69. The trial court asked why it should give such an instruction, even if it was an agreed stipulation as had been represented by defense counsel, in light of the objections Morris-Wolff had successfully raised before the jury. 22RP 69. Morris-Wolff argued that the State had implied that he could have lawfully visited his children through supervised visits and chose not to, and that an instruction was the appropriate remedy given that the court had sustained the second objection. 22RP 70.

The trial court denied the request out of concern that such an instruction would be untimely, a judicial comment on the evidence and confusing to the jury. 22RP 71-72. When Morris-Wolff then asked that the jurors be instructed to disregard the State's argument, the trial court denied that request as well. 22RP 71.

After the jury found him guilty of residential burglary as charged, Morris-Wolff moved for a new trial under CrR 7.5, arguing that the prosecutor had committed misconduct and denied him a fair trial by stating, without any basis in the evidence, that Morris-Wolff had not attended court-ordered supervised visits with his children. CP 261, 267-71. In support of his argument that he was

prejudiced by the alleged prosecutorial misconduct, Morris-Wolff submitted a declaration by defense counsel regarding statements that some jurors had made to defense counsel after the verdict. CP 261-66.

In the declaration, defense counsel asserted that some jurors, in the presence of the prosecutor and the judge, had stated that they had discussed the issue of supervised visitation during deliberations. CP 265. The declaration stated that two jurors had stated that they believed Morris-Wolff likely could not lawfully visit his children, but one juror stated that the fact that Morris-Wolff had not been attending his supervised visits "was a 'nail in the coffin.'" CP 265. It also asserted that "several" of the jurors appeared surprised when defense counsel told them that Morris-Wolff was not lawfully permitted to visit his children even with supervision. CP 265.

Responding to the motion, the State argued that the prosecutor's remarks did not actually assert that Morris-Wolff could have lawfully seen his children through supervised visitation, and had been a proper response to defense counsel's closing argument. 22RP 85-87. The State reminded the trial court that statements by jurors about their thought process inhere in the

verdict and may not be considered when evaluating whether Morris-Wolff had met his burden to establish that he was prejudiced by the challenged remarks. CP 388. For that reason, the prosecutor did not state on the record what he recalled the jurors saying, but merely noted that "I think [defense counsel] and I have a different perspective on what the jurors said." 22RP 87.

The trial court denied the motion for a new trial, finding that there was no prosecutorial misconduct or error of law that would justify setting aside the jury's verdict. CP 272; 22RP 89-90. In explaining its ruling, the court noted that the issue of supervised visitation was not central to the trial or the elements of the charge, and that the prosecutor's remarks referred to a portion of an admitted exhibit rather than facts not in evidence. 22RP 89-90. The court also noted that the request for a curative instruction had not come until after the jury had begun deliberating, and that the court had been reluctant to unduly emphasize the issue with a late jury instruction. 22RP 89.

Although the judge found that no misconduct had occurred, she also addressed the issue of the juror's post-verdict comments by stating that she happened to be present in the room as the attorneys were speaking with some of the jurors, and "my takeaway

from that conversation was different from [defense counsel's] in some respects," though she acknowledged that she had not been present for the entire conversation. 22RP 88. Specifically, the court noted that although one juror had indicated surprise at learning that Morris-Wolff could not lawfully see his children through supervised visitation, another juror had said "that they weren't sure about [the supervised visitation issue] but that they decided it didn't make a difference anyway." 22RP 88.

b. Morris-Wolff Failed To Establish That He Was Entitled To A New Trial.

CrR 7.5(a) states that a trial court may grant a defendant's motion for a new trial based on any one of eight enumerated reasons, one of which is "misconduct of the prosecution or jury," "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a)(2). Because the trial court, having seen and heard the proceedings, is in a better position than the appellate courts to evaluate the merits of a motion for new trial, a trial court's ruling on such a motion will not be disturbed absent a clear abuse of discretion. State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006). "An abuse of discretion will be found only when no reasonable judge would have

reached the same conclusion." Id. at 52 (internal quotations marks omitted).

A trial court presented with a motion for new trial based on claims of prosecutorial misconduct applies the same standard that the appellate courts use when evaluating prosecutorial misconduct claims. Id. In order to prevail on such a claim, a defendant bears the burden of establishing that the prosecutor's comments were both improper and prejudicial. Id.

i. Morris-Wolff failed to establish that the prosecutor's comments were improper.

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937, 947 (2009). Appellate courts evaluate allegedly improper comments "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Morris-Wolff contends that the prosecutor's remarks asserted to the jury, without any basis in the evidence, that Morris-Wolff had failed to attend scheduled supervised visits with his

children. Brief of Appellant at 18. However, when the prosecutor's comments are viewed in context, it is apparent that the prosecutor did not make any such assertion, but merely made proper reference to facts contained in an admitted exhibit.

