Supreme Court No._____
Court of Appeals No. 74673-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

.

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RICHARD BRUCE,

Petitioner.

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

PETITION FOR REVIEW

Kate Benward
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

Washington Court of Appeals Decisions

Rules

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.3 and RAP 13.4, Michael Richard Bruce, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals unpublished opinion in case number 74673-1-I, issued on August 7, 2017, affirming his conviction.[1]

B. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the trial court's denial of Mr. Bruce's motion to sever, where he was prejudiced by joinder with the far more culpable co-defendant whose defense was antagonistic and mutually exclusive to Mr. Bruce's defense?

C. STATEMENT OF THE CASE

Sandra Davis owns a lakefront home where she only occasionally stayed. RP 728. She testified that her home was broken into. RP 750; CP 103 (information charging residential burglary).

Very early in the morning she claimed the house was burgled, Davis' neighbor, William Campbell, saw several men near the Davis home and called 911. RP 98-117. One man allegedly carried a white plastic bag[2] away from the Davis carport, put it in the back of a Jeep

[1] The opinion is attached to this petition.

[2] Later, pursuant to a search warrant, police found mail belonging to Davis in the Jeep. RP 333-335, 470. This was in a white bag, in the spare tire compartment, out of view. RP

parked down the road, and got into the driver's side of the car. RP 100-101, 109.

Campbell said other men came from the carport area carrying boxes. RP 103. He also saw a white van pull up to the Jeep, then drive off. RP 106-107, 114. Police who responded found a white van and a Jeep, but not together. At the white van, they detained Svein Vik, Denis Gorbunov, and Vladimir Korabut. RP 133, 135, 298, 414-417.

The Jeep was some 50 yards away from the Davis residence and Mr. Bruce was inside it. RP 181-187. He was lying down, in the back seat, not the driver's seat. RP 185-186, 208. Mr. Bruce denied being involved in a burglary. RP 213. He told the police he had been at a barbecue on the other side of the lake and was on his way home when the Jeep broke down[3] and he just fell asleep. RP 186, 423. Mr. Bruce said he was with a Scott McKay[4]. RP 187. The police did not

399. The car was registered to a Michael Moran, who was not seen that morning. RP 283. The police called the owner, but never spoke with him. RP 400, 571. In closing argument, the prosecutor hypothesized Mr. Bruce had put the white bag into the Jeep, but also added "what's clear is there was a lot of people involved on that morning." RP 971, 1048.

[3] There was testimony the hood of the car was "warm," but that could not establish if the car was operable or inoperable. RP 183; 213. The police did not try to start the car, which was towed. RP 201, 211, 281-294. The car may or may not have been out of gas. RP 211-212, 328, 402-405.

[4]In the Jeep, the police found a utility invoice for Scott McKay. RP 406. McKay was not seen by police that morning. The police never tried to find him. RP 522, 570.

investigate what Mr. Bruce said, but they did release him. RP 211, 213, 454.

At trial, a witness testified on Mr. Bruce's behalf and said he had been at a barbecue that night. RP 837-853. In talking with a defense investigator before trial, the witness agreed Mr. Bruce was there with Scott. RP 843, 853. She testified Mr. Bruce was drinking and left the party to sleep in the Jeep. RP 843-845.[5]

Unlike Mr. Bruce or Mr. Blunt, Mr. Vik went to the police station to be interviewed. RP 454. Mr. Vik admitted he went to the neighborhood with Karabut and Gorbunov in the white van. RP 457.

Mr. Vik claimed he did not take anything from the residence. RP 422. But unlike Mr. Bruce and Mr. Blunt, Mr. Vik said he saw boxes – full of silver – being moved from the home to the van. RP 459. Also unlike Mr. Bruce and Mr. Blunt, Mr. Vik was worried the police would be called, in part because he had seen neighbor Campbell. RP 458-460. Mr. Vik took the police to his Everett home and allowed a detective to go through it, except for the garage. RP 460-468.

Police later searched Mr. Vik's home pursuant to a warrant. They had to force entry. RP 338. Mr. Vik's home was full of people

[5] The witness admitted to having two prior convictions. RP 848, 854; ER 609.

(Christopher Fuller, Thomas Baab, Sean Hall, Kristina Powers, Jason Leslie, Micia Salazar, John Jack, Joelle Jack) who were all considered to be suspects or witnesses. RP 341-345, 526, 563.

The State introduced into evidence a Department of Licensing record listing Mr. Vik's address as Mr. Bruce's, as well as a piece of Mr. Bruce's mail that was found at Mr. Vik's. RP 360, 378-379; Ex. 158. Mr. Bruce was not among the large group of people found at Mr. Vik's home and he did not live there. RP 401.

