SUPREME COURT NO. 93225-5

NO. 73203-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHON ALLEN,

Petitioner.

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

The Honorable Brian D. Gain, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Nathon Allen, the appellant below, asks this Court to grant review of the court of appeals' unpublished decision in State v. Allen, No. 73203-0-1, filed April 25, 2016 (attached as Appendix A).

B. ISSUES PRESENTED FOR REVIEW

1. Did the prosecutor commit reversible misconduct during closing argument when he repeatedly invited the jury to infer Allen was guilty of an uncharged crime?

2. Does the jury instruction defining reasonable doubt as "one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to the accused to provide a reason for why reasonable doubt exists?

C. STATEMENT OF THE CASE

The State charged Allen with second degree burglary, alleging that on November 27, 2013, Allen entered and remained unlawfully in a building located at 3600 East Valley Road, with intent to commit a crime against a person or property therein. CP 12.

Burt Brienen owns storage unit 626 at Public Storage, 3600 East Valley Road, Renton, Washington. RP 252. Brienen and his stepson, Paul LaVaque, store many household and personal items there. RP 253-54. On October 16, 2013, Brienen noticed several items missing from his storage

unit, including weights, tools, painting supplies, and LaVaque's leather jackets and motorcycle riding boots. RP 256-58, 282-83. A September 25, 2013 surveillance video showed an unidentified individual pull up to the storage unit in a U-Haul van. RP 325-26.

On November 25, 2013, Allen purchased storage unit 625 at public auction. RP 154-57. Once an individual purchases a storage unit at auction, he or she has two days to empty it. RP 153, 163. Public Storage is a secure facility, requiring an individualized gate code to enter. RP 151, 173-74. Auction buyers are not given a gate code; instead they must request access from a Public Storage employee. RP 162-63. Around 6:00 p.m. on November 26, the day after the auction, Allen went to the Public Storage office to request access to his storage unit. RP 207-08, 218. Allen exited the property around 9:00 p.m. with his truck and trailer. RP 194-97.

Allen returned the following morning and again asked for access to the property. RP 212-13. The onsite manager, Kelly Mast, opened the gate for Allen and testified she did not see anyone else inside Allen's pickup truck. RP 212-13. Then, while she conducted her morning lock check of the facility, another man who appeared to be an acquaintance of Allen's "popped out" of Allen's unit. RP 215. A security video from that morning showed Allen and the other man loading up Allen's truck. 216-17.

Brienen called the police on November 27 to report items missing from his storage unit, including a pressure washer, portable air conditioner, leather bench, king-sized mattress, decorative wooden bench, and LaVaque's motorcycle. Ex. 12; RP 138-39, 256-58, 265-73. Records showed Brienen had not accessed the property since November 1. RP 175. A police officer testified the lock on Brienen's storage unit was still intact, but screws had been conspicuously removed and replaced on the interior wall shared with unit 625. RP 142-45.

Several months later, Detective Renggli went to Allen's home with two other detectives to investigate. RP 298. Allen explained to Renggli that he purchased unit 625 for $100 and was still in possession of many of the items from the unit. RP 299-300. Renggli showed Allen several photos from the November 26 and 27 surveillance videos. RP 300. Allen identified himself and his friend Paul Reed in the November 26 photos, and himself and his acquaintance John Cotton in the November 27 photos. RP 300-02. Allen explained he and Cotton made arrangements for Cotton to help him clear out the storage unit on that date. RP 302-03.

Allen then led the detectives around his property retrieving items from the storage unit he purchased, including a pressure washer, portable air conditioning unit, tools, and motorcycle riding boots. RP 304-08. Some but not all of the items Allen retrieved were identified by Brienen as stolen from

his storage unit. RP 306-08. For instance, Allen showed Renggli a battery charger, nail gun, and several tools that were not among the allegedly stolen items. RP 306-07. Renggli testified Allen was very cooperative throughout the encounter. RP 304, 321-22.

At trial, the State played the November 27 surveillance video during Brienen's testimony. RP 268-69. Brienen identified several of the items from his storage unit being loaded into Allen's truck, including: sand cup tires for LaVaque's motorcycle, a bicycle, sledge hammer, shop-vac, circular saw, the mattress, and air conditioning unit. RP 268-75.

