SUPREME COURT NO. 94987-5

NO. 74674-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDWARD BLUNT,

Petitioner.

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

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Edward Blunt asks this Court to grant review of the court of appeals' unpublished decision in State v. Blunt, No. 74674-0-I, filed August 7, 2017 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

1. Should this Court grant review under RAP 13.4(b)(3) where there is insufficient evidence that Blunt acted as an accomplice to residential burglary?

2. Should this Court grant review under RAP 13.4(b)(4) where the trial court erred in denying appellant's repeated motions to sever his trial from his two co-defendants?

3. Should this Court grant review under RAP 13.4(b)(3) where, in closing argument, the prosecutor argued facts not in evidence and expressed a personal opinion about Blunt's guilt?

C. STATEMENT OF THE CASE

On December 11, 2014, the State charged Edward Blunt with one count of residential burglary. CP 123. The State alleged that on September 27, 2012, Blunt entered and remained unlawfully in the dwelling of Sandra Davis, with intent to commit the crime of theft therein. CP 123. The State charged four other co-defendants: Michael Bruce, Denis Gorbunov, Vladimir Karabut, and Svein Vik. CP 123. After the trial court denied

Blunt's multiple motions to sever his trial from his co-defendants, Blunt, Bruce, and Vik proceeded to a joint jury trial. 1RP 77-78; 3RP 72.

Davis has a house on Serene Way in Lynnwood, Washington, which travels around Lake Serene. 5RP 102; 8RP 733. Davis's backyard extends down to the lake. 5RP 102; 8RP 733. Her house was first burglarized on September 22, 2012. 8RP 731. Davis explained the burglars left a mess inside, with "things just piled everywhere." 8RP 732.

William Campbell was walking along Serene Way around 5:30 a.m. on September 27, 2012. 5RP 95-99. Campbell saw a man come out of the carport at Davis's home carrying a white plastic bag, place the bag in the back of a Jeep Cherokee about 100 yards away, and then get in the Jeep. 5RP 99-101, 181. Campbell saw two more men—later identified as Gorbunov and Vik—come from the carport area and walk down the street. 5RP 103-05; 6RP 414-16. Another man then came out of the carport, "carrying a whole stack of boxes." 5RP 104. Campbell called 911. 5RP 103. When he looked back down the street, Campbell saw a white SUV pull up next to the Jeep, stop for around five to ten seconds, then "they both drove off." 5RP 106, 114.

Several officers responded. The lock on the gate to the backyard was damaged and the gate open. 6RP 428-35; 7RP 646-48. There were boxes of items outside the house that Detective Ainsworth thought looked staged.

6RP 437-38, 448-54. The door to the house appeared to have been "pried, booted into," with damage to the door jamb. 7RP 656-58. Neither police officers nor a K-9 unit could find anyone inside the house. 5RP 130, 140-45, 154-56; 7RP 662-63; 8RP 707.

Ainsworth and Sergeant Langdon contacted Gorbunov and Vik as they walked toward a white Dodge Caravan parked a block or two away from the house. 5RP 135-38; 6RP 412-16, 420. Karabut, whose wife was the registered owner of the van, was sitting in the driver's seat. 6RP 416-17; 7RP 573. Langdon patted Gorbunov down and found a "flat, pry-tool-type device" in his pocket. 5RP 138. Inside the van were items that were later confirmed to be stolen from Davis's house. 6RP 418-19; 7RP 487-88.

Vik told Ainsworth that Karabut had driven him and Gorbunov there, and acknowledged seeing Gorbunov carrying a box of silver bowls to the van. 6RP 421-22, 457-60. Vik denied taking anything from the house. 6RP 422. Vik consented to a search of his home the same day, and showed Ainsworth a blue rug that Davis later identified as hers. 6RP 458-68; 8RP 766-67. Property belonging to Davis and Ansel Davis, her deceased father, was found in a subsequent search of the van. 7RP 486-504.

Deputy Troy Koster arrived at the scene at 5:53 a.m. and first contacted Bruce. 5RP 183-89. Koster approached the Jeep and put his hand on the hood, noticing it was warm. 5RP 183. Koster found Bruce laying

down in the backseat. 5RP 183-86. Bruce told Koster he had attended a barbecue on the other side of the lake with a man named Scott McKay, but the Jeep broke down on their way home so Bruce slept in the back. 5RP 186-87. The Jeep was towed to police impound. 5RP 211-12; 6RP 321-24.

Sergeant David Sorenson saw Blunt come through the carport gate, which leads to the backyard. 5RP 243-45. Blunt walked down the driveway and onto the sidewalk, where Koster contacted him at 6:33 a.m. 5RP 189-91, 230. Blunt told Koster he had been in the backyard with a woman named Teri. 5RP 191. Blunt explained he had fallen asleep back there after getting intoxicated. 5RP 191. Koster did not find Teri in the backyard, but agreed someone could have left through the neighbor's property. 5RP 207. Blunt did not have any stolen property on his person. 5RP 219.

Several days later, Davis turned over to the police two crowbars found outside her house, as well as a cigarette butt and ice cream container she found inside the house. 5RP 258-59; 8RP 750. No fingerprints could be obtained from the crowbars. 5RP 262. DNA on the cigarette butt matched a man named Jacob Lee, as did fingerprints on the ice cream container. 6RP 469-70; 7RP 596. Lee's prints were also found on a glass urn inside Karabut's van. 7RP 594-95.