Mr. Vik's antagonistic trial testimony.

Unlike Mr. Bruce and Mr. Blunt, who were only charged with residential burglary, Mr. Vik was also charged with possession of stolen property. CP 52. Unlike Mr. Bruce and Mr. Blunt, who remained silent at trial, Mr. Vik testified.

Mr. Vik claimed to be an antique treasure hunter who buys antiques all over the place. RP 869, 907. He claimed to have bought the items found in his home in Las Vegas, "online, eBay… Goodwill, Value Village, St. Vincent DePaul, garage sale." RP 869. He claimed to find them "on Airport Road, Casino Road, in the bins." RP 869. His testimony was largely discredited by the prosecution's ability to show that the much of the property recovered from Mr. Vik's house was

stolen from Davis. RP 351-354, 532-533, 540, 764, 766; Ex. 209. The police did not lift any fingerprints from Davis' property found in Mr. Vik's house. RP 392. The State did not call any of the people found at Mr. Vik's house as witnesses at trial.

Mr. Vik also talked about Mr. Bruce, at length. Mr. Vik said he knew Mr. Bruce and that while Mr. Bruce did not live at his house, he occasionally used it as a mailing address. RP 879-880.

Mr. Vik testified Mr. Bruce came by his house on the evening before the burglary. RP 916-918. Mr. Vik's testimony suggested Mr. Bruce was at his home for at least an hour, or two, with Mr. Blunt. RP 918-919.

Mr. Vik testified he went out to the Serene Way area that morning to "look for Michael Bruce." RP 880. Mr. Vik testified he had gotten "a call from a girl that needed a ride and to get him [Bruce] and he [Bruce] was broke down out in Serene Lake." RP 880. Mr. Vik did not talk to Mr. Bruce himself. RP 928. "Me and Vladimir and Denis went there together," to find Bruce, "so we can help him move the car." RP 920, 928. Mr. Vik testified his friend "Denis" knew the area. RP 880-881. Mr. Vik testified that "Vladimir, had a car, and he drove" to

Serene Way. RP 880. Mr. Vik said these were Gorbunov and Karabut. RP 919-920.

Mr. Vik testified they searched for Mr. Bruce on foot. RP 881, 921. Mr. Vik said he never found Mr. Bruce or a Jeep; "it was too dark." RP 881, 930. He testified he, Karabut, and Gorbunov ran into Campbell, the neighbor. RP 922.

Mr. Vik claimed he never went into any home and never took anything from a residence or carport. RP 881-882, 932. He did testify that he saw Karabut carrying boxes. RP 923. Mr. Vik said Karabut said he "found them on the curb." RP 923.

At trial, Mr. Bruce moved to sever his case from that of his co-defendants, in relevant part, because his defense was antagonistic to that of Mr. Vik. CP 68-75. The trial court denied the request. RP 13-14. His attempts to renew the motion were denied as well. RP 65-72, 834, 836. Mr. Bruce argued on appeal that he was prejudiced by the trial court's erroneous denial of his motion to sever because he had an antagonistic, mutually exclusive defense from Mr. Vik's. AOB 17-23. The Court of Appeals erroneously affirmed based on what it deemed to be the "incomplete recollections" of the witness testimony involved in Mr. Bruce's and Mr. Vik's antagonistic defenses.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the Court of Appeals erred in affirming the trial court's denial of Mr. Bruce's motion to sever. The appellate court affirmed on the basis of what it deemed to be vague witness testimony that allowed for both defenses to be believed, rather than properly considering the fact that Mr. Bruce and Mr. Vik in fact presented mutually antagonistic defenses that prejudiced Mr. Bruce. This decision denies Mr. Bruce his right to a fair trial, and thus involves a "substantial public interest." RAP 13.4 (4)(b).

Severance was required where joinder deprived Mr. Bruce of a fair trial, and he was prejudiced because he and his co-defendant presented a mutually antagonistic, mutually exclusive defense.

a. Severance may be necessary to ensure a fair trial where co-defendants present antagonistic, mutually exclusive defenses.

CrR 4.4 provides, in relevant part:

> (c) Severance of Defendants.
> …
> (2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant severance of defendants whenever:
>
> > (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

Trial courts properly grant severance motions where a defendant demonstrates that the prejudice inflicted by a joint trial outweighs concerns of judicial economy. State v. Johnson, 147 Wn. App. 276, 283-84, 194 P.3d 1009 (2008). "Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive." State v. Medina, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002).