In closing, the State argued:

> [T]his is not about that first burglary that was reported. We're not here to prove beyond a reasonable doubt that the defendant participated in that burglary on October 16th. It may be likely, it may be probable, but it will not be one of the elements that the State must prove beyond a reasonable doubt.

RP 352. Defense counsel did not object. RP 352. Later in closing, the State again argued:

> And it's important to remember when you're thinking about this case, think about that first burglary, what was reported, and think about November 27th. The first burglary we're not here to prove that the defendant was involved in. It's highly likely again because of some of that property that was found on his property, some of Burt's property --.

RP 361. Defense counsel objected, but the trial court overruled, stating, "This is argument." RP 361. The State continued, "Property from that first

burglary, as Burt told you, was found on Mr. Allen's property. It's probably likely that somehow there was a connection, but that's not what the State has to prove in this case." RP 361. The State concluded its closing argument shortly thereafter. RP 361.

The State's theory was that Allen's friend Cotton stayed overnight in Allen's storage unit on November 26 in order to access Brienen's unit. RP 369-70. The defense theory was that Allen unwittingly purchased a storage unit that contained Brienen's property. RP 363. Defense counsel also pointed out that the surveillance video from November 26 never showed Cotton, only Allen's friend, Reed. RP 369-70. The jury found Allen guilty of second degree burglary. CP 40.

On appeal, Allen argued the prosecutor committed misconduct by repeatedly inviting the jury to infer he was guilty of an uncharged crime. Br. of Appellant, 14-25. The prosecutor began and ended his closing argument by claiming it was likely Allen was involved with the uncharged September burglary. This invited the jury to infer Allen's guilt based on his propensity to commit burglary. Given that the September burglary was almost identical to the November burglary, the prosecutor's argument could have easily swayed the jury's decision, denying Allen a fair trial. Br. of Appellant, 25. Allen also argued the reasonable doubt jury instruction contained an unconstitutional articulation requirement. Br. of Appellant, 25-42.

The court of appeals rejected both arguments. On the first issue, the court held there was no misconduct, reasoning that "[t]estimony concerning the first burglary was in evidence, and the prosecutor permissibly argued an inference from that evidence." Opinion, 11. On the second issue, the court agreed that even though the reasonable doubt instruction was not objected to below, a jury instruction that misstates the law is manifest constitutional error. Opinion, 12. However, the court held "the instruction did not misstate the law" and this Court "has long recognized WPIC 4.01 as an accurate statement of the law," citing State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). Opinion, 12.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY REPEATEDLY INVITING THE JURY TO INFER ALLEN WAS GUILTY OF AN UNCHARGED CRIME.

A prosecutor is forbidden from appealing to the jurors' passions and encouraging them to render a verdict based on emotion rather than properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge, and that otherwise prevent calm and dispassionate evaluation of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). This includes comments

encouraging jurors to convict based on propensity to commit the crime charged. State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009). It is particularly offensive to suggest that the accused committed an uncharged crime. State v. Henderson, 100 Wn. App. 794, 802-03, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976).

Reference to uncharged incidents and dismissed charges constituted reversible error in Torres and State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In Torres, the court of appeals held it improper when the prosecutor suggested in opening that one of the defendants, who was charged with rape, could also have been charged with burglary. 16 Wn. App. at 256. "This suggestion was uncalled for and asked the jury to infer that the defendant Castillo was guilty of other crimes not charged in the information." Id.

In Boehning, the prosecutor twice referred to dismissed rape charges in closing argument and suggested the complainant's previous disclosures would have supported these charges. 127 Wn. App. at 519-21. Defense counsel did not object. Id. at 518. The court nevertheless concluded these references were improper and required reversal for several reasons. Id. at 522. First, the dismissed charges were not "'evidence' from which reasonable inferences and arguments about the [remaining] molestation charges could be made." Id. Second, the dismissed charges were "wholly

irrelevant to the State's case." Id. Third, the argument "improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." Id.

Under ER 404(b), evidence of prior bad acts is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). In Allen's case, the State never sought to admit evidence of the September 2013 burglary under one of the proper exceptions to ER 404(b), such as motive, opportunity, intent, or identity. Defense counsel accordingly had no opportunity to object to its admission or request a limiting instruction.