The civil protection order issued at Lisa's request was admitted at trial as Exhibit 8, and contained a provision that Morris-Wolff could see his children at specified times through supervised visitation. Ex. 8. The no-contact orders prohibiting all contact with the children were also admitted at trial, and the jury consistently heard from both parties and nearly every witness that Morris-Wolff was not permitted to contact the children. 19RP 45 (State's opening), 61 (defense opening), 123 (testimony of Lisa Morris-Wolff); 20RP 126 (Testimony of Officer Tim Barnes), 134-35 (testimony of Detective Nicholas Carter); 21RP 90 (testimony of Morris-Wolff); 22RP 33 (state's closing), 47 (defense closing).

During closing argument, defense counsel contended that Morris-Wolff's intent in entering the home "had nothing to do with" Lisa, and that his intended contact with the children was not a crime against a person. 22RP 48, 51-54. In rebuttal, the prosecutor responded to that contention by pointing out to the jury that Morris-Wolff knew when he broke down the door that Lisa was standing on

the other side, and that he thus intended to commit a crime against a person by contacting the children in Lisa's presence in an alarming manner, rather than seeing the children under different circumstances. 22RP 63. The prosecutor pointed out that Morris-Wolff did not go to the children's daycare and did not go to the children's school, even though he knew where they were located, "and he certainly did not go on August 14th as defined in State's Exhibit 8, the order for protection that Lisa asked for, to the supervised visitation that was ordered with his children." 22RP 63.

The reference to supervised visitation was merely the third in a list of less alarming ways in which Morris-Wolff could have violated the court orders in order to see his children. The prosecutor did not assert that a supervised visit was scheduled for the day of the burglary and Morris-Wolff failed to attend—he merely pointed out that Morris-Wolff's presence at the house that day was not part of some planned supervised visit. 22RP 63. As such, the remark did not refer to facts outside the record and was not improper, and the trial court properly exercised its discretion in overruling Morris-Wolff's objection.

The second challenged remark in the prosecutor's rebuttal argument occurred when the prosecutor was explicitly responding

to defense counsel's remarks reminding the jury not to decide the case based on sympathy. 22RP 64. The prosecutor echoed that message, and reminded the jurors that a father's desire to see his children is "not a defense to residential burglary." 22RP 64. When the prosecutor went on to note that Lisa followed the appropriate court procedures to obtain a protection order, and the defendant chose not to participate but "had supervised visitation," the prosecutor was not suggesting that Morris-Wolff could have lawfully seen the children through supervised visitation. 22RP 64. He was merely reminding the jurors that, not only was sympathy not a proper basis for their verdict, but there was no reason to be sympathetic of Morris-Wolff over Lisa, as Lisa had followed the rules and the order she obtained had attempted to preserve Morris-Wolff's ability to have some contact with his children, even though he did not appear for the hearing. Thus, viewed in proper context, the second challenged remark was not improper.

Because Morris-Wolff failed to meet his burden to establish that the challenged remarks by the prosecutor were improper, the trial court properly exercised its discretion in finding that no prosecutorial misconduct occurred and in denying the motion for a new trial.

ii. Morris-Wolff failed to establish that the prosecutor's comments were prejudicial.

In order to establish prejudice, a defendant who objected to allegedly improper prosecutorial remarks at trial must show that the prosecutor's comments resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A defendant who did not timely (1) object and (2) request a curative instruction has waived any error unless the comment is so flagrant and ill-intentioned that it causes an enduring prejudice that could not have been neutralized by a curative instruction. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

In either case, the required showing of prejudice can be based only on the contents of the trial itself and an objective assessment of the probable effect of the challenged remarks on the jury; evidence regarding the processes through which the jury arrived at its decision inheres in the verdict and is inadmissible in a motion for new trial. State v. Elmore, 139 Wn.2d 250, 294 n.17, 985 P.2d 289 (1999) (juror affidavits inadmissible in motion for new trial if affidavits describe the individual or collective thought

processes leading to the verdict); Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967) (affidavits regarding "the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence" are inadmissible in motion for new trial because those factors inhere in the verdict); Gardner v. Malone, 60 Wn.2d 836, 840, 376 P.2d 651 (1962) (noting rule that juror affidavits may be considered regarding facts of misconduct but not regarding the prejudicial effect; it is for court to determine the probable effect upon the verdict).

Here, Morris-Wolff failed to establish that the challenged remarks had a substantial likelihood of affecting the verdict. The affidavit defense counsel provided regarding jurors' post-verdict statements was hearsay, and even affidavits by the jurors themselves regarding the effect of the prosecutor's comments on their deliberations or the weight they gave to the visitation provision within the protection order would have been inadmissible as inhering in the verdict. See, e.g., Cox, 70 Wn.2d at 179-80. Thus, Morris-Wolff's burden to establish prejudice could be met only if the prosecutor's remarks themselves and their context in the trial as a whole established that the remarks had a substantial likelihood of affecting the jury's verdict. See id.; Gardner, 60 Wn.2d at 840.