An appellate court reviews a trial court's decision on a motion to sever for abuse of discretion. State v. Larry, 108 Wn. App. 894, 911, 34 P.3d 241 (2001).

b. Severance was necessary where Mr. Bruce and Mr. Vik presented antagonistic, mutually exclusive defenses.

Here, Mr. Bruce and Mr. Vik clearly presented antagonistic, mutually exclusive defenses. The parties' respective closing arguments show just how irreconcilable these defenses were. Mr. Vik's lawyer described his client as "a very, very nice man." RP 981. He argued Mr. Vik was not guilty because he "cooperated" and "invited" police into his home. RP 981. Nice or not, Mr. Vik's claims that he was with Mr. Bruce and Blunt the night before the burglary incriminated both men.

Blunt's lawyer argued his client had merely slept in Davis' backyard. RP 1006-1012. Mr. Bruce's lawyer argued either McKay or Moran drove Mr. Bruce to the barbecue party, only to abandon him there. RP 1032-1033. His witness corroborated this. RP 837-853. But Mr. Vik's testimony was irreconcilable with these defenses and the prosecutor made sure the jury knew that.

In the State's initial closing argument, the prosecutor drew the jury's attention to the conflict between Mr. Bruce's statement at the scene, the testimony of Mr. Bruce's witness, and what Mr. Vik testified to. The prosecutor said there were "problems" with Mr. Bruce's defense that McKay brought him to the lake for a party. The prosecutor first repeated for the jury that Mr. Bruce's witness said she and Mr. Bruce were "at a barbecue from 7:00, until 4:00, 4:30 in the morning." RP 970. But then the prosecutor contrasted this with what Mr. Vik said: "at some point, he was also at Mr. Mr. Vik's house." RP 970.

The prosecutor drove the point home in rebuttal:

> Well, I think it's clear that there's some issue in credibility, at least you have to consider it, regarding the timing of when she said she saw Mr. Bruce, and when Mr. Mr. Vik said he saw Mr. Bruce. Those things don't fit. They don't fit because they aren't credible, but you are going to be the ones who determine that.

RP 1042.

But this was not a question of "fit." Mr. Bruce either went to the barbecue with Scott McKay (but not Blunt), or he met up with Mr. Vik and Mr. Blunt the night before for an hour or two. The inference from such a meeting – with someone who eventually had $14,389 worth of Davis' property in his house – is that the men were up to no good all along. Mr. Vik's defense was premised on using Mr. Bruce to explain Mr. Vik's presence near the house, but Mr. Bruce's defense had nothing to do with Mr. Vik. These were irreconcilable defenses and the motion to sever should have been granted.

Mr. Bruce's case can be contrasted with the circumstances in State v. Grisby, where both defendants agreed that they went to the victims' apartment armed with two pistols to resolve a drug dispute. 97 Wn.2d 493, 508, 647 P.2d 6 (1982). The sole disagreement was "who killed which victims." Thus, the supreme court held, "in this case the defenses do not appear to be inherently antagonistic." Id. In contrast, Mr. Bruce did not agree that he was at the scene of the crime *with Mr. Vik*. Mr. Vik used Mr. Bruce's presence to explain what he was doing, but not the other way around. And Mr. Vik, whose testimony implicated Mr. Bruce, also made outlandish claims regarding Davis'

property found in his home. RP 869, 907-914. Unlike in Grisby, the defenses were inherently antagonistic.

Mr. Bruce's and Mr. Vik's defenses were mutually exclusive because Mr. Vik's claim of spending time with him the night before conflicted with Mr. Bruce's witness's account. RP 1042 (prosecutor arguing "these things don't fit"). By Mr. Bruce's account, he was near the Davis' house with McKay or alone. By Mr. Vik's account, Mr. Bruce was all of a sudden part of a larger group of men acting in concert.[6]

c. The Court of Appeals erroneously affirmed the trial court based on an assessment of witness credibility, failing to account for the fact that Mr. Bruce and Mr. Vik presented antagonistic, mutually exclusive defenses.

The Court of Appeals affirmed the trial court's denial of Mr. Bruce's motion to sever. Slip Op. at 1. The Court of Appeals based its ruling on its estimation of Mr. Bruce's and Mr. Vik's opposing witness testimony, concluding that both were "incomplete" and "vague" such that both "accounts could be believed." Slip Op. at 6-7. The appellate court thus determined that Mr. Bruce's defense was not antagonistic

[6] What Mr. Vik was saying about Mr. Bruce also made it easier for the State to lump Mr. Bruce in with the other suspects. The prosecutor began his closing remarks by an accusation all these men were guilty by association: "When you're going to do a big job, you call a big crew. The crew here included Denis Gorbunov, Vladimir Karabut, Svein Vik, Eddie Blunt, Michael Bruce, possibly others." RP 958.

and mutually exclusive to Mr. Vik's because: "Belief in one witness's testimony did not require complete disbelief of the other." Slip Op. at 7.