There was no evidence Allen had access to the Public Storage property prior to November 25, 2013 when he purchased unit 625 at auction. On the September 15 surveillance video, neither Allen nor his friends can be seen when the U-Haul van pulled up to Brienen's storage unit. RP 325-26. The identity of the individual in that video was never established. RP 325-26. Detective Renggli testified nothing linked Allen to the September burglary. RP 325-27.

The only conceivable link between Allen and the September burglary was Allen's possession of motorcycle riding boots, which Brienen believed were stolen in the first burglary. RP 256-58, 304-08. But "proof of possession of recently stolen property, unless accompanied by other

evidence of guilt, is not prima facie evidence of burglary." State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Allen's possession of possibly stolen riding boots is therefore insufficient to establish his involvement in the September burglary.

Nevertheless, the prosecutor repeatedly argued in closing that it was highly likely Allen was responsible for or involved in the uncharged burglary. At the beginning of argument, the prosecutor claimed "[i]t may be likely, it may be probable" that Allen "participated in that burglary on October 16th." RP 352. Defense counsel did not object. But defense counsel in Boehning did not object either. 127 Wn. App. at 518. Regardless, the court concluded reference to Boehning's dismissed rape charges required reversal. Id. at 518-19, 522. This establishes that inviting the jury to infer Allen was guilty of the uncharged burglary was flagrant and ill-intentioned misconduct. See id. at 525.

Later in closing, the prosecutor again argued "[i]t's highly likely" Allen was involved in the first burglary, "because of some of that property that was found on his property, some of Burt's property --." RP 361. Defense counsel objected, but the trial court overruled, stating, "This is argument." RP 361. The prosecutor immediately continued with the same argument, "Property from that first burglary, as Burt told you, was found on Mr. Allen's property. It's probably likely that somehow there was a

connection." RP 362. This invited the jury to infer Allen was guilty of the September burglary, even though he was never charged for that crime and there would be insufficient evidence to support any such conviction.

Washington law is clear: it is flagrant and ill-intentioned misconduct for the prosecutor to argue the accused is guilty of uncharged crimes. Boehning, 127 Wn. App. at 518-19; Torres, 16 Wn. App. at 256-57. Further, defense counsel objected to the second reference and the third reference followed immediately after the trial court overruled the objection. Where defense counsel objects, the appellant need only show the prosecutor's conduct was improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Just as in Torres and Boehning, the prosecutor's repeated argument that it was "highly likely" and "probable" Allen was involved in the September burglary was "uncalled for" and impermissibly asked the jury to infer Allen was guilty of that uncharged crime. Boehning, 127 Wn. App. at 522; Torres, 16 Wn. App. at 256.

The court of appeals nevertheless concluded that because "[t]estimony concerning the first burglary was in evidence, . . . the prosecutor permissibly argued an inference from that evidence." Opinion, 11. This is conflicts with Boehning, which held that referencing dismissed charges was not a reasonable inference from the evidence. 127 Wn. App. at 522. The Boehning court further emphasized the dismissed charges "were

wholly irrelevant to the State's case." Id. The court of appeals' also conflicts with Torres, where there was evidence of the defendant's possible involvement in a separate, uncharged burglary. 16 Wn. App. at 256. The prosecutor's suggestion that Torres was involved in that burglary was nevertheless "uncalled for" and impermissibly asked the jury to infer Torres "was guilty of other crimes not charged in the information." Id.

The prosecutor argued argue it was "likely," "probable," "highly likely," and "probably likely" Allen was involved in the September burglary. RP 352, 361-62. But Allen was not charged with that burglary. Under clear case law, whether he was involved in the earlier burglary was irrelevant to whether he committed the November burglary. Such an argument served only to encourage the jury to convict based on Allen's purported propensity to commit burglary. The prosecutor's argument also did not constitute a reasonable inference from the evidence because mere possession of stolen property cannot, as a matter of law, establish burglary.

Misconduct warrants reversal when it "was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. Belgarde, 110 Wn.2d at 508; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Misconduct that is not objected to warrants

reversal when no jury instruction could have cured the resulting prejudice. Boehning, 127 Wn. App. at 522.

Like in Boehning, the prosecutor's argument that Allen was involved in the uncharged burglary "alone compels reversal," because it "improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds." Id. Prosecutors, in their quasi-judicial capacity, exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Statements made during closing argument are intended to influence the jury. Reed, 102 Wn.2d at 146. Such was the case here. The prosecutor's argument invited the jury to improperly convict Allen based on an alleged but unproved propensity to commit burglary.