Morris-Wolff failed to establish that the first challenged comment, to which his objection was overruled, prejudiced him. When contrasting Morris-Wolff's violent break-in with the alternatives he could have used to see the children in a less frightening manner, the prosecutor's statement that Morris-Wolff was not coming to the house on August 14th for the purpose of "supervised visitation that was ordered with his children" was admittedly inartful. 22RP 63. Taken out of context, that wording might appear to suggest that a court had ordered him to attend supervised visitation. However, the prosecutor pointed to the protection order provision regarding visitation as he made the remark, and the order clearly stated that Morris-Wolff "will be **allowed** visitations as follows . . ." and gave no indication that visitation was required. Ex. 8 (emphasis added); 20RP 140. Furthermore, the prosecutor was consistent throughout the trial in telling the jury that it was a violation of court orders for Morris-Wolff to have any contact with the children, and no witness or attorney suggested that the protection order's visitation provision controlled over the no-contact order's prohibition on all contact. 19RP 45; 22RP 33. Under the circumstances, the jury would not have

misinterpreted the prosecutor's comment in a way that would cause prejudice with a substantial likelihood of affecting the verdict.

Similarly, the second challenged comment would not likely have been interpreted by the jury as anything more than a comment on the fact that Lisa was not responsible for Morris-Wolff being denied all access to his children because the protection order she obtained would have permitted supervised visitation. 22RP 65. To the extent there was any danger of prejudice to Morris-Wolff, it was ameliorated by Morris-Wolff's timely objection stating, "That's misleading because of the other orders," which the trial court sustained. 22RP 64-65. The jury was thus alerted to the fact that the other court orders prevented Morris-Wolff from actually making use of the supervised visitation clause of the protection order.

Furthermore, Morris-Wolff could have immediately requested a curative instruction, but did not do so. 22RP 65. Even at the next opportunity to raise issues outside the presence of the jury, which occurred immediately after the jurors were excused to begin their deliberations, Morris-Wolff did not request an instruction. 22RP 66-68. Only later, part way through the jury's deliberations, did he finally request a curative instruction. 22RP 68. At that point, the

trial court properly denied the request as untimely. See State v. Fowler, 114 Wn.2d 59, 65-67, 785 P.2d 808 (1990) (objection to closing argument after jury retired was untimely), disapproved of on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Morris-Wolff's failure to timely request a curative instruction regarding the second challenged comment means that he was entitled to a new trial only if any prejudicial effect could not have been cured by a timely instruction. Charlton, 90 Wn.2d at 661. That is clearly not the case here, as even defense counsel believed that a curative instruction would be sufficient to remove any prejudice. 22RP 70 ("I think an instruction is appropriate rather than a motion for a mistrial."); State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) ("The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.").

Even if this Court were to analyze the possible prejudice as if Morris-Wolff's request for a curative instruction were timely, Morris-Wolff is not entitled to a new trial. The trial court instructed the jury prior to closing argument that "the lawyers' statements are not

evidence," and that they "must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions." 22RP 13; CP 232. Jurors are presumed to follow the court's instructions. Kirkman, 159 Wn.2d at 928. Because the second comment was not improper in context, the jury was alerted to the potential for misinterpretation by defense counsel's sustained objection, and the jury was instructed that closing arguments are not evidence, the second comment did not, either singly or in conjunction with the first comment, result in prejudice that had a substantial likelihood of affecting the jury's verdict.

Because Morris-Wolff failed to meet his burden to establish that the prosecutor's comments in closing argument were both improper and prejudicial, he failed to establish that prosecutorial misconduct occurred, and the trial court properly exercised its discretion in denying his motion for a new trial.

4. CUMULATIVE ERROR.

Morris-Wolff contends that the cumulative effect of the trial errors alleged requires reversal, even if the errors are found to be harmless individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). In order to seek reversal pursuant to the cumulative error doctrine, however, the defendant must establish the presence of multiple trial errors *and* that the cumulative prejudice affected the verdict. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply "where the errors are few and have little or no effect on the outcome of the trial." Id.

Instead, reversals due to cumulative error are justified only in rather extraordinary circumstances. See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

Here, as explained in the sections above, no error occurred that affected the outcome of the trial, either individually or cumulatively.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Morris-Wolff's conviction for residential burglary.

DATED this 6th day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Sarah Hrobsky, the attorney for the appellant, at Sally@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Darren Morris-Wolff, Cause No. 72141-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 6 day of July, 2015.

Name:
Done in Seattle, Washington