However, it is well established that the jury is solely charged with the determining the credibility of a witness: "This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). Regardless of how certain or uncertain the witnesses may have appeared at trial, the fact remained that Mr. Bruce and Mr. Vik presented entirely antagonistic and mutually exclusive defenses.

d. Mr. Bruce was prejudiced.

Courts infer specific prejudice from:

> (l) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Jones, 93 Wn. App. 166, 171-172, 968 P.2d 888 (1998) quoting State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)).

The defenses were irreconcilable. Bruce's version of events could not be believed without the jury disbelieving Mr. Vik's and Mr.

Blunt's, and vice versa. The State – in prosecuting Mr. Vik for the possession of stolen property charge – presented overwhelming evidence of Mr. Vik's guilt that would not have been necessary (or even relevant) if Mr. Bruce had a trial of his own. Over days and days of trial, the message that was repeated to the jury was that Davis was a victim of a grand theft, with the stolen property accumulating at Mr. Vik's home. Simply put, there was a gross disparity in the weight of the evidence against the two co-defendants and this too is a reason for severance.

The trial court abused its discretion in denying Mr. Bruce's repeated motions to sever defendants. The appellate court's decision affirming this was error that merits review by this Court.

E. CONCLUSION

Review should be granted where Mr. Bruce was deprived of his right to a fair trial because of the appellate court's opinion affirming the trial court's erroneous denial of Mr. Bruce's motion to sever.

Respectfully submitted this the 1st day of September 2017.

_s/ Kate Benward
Kate Benward, Attorney for Petitioner (# 43651)
Washington Appellate Project - 91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL RICHARD BRUCE, Appellant.	No. 74673-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 7, 2017

APPELWICK, J. — Bruce was convicted of residential burglary. He contends that the evidence was insufficient to support his conviction, that the trial court abused its discretion in not severing his trial from his codefendants, and that the jury instructions amounted to a judicial comment on the evidence. We affirm.

FACTS

At about 5:30 a.m. on September 27, 2012, Bill Campbell saw four men carrying boxes and large bags out of a neighbor's carport and called 911. Snohomish County Sheriff's Deputy John Sadro was one of the first officers to arrive at the scene. Deputy Sadro observed a damaged lock to a gate that had "tool marks," and a door into the house appeared to have been pried open.

Lynnwood Police Department Sergeant Coleman Langdon also responded. He observed two males, later identified as Denis Gorbunov and Svein Vik, walking along Serene Way towards a white minivan, and spoke with them. Sergeant Langdon patted down Gorbunov. He discovered a flat prying tool. The police

I. Sufficiency of Evidence

Bruce argues that the evidence was insufficient to support his conviction for residential burglary. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

Under RCW 9A.52.025, "[a] person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." The State's theory of the case included the possibility that Bruce was an accomplice to the crime. A person is an accomplice of another person in the commission of a crime if:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3).

While no evidence directly put Bruce inside of the residence, extensive evidence supported an inference that he had in fact been a participant in the

residential burglary. Neighbor William Campbell saw a man walk away from the house and place a package in the back of the Jeep. Bruce was found inside of the Jeep that was parked near the residence. Bruce told police that he had been sleeping there that night, but the hood of the Jeep was warm to the touch, suggesting that it had recently been running. Inside the Jeep, police found medications prescribed to the residence owner, Sandra Davis, mail addressed to Davis, checkbooks in Davis's name, a credit card belonging to Davis's father, Ansel Davis, and receipts with Sandra Davis's name on them. The Jeep also contained bolt cutters, a pair of pliers, and a screwdriver. The lock of the gate to the residence was broken and the door to the house appeared to have been pried open. Police found a glove in the Jeep's glove compartment that matched a single glove that police found inside of the residence. And, police found numerous items from Davis's residence at Vik's residence.[1] Bruce's driver's license showed Vik's residence as Bruce's address, and Bruce received mail at that address.

Bruce notes that mere physical presence at a scene is not sufficient to show that an individual was an accomplice to a crime. State v. Roberts, 80 Wn. App. 342, 355, 908 P.2d 892 (1996). But, the evidence at trial established far more than mere physical presence. The evidence was sufficient to support the jury's verdict finding Bruce guilty of residential burglary.

---

[1] Similarly, police found additional stolen goods, including Davis's credit cards and receipts, in Vik's white van.