Furthermore, allegations of prior crimes are "highly prejudicial." State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Even more prejudicial is "admission of evidence concerning a crime similar to the charged offenses." State v. Babcock, 145 Wn. App. 157, 164-65, 185 P.3d 1213 (2008). Such evidence is "inherently difficult to disregard." Id. The prosecutor alleged Allen's involvement in an uncharged burglary almost identical to the charged burglary. This would be incredibly difficult for the jury to disregard, even if the court had given a proper curative instruction.

The prosecutor's argument that Allen was guilty of an uncharged crime was improper, as well as flagrant and ill-intentioned misconduct. This Court should grant review under RAP 13.4(b)(1), (b)(2), and (b)(3).

2. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

At Allen's trial, the court gave the standard reasonable doubt jury instruction, WPIC 4.01, which reads, in part: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 46; RP 345. Instructing jurors with WPIC 4.01 is constitutional error.

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 138 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). The error in WPIC 4.01 is readily apparent to the ordinary mind. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. WPIC 4.01 erroneously requires both for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining in the bounds of reason . . . having the faculty of

reason : RATIONAL . . . possessing good sound judgment." WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993). Under these definitions, for a doubt to be reasonable it must be rational, logically derived, and not in conflict with reason. This definition comports with U.S. Supreme Court precedent defining the reasonable doubt standard.[1]

The article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason," as employed in WPIC 4.01, means "an expression or statement offered as an explanation or a belief or assertion or as a justification." WEBSTER'S, supra, at 1891. WPIC 4.01's use of the words "a reason" indicates reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006) (internal quotations marks omitted). Ambiguous instructions that permit an erroneous interpretation of the law are improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled in part on other grounds by

[1] E.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Even if it is possible for judges and lawyers to interpret the instruction to avoid constitutional infirmity, this is not the correct standard for measuring the adequacy of jury instructions. Judges and lawyers have an arsenal of interpretative aids at their disposal that jurors do not. Id.

Prosecutorial misconduct cases exemplify how WPIC 4.01 fails to make the reasonable doubt standard manifestly apparent even to trained legal professionals. Washington courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. These fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable" and "subtly shift[] the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). They are improper "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." Id. at 759.

But the improper fill-in-the-blank arguments did not originate in a vacuum—they sprang directly from WPIC 4.01's language. In State v. Anderson, for example, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." 153 Wn. App. 417, 424, 220 P.3d 1273 (2009). The same occurred in State v. Johnson, where the prosecutor told jurors: "What [WPIC 4.01] says is 'a

doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." 158 Wn. App. 677, 682, 243 P.3d 936 (2010).

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The prosecutorial misconduct cases make clear WPIC 4.01 is the true culprit. Its doubt "for which a reason exists" language provides a natural and seemingly irresistible basis to argue jurors must give a reason why there is reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason for it, then how can average jurors be expected to avoid the same pitfall?

Despite the fact that the plain language of WPIC 4.01 requires articulation of doubt, the court of appeals refused to address the substance of Allen's argument, conclude this Court "has long recognized WPIC 4.01 as an accurate statement of the law." Opinion, 12 (citing Bennett, 161 Wn.2d at 317-18). But Bennett did not address a direct challenge to WPIC 4.01 and therefore does not fairly resolve Allen's dispute.

Bennett actually undermines WPIC 4.01 by requiring the instruction be given in every criminal case only "until a better instruction is approved." 161 Wn.2d at 318. This Court clearly signaled that WPIC 4.01 has room for improvement. In State v. Kalebaugh, this Court concluded the trial court's erroneous instruction—"a doubt for which a reason can be given"—was harmless, accepting Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with final instructions given here," which included WPIC 4.01. 183 Wn.2d 578, 585, 355 P.3d 253 (2015).

Neither of the petitioners in Bennett or Kalebaugh argued the "one for which a reason exists" language in WPIC 4.01 misstated the reasonable doubt standard. Instead, the analysis in each case flowed from the unquestioned premise that WPIC 4.01 is correct. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because this Court has suggested WPIC 4.01 can be improved and no appellate court has recently addressed flaws in WPIC 4.01's language, this Court should take this opportunity to closely examine WPIC 4.01.

Such examination demonstrates this Court's precedent is in disarray. In State v. Harras, 25 Wash. 416, 421, 65 P. 774 (1901), this Court upheld

the instruction, "It should be a doubt for which a good reason exists." This Court maintained the "great weight of authority" supported the instruction, citing the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894). This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[2] In other words, the Harras court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. This conflicts with Kalebaugh and Emery, which reject any requirement that jurors must be able to give a reason for why reasonable doubt exists.

This Court's decision in State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), demonstrates further inconsistency. The Harsted court upheld the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Id. at 162. In doing so, this Court relied on out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can be given. Id. at 164. One of the authorities this Court relied on was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." Though this Court noted that some courts had disapproved of

[2] The relevant portion of the note is attached as Appendix B.

similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. 66 Wash. at 165.

Harsted and Harras provide the origins of WPIC 4.01's infirmity. In both cases this Court equated a doubt "for which a reason exists" with a doubt "for which a reason can be given." The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Emery and Kalebaugh conflict with Harras and Harsted. The law has evolved. What was acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington court to seriously confront the unconstitutional articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require articulation. Because this Court's and the court of appeals' decisions demonstrate the case law is in disarray on the significant constitutional issue of properly defining reasonable doubt for Washington juries, Allen's argument merits review under all four criteria of RAP 13.4(b).

E. CONCLUSION

Because Allen satisfies all the criteria for review under RAP 13.4(b), he respectfully asks that this Court grant review, reverse his conviction, and remand for a new trial.

DATED this 25th day of May, 2016.

Respectfully submitted,

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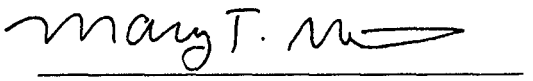

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Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NATHON ALLEN, Appellant.	)	No. 73203-0-I DIVISION ONE UNPUBLISHED OPINION FILED: April 25, 2016

SPEARMAN, J. — Nathon Allen was convicted by a jury of second degree burglary. He appeals, arguing that the information was deficient, the prosecutor committed reversible misconduct, and the trial court erred in using the pattern jury instruction defining reasonable doubt. Finding no error, we affirm.

FACTS

At the beginning of October 2013, the manager of a Public Storage facility discovered that the owners of storage unit 625 had been sleeping in their storage space. The manager informed the owners that Public Storage prohibits using a storage unit as a residence. He restricted their access code so they could only enter the facility during business hours. The owners of unit 625 did not pay rent for the month of October. The manager disabled their access code for the security gate when rent was seven days overdue.

Burt Brienen owned the adjoining storage unit, unit 626. On October 16, 2013, Brienen reported that his unit had been burglarized. Brienen stated that items in his storage unit had been moved and several pieces were missing, including furniture, tools, and motorcycle gear. Brienen could not pinpoint when the theft occurred. Public Storage employees identified suspicious activity near unit 626 on a surveillance video from September 15, 2013.

In the first week of November, when rent on unit 625 was 30 days overdue, the manager cut the owners' lock, opened the unit, and conducted a brief visual inspection. At that time, unit 625 contained a bed, a rolling shelf with hangers and clothing, a dresser with a mirror, and empty food and drink containers. The unit was not full and there were no bulky items obstructing the manager's view of the contents. The manager stated that all of the contents of unit 625 could be loaded into one 12-foot van. The manager placed a Public Storage lock and a security tag on the unit. Unit 625 remained locked until its contents were sold at auction on November 25, 2013.

Allen purchased the contents of unit 625 at auction. Auction procedure allowed Allen two days after the sale to remove the contents. Public Storage employees observed Allen loading items from unit 625 onto a truck and large trailer on November 25, 26, and 27. On some occasions, Allen was accompanied by two or three other people.

Allen did not receive an access code to enter the Public Storage facility and he had to request access from an employee each time he drove on site. Kelly Mast, a Public Storage employee, opened the gate for Allen to drive into the

facility on the morning of November 27. A few minutes later Mast saw another man exit unit 625. Mast was surprised because Allen was alone in his truck when she opened the gate.