II. Severance

Bruce moved to sever trial from his codefendants multiple times. He argues that the trial court abused its discretion in denying his motions to sever under CrR 4.4(c)(2). That rule states that a trial court should grant a severance

> (i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or
>
> (ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

Id.

A trial court's denial of a motion for severance will not be reversed absent a manifest abuse of discretion. State v. Dent, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). "Separate trials are not favored in this state." Id. On appeal from denial of a motion for severance, the defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). To meet this burden, the defendant must show specific prejudice. State v. Jones, 93 Wn. App. 166, 171, 968 P.2d 888 (1998).

Specific prejudice may result if the codefendants offer "antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive." Id. The existence of mutually antagonistic defenses is not alone sufficient to compel separate trials. Hoffman, 116 Wn.2d at 74. Rather, it must be demonstrated that the conflict is so prejudicial that defenses are irreconcilable, and

the jury will unjustifiably infer that this conflict alone demonstrates that all are guilty. Id. The burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. Id.

Bruce argues that he was prejudiced here, because his defense and Vik's defenses were irreconcilable and mutually exclusive. Bruce's defense was that the Jeep had broken down after he had attended a nearby party. A witness called by Bruce, Taylor Nemra, testified that she had been at a party the evening of September 26, 2012. She stated that she arrived at the barbecue around 7:00 p.m. She also stated that Bruce had arrived at the party "probably within the same hour" that she had arrived, and did not leave until after 2:00 a.m. But, Vik testified that Bruce and Blunt had come over to Vik's house the night of September 26, 2012. Vik read a prior statement that claimed that Blunt and Bruce had stopped by his house between 8:00 p.m. and 9:00 p.m. that night.

However, during his testimony, Vik could not recall the specifics of that visit beyond what he had written in his prior statement. Nemra's recollection about the timeline of that night was similarly vague. She noted that, while Bruce "probably" showed up within the same hour as her, "I can't recall exact time honestly." And, her own statement that she arrived around 7:00 p.m. "give or take," was just a "rough estimate."

Nemra's and Vik's respective testimony do not give a concrete narrative for a timeline of the night. But, we cannot say that the trial court abused its discretion in determining that these incomplete recollections gave sufficient room such that

both Nemra's and Vik's accounts could be believed. Belief in one witness's testimony did not require complete disbelief of the other.

III. Comment on Evidence

Bruce also argues that the trial court's jury instructions amounted to a judicial comment on the evidence. He assigns error to an instruction that stated, "A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not." (Emphasis added.) Bruce concedes that this is the language offered by 11 Washington Practice: Washington Pattern Jury Instructions: Criminial 10.51, at 234 (4th ed. 2016), but he argues that in this particular case, the "whether present or not" language singled out Bruce. He contends this is so, because his codefendants were walking around near the scene, while Bruce was lying down inside of a vehicle, and the instruction turned this exculpatory fact against Bruce.

Article IV, section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). We review jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)

This pattern instruction did not amount to a comment on the evidence by singling out Bruce.[2] Bruce was found in his Jeep containing the victim's property near to the scene of the crime—roughly 50 yards away. And, to the extent he was not on the property when found, he was not singled out by the instruction. Codefendant Blunt was not on the residence property when police first approached him, and the State's closing argument acknowledged that it had no direct evidence of Blunt breaking and entering the residence as part of a burglary. The instruction therefore did not amount to a judicial comment on the evidence.

We affirm.[3]

WE CONCUR:

---

[2] Bruce did not make this argument below. But, because the Washington constitution expressly prohibits any judicial comment on the evidence, a claimed error based upon such a comment involves a manifest constitutional error that may be challenged for the first time on appeal. State v. Besabe, 166 Wn. App. 872, 880, 271 P.3d 387 (2012).

[3] Bruce asks that appellate costs not be imposed, because the trial court found Bruce indigent for the purposes of appeal. State does not contest Bruce's indigency in its brief. "Unless a trial court finds a defendant's condition has improved, we presume the defendant continues to be indigent." State v. Caver, 195 Wn. App. 774, 785, 381 P.3d 191 (2016), review denied, 187 Wn.2d 1013 (2017). The State is therefore not entitled to costs.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74673-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrew Alsdorf, DPA
[aalsdorf@snoco.org]
Snohomish County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 1, 2017

WASHINGTON APPELLATE PROJECT

September 01, 2017 - 4:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74673-1
Appellate Court Case Title:	State of Washington, Resp v. Michael Richard Bruce, App
Superior Court Case Number:	14-1-02322-1

The following documents have been uploaded:

- 746731_Petition_for_Review_20170901160706D1898902_7777.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20170901_155155.pdf

A copy of the uploaded files will be sent to:

- aalsdorf@snoco.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20170901160706D1898902