Later that same day, Brienen and his stepson visited unit 626. The items in their storage unit were not in their usual places and many items were missing, including tools, a motorcycle, two air conditioning units, collectible dolls, tires and rims, a bicycle, a king-sized bed, and a wooden bench. As Brienen and his stepson examined the unit to see what was missing, a portion of the sheet metal wall separating units 625 and 626 opened. The screws that originally secured the partition had been removed. With the interior wall open, unit 626 led directly into unit 625.

Brienen reported the burglary to the police and filled out an inventory of missing property. Brienen was unsure whether some items were taken in the first or the second burglary. He stated that the items on the first two pages of the inventory had all been taken in the second burglary, and the items on the third page were taken in the first burglary.

Police officers showed Brienen surveillance video of Allen loading items onto a truck on November 27. Brienen identified several of the items as property from his storage unit.

When police officers questioned Allen, he was very cooperative. Allen denied removing the partition separating the units, but stated that he had many of the missing items. Allen said that he had sold some of the furniture the officers were looking for, but he gave the officers other items from Brienen's inventory.

Some of the items that Allen returned had been taken in the first burglary, others had been taken in the second burglary.

The State charged Allen with second degree burglary. Based on the theft of the stepson's motorcycle and tools, the State also charged Allen with theft of a motor vehicle and first degree theft. The State later dismissed the two theft charges because Brienen's stepson was not available to testify.

At trial, Brienen testified at length about both burglaries. Allen did not object. During cross examination, Allen elicited details about when the first burglary occurred and what items were taken. A police officer testified to his investigation of the second burglary. Allen questioned the officer concerning the first burglary. On redirect, the investigating officer stated that he was not aware of anything linking Allen to the first burglary and that Allen does not appear on the surveillance video that presumably shows the first burglary.

In closing argument, the State's theory was that Allen worked with at least one accomplice to access Brienen's storage unit and steal Brienen's belongings. The prosecutor referred to the first burglary and stated that it was "likely" or "probable" that Allen was involved, but argued that what the State had to prove was that Allen participated in the second burglary. Verbatim Report of Proceedings (VRP) at 352, 361-62.

Allen's theory was that he unknowingly bought a storage unit that contained stolen property. He argued that the owners of unit 625 continuously burglarized Brienen's unit until they were locked out. Allen argued that this theory

explained why he was in possession of some of Brienen's property reported missing in the first burglary.

The jury convicted Allen of second degree burglary. Allen was sentenced to twelve months of electronic home detention. He appeals.

DISCUSSION

Allen first argues that the information was constitutionally deficient because it failed to allege an element of the charged offense. The Sixth Amendment of the United States Constitution and article 1, section 22 of our state constitution require that charging documents include all essential statutory and nonstatutory elements of a crime. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004) (citing State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)). The purpose of the requirement is to ensure that the accused has notice of the nature of the crime in order to prepare an adequate defense. State v. Tandecki, 153 Wn.2d 842, 846-47, 109 P.3d 398 (2005) (quoting State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

When a charging document is challenged for the first time on appeal, we liberally construe the document in favor of validity. Tandecki, 153 Wn.2d at 849. We apply a two part test, examining (1) whether the necessary facts appear on the face of the charging document or may be fairly implied and, if so, (2) whether the defendant can show that he was actually prejudiced because the inartful language caused a lack of notice in the charging document. Id. (quoting Kjorsvik, 117 Wn.2d at 105-06). If the necessary elements are not found or implied caused a lack of notice, prejudice is assumed. State v. McCarty, 140 Wn.2d 420, 425,

998 P.2d 296 (2000) (citing State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998)).

Here, the State charged Allen with second degree burglary under RCW 9A.52.030(1), which provides that a person is "guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." The crime has two elements: (1) entering or remaining unlawfully in a building and (2) intent to commit a crime therein. State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995). RCW 9A.52.010(5) defines the "unlawful entry" element and states that a person "'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain."

The information charging Allen stated in relevant part:

> [T]he defendant Nathon George Allen in King County, Washington, on or about November 27, 2013, did enter and remain unlawfully in a building, located at 3600 East Valley Road, in said county and state, with intent to commit a crime against a person or property therein[.]

Clerk's Papers (CP) at 12. Allen argues that the information was deficient because it did not allege ownership of the premises. He asserts that he had the lawful right to enter storage unit 625 at the address listed in the information and the information failed to negate that right to enter.

Allen is mistaken. The information includes both of the elements of second degree burglary: unlawful entry and intent to commit a crime. At most, the language of the information may have been inartful in failing to specify that the charge concerned a storage unit other than unit 625, which Allen had a lawful

right to enter. But this fact may be fairly implied by the word "unlawfully," which necessarily refers to premises that Allen did not have a right to enter.[1] Allen makes no argument that he was prejudiced by the inartful language. Because the necessary facts appear in the charging document or may fairly be implied, and Allen has shown no prejudice due to inartful language, we conclude that the information was valid.

However, Allen argues that under State v. Klein, 195 Wash. 338, 341, 80 P.2d 825 (1938), the information must include language that someone held an ownership or occupancy right in the burglarized property superior to Allen's right. Allen's argument is unavailing.

At the time of the Klein opinion, the burglary statute did not refer to "unlawful entry" but instead criminalized entering "the dwelling-house of another" or breaking and entering "any building" where property is kept. Klein, 195 Wash. at 340 (quoting Rem. Rev. Stat § 2579). To prevail, the State had to prove that the burglarized building belonged to or was occupied by "another." Id. at 341-42. Under the current burglary statute, the State must prove "unlawful entry." This element was adequately charged in the information.

Furthermore, even under the prior burglary statute, an allegation of ownership was material only to show that the accused did not own the property and to protect the accused from a second prosecution for the same offense. Id. at 343-44 (quoting State v. Franklin, 124 Wash. 620, 215 P.29 (1923)). The

[1] Additionally, the certification for determination of probable cause clarified any confusion by specifying that the burglary charged was of unit 626.

information in the present case meets these purposes. The information alleges that Allen entered a building that he did not have a legal right to enter and sufficiently identifies the location to protect Allen from a second prosecution. Klein does not create a requirement to allege ownership or occupancy by another in charging second degree burglary under RCW 9A.52.030(1).

Next, Allen argues that the prosecutor committed reversible misconduct by inviting the jury to infer that Allen was guilty of an uncharged crime. A prosecutor's conduct is grounds for reversal if that conduct is both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). Prosecutorial misconduct is prejudicial if it "'had a substantial likelihood of affecting the jury's verdict.'" State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)). When a defendant did not object to the alleged misconduct at trial, any error is waived unless the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction to the jury. Id. (citing State v. Stenson, 132 Wn.2d 668 727, 940 P.2d 1239 (1997)).

The prosecuting attorney has "'wide latitude in making arguments to the jury'" and may argue reasonable inferences from the evidence. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). But a prosecutor must not refer to evidence outside the record or encourage the jury to convict on improper grounds. Id. (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). It is improper for the prosecutor

to encourage jurors to convict based on a propensity to commit the crime charged. Id. We examine the prosecutor's alleged misconduct in "the full trial context," considering the issues, evidence, and jury instructions. Monday, 171 Wn.2d. at 675.

Allen argues that, by referring to the first burglary in closing argument, the prosecutor improperly encouraged the jury to infer that Allen was guilty of an uncharged crime and had a propensity to commit the crime charged. Near the beginning of the State's closing argument, the prosecutor said:

> [T]his is not about that first burglary that was reported. We're not here to prove beyond a reasonable doubt that the defendant participated in that burglary on October 16th. It may be likely, it may be probable, but it will not be one of the elements that the State must prove beyond a reasonable doubt.

VRP at 352. Allen did not object to this argument.

The prosecutor further argued:

> And it's important to remember when you're thinking about this case, think about that first burglary, what was reported, and think about November 27th. The first burglary we're not here to prove that the defendant was involved in. It's highly likely again because of some of that property that was found on his property, some of Burt's property—

VRP at 361. Allen objected to this argument but was overruled. The State continued:

> Property from that first burglary, as Burt told you, was found on Mr. Allen's property. It's probably highly likely that somehow there was a connection, but that's not what the State has to prove in this case...
>
> What has to happen is the State has to prove that the November burglary occurred and that Mr. Allen was part of it.
>
> And in that first burglary, the October 16th, there's that U-Haul video that no one knows about. And then of course there's

> gaps. I mean, it could be anybody that was part of that first burglary.
>
> But there's only one man that could have been a part of that second burglary. That was the man that purchased the unit at auction.

VRP at 362.

Allen argues that these references to the uncharged first burglary are analogous to the improper and prejudicial comments in State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In Boehning, the defendant was accused of three counts of rape of a child or, alternatively, three counts of first degree child molestation. At the close of evidence, the State dismissed the rape charges.. In closing argument on the molestation charges, the prosecutor suggested that the defendant was guilty of rape but the charges had been dismissed because the child/victim was not "comfortable" enough to testify about the rape at trial. Id. at 522.

On appeal, we held that the dismissed rape charges were wholly irrelevant to the State's case. The dismissed charges were not evidence and by referring to those charges the prosecutor was not arguing an inference from the evidence. Rather, the prosecutor's comments "impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony." Id. at 522 (citing State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976)).

The present case is distinguishable. Here, Brienen referred to the first burglary in testimony. Allen elicited testimony from the investigating officer

concerning the first burglary. Evidence of the first burglary was key to Allen's theory of the case. In closing, Allen argued:

> Things were taken in September, and they went someplace. He had a lot of property taken in September. And one of the things that was taken was a cutting torch. And that cutting torch was in the unit that Nathon Allen put a bid in on because that's one of the things that was returned.
>
> Nathon was not in the video from September...That cutting torch went from Mr. Brienen's unit to the unit on which Nathon put a bid, and it did so between September to the point at which this other person vacated the unit.

VRP 375-76. Testimony concerning the first burglary was in evidence, and the prosecutor permissibly argued an inference from that evidence. Considering the context of the entire trial, the prosecutor did not err by referring to the first burglary in closing argument. There was no misconduct.

Finally, Allen argues that the trial court erred in instructing the jury using the pattern reasonable doubt instruction in 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 at 27 (3d ed. Supp. 2014-15) (WPIC). Allen acknowledges that our Supreme Court has approved WPIC 4.01 and requires trial courts to use it "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). Nevertheless, Allen argues that the instruction is constitutionally deficient. WPIC 4.01 instructs the jury that "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." Allen argues that this phrasing impermissibly requires jurors to articulate a reason for doubt and thus undermines the presumption of innocence.

Allen did not object to the reasonable doubt instruction at trial. He can raise the objection for the first time on appeal only if it concerns a "manifest error affecting a constitutional right." RAP 2.5(a)(3). An error is manifest if it resulted in actual prejudice and if it was obvious from the record before the trial court. State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (citing State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009)). A jury instruction that misstates the law is manifest error. Id. at 584-85.

Here, however, the jury instruction did not misstate the law. Our Supreme Court has long recognized WPIC 4.01 as an accurate statement of the law. Bennett, 161 Wn.2d at 317-18. And this court has already rejected the argument that the instruction undermines the presumption of innocence. State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015). Allen's argument is without merit.

We conclude that the trial court did not err in using WPIC 4.01 to instruct the jury in reasonable doubt.

Affirmed.

Specman, J.

WE CONCUR:

Leach, J.

Trickey, ACJ

Appendix B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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N. Y. 503; *Cohen* v. *State*, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": *State* v. *Jefferson*, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: *Vann* v. *State*, 83 Ga. 44, 52. And in *State* v. *Morey*, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: *Siberry* v. *State*, 133 Ind. 677; *State* v. *Sauer*, 38 Minn. 438; *Ray* v. *State*, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": *Morgan* v. *State*, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: *Carr* v. *State*, 23 Neb. 749; *Cowan* v. *State*, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: *Ray* v. *State*, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": *Gannon* v. *People*, 127 Ill. 507; 11 Am. St. Rep. 147; *Dunn* v. *People*, 109 Ill. 635; *Wacaser* v. *People*, 134 Ill. 438; 23 Am. St. Rep. 683; *Boulden* v. *State*, 102 Ala. 78; *Welsh* v. *State*, 96 Ala. 93; *State* v. *Gibbs*, 10 Mont. 213; *Miller* v. *People*, 39 Ill. 457; *Willis* v. *State*, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": *Jarrell* v. *State*, 58 Ind. 293; *Arnold* v. *State*, 23 Ind. 170; *State* v. *Kearley*, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, vs. NATHON ALLEN, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 73203-0-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF MAY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NATHON ALLEN
4412 SW 335TH STREET
FEDERAL WAY, WA 98023

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF MAY 2016.

X Patrick Mayovsky