In a subsequent search of the Jeep, bolt cutters were found on the floor of the front passenger seat area. 7RP 508. In the spare tire

compartment in the rear of the Jeep was a white plastic bag containing mail, checkbooks, and prescription bottles belonging to Davis and her father. 6RP 333-35; 7RP 519. In the front center console of the Jeep was a credit card with Ansel Davis's name on it. 7RP 516-17.

A backpack was found behind the front driver's seat of the Jeep containing Blunt's driver's license, a pawn ticket from before the burglaries, a camera, a pair of pliers, a small jewelry box, some clothing, work gloves, and a laptop. 7RP 511-16. No stolen property was recovered from Blunt's backpack and there was no indication that any of the items inside the backpack did not belong to Blunt. 7RP 553-62. Officers concluded there was nothing of evidentiary value inside the backpack. 7RP 557-58.

Police searched Vik's house on October 10. 6RP 337-38. Several people live in Vik's home, including a man named John Jack. 3RP 341-43, 383. Seven to eight people were present at Vik's home during the search. 3RP 402; 7RP 563-64. Several items belonging to Davis were found in the garage. 6RP 351-58; 7RP 523-33. More items belonging to Davis were found in Jack's room. 7RP 529-30. Police found mail addressed to Bruce in Vik's nightstand. 3RP 360-61; 7RP 610-11.

Vik testified at trial and explained Bruce did not live at his house, but had his mail delivered there. 8RP 879-80. Vik explained that on the night of September 26, a woman called him to say Bruce needed a ride home because

his vehicle had broken down near Lake Serene. 8RP 880. Because Vik does not have a car, he called Karabut to drive. 8RP 880. Karabut arrived at Vik's in the white van around 3:00 or 3:30 a.m., and they drove with Gorbunov to Lake Serene. 9RP 919-20. They had difficulty finding Bruce on Serene Way because it was dark, so they parked and started walking. 9RP 922. Vik said they passed by a carport when he turned and saw Gorbunov carrying boxes, which Gorbunov placed in the back of the van. 9RP 923-24, 931. On cross-examination, Vik admitted Bruce and Blunt stopped by his house on the evening of September 26. 9RP 918-19.

Blunt received lesser included instructions on first and second degree criminal trespass. CP 53, 56. The jury found Blunt, Bruce, and Vik all guilty of residential burglary, and Vik guilty of second degree possession of stolen property. CP 27; 10RP 1061-62. Blunt timely appealed. CP 18. The court of appeals affirmed Blunt's conviction. Opinion, at 15.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. BLUNT'S RESIDENTIAL BURGLARY CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

On appeal, Blunt argued the State failed to present sufficient evidence to sustain his residential burglary conviction. Br. of Appellant, at 10-20. Blunt argued only the State's evidence, and not Vik's testimony, should be considered, because Blunt made a halftime motion to dismiss and

did not present any of his own evidence. Br. of Appellant, at 11-15. The court of appeals agreed, "[h]ere, we look only at the evidence offered before the State rested." Opinion, at 4 n.1, 6 (citing State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 945 (1996)). The court acknowledged "no direct evidence places Blunt in the house," and "[n]or does any direct evidence place Blunt in actual possession of stolen property," but nevertheless rejected Blunt's sufficient challenge. Opinion, at 5-7.

This Court should grant review under RAP 13.4(b)(3), because there is insufficient evidence to support Blunt's conviction, contrary to the court of appeals' conclusion. Without any evidence that Blunt entered Davis's home or possessed any of Davis's property, the State theorized that Blunt was an accomplice to the burglary. 9RP 966, 975. Jurors were given the pattern instruction on accomplice liability, which specifies a person is an accomplice if he aids another person "in planning or committing the crime." CP 61. "A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime." CP 61.

An individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Physical presence at the scene and assent

to the crime, without more, are insufficient to establish accomplice liability. State v. Roberts, 80 Wn. App. 342, 355, 908 P.2d 892 (1996); State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Foreseeability that another might commit the crime is also insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

Campbell saw only four men on the morning of September 27: Bruce, Karabut, Vik, and Bruce. 5RP 116-17. He did not see Blunt. Two officers conducted an initial sweep of Davis's home, clearing every room, and did not find Blunt inside. 7RP 660-63; 8RP 707. The K-9 unit then searched the entire house and even Buddy the dog did not find Blunt inside. 5RP 145, 154-56. Langdon believed it was very unlikely Buddy would not find someone present inside the house. 5RP 157-58. The reasonable inference from this evidence is Blunt was not inside the house. There is no other evidence in the record establishing that he entered the home.

Blunt was first seen walking out of Davis's carport, which leads to the backyard and not inside the house. 5RP 243-45. Blunt told police he had gotten drunk and fallen asleep in the backyard with a woman named Teri. 5RP 191. Officers noted Blunt's clothing did not appear wet or wrinkled, even though there may have been dew on the ground that morning. 5RP 235-37; 7RP 666-67. Sergeant Sorensen did not recall smelling alcohol on Blunt, but acknowledged he was not really paying attention. 5RP 237-38.

Blunt did not have any stolen property on his person or tools that could be used to gain access to Davis's home. 5RP 219.

Even if one can reasonably infer Blunt was lying about sleeping in the backyard, it does not establish he was involved in the burglary. Rather, it establishes only second degree criminal trespass—that Blunt was present in Davis's backyard without permission. RCW 9A.52.080(1).

Nor is it enough that Blunt should have known about the burglary because there were boxes of Davis's property outside her house that appeared staged for theft. 6RP 419, 424. Accomplice liability is not established when the individual "should have known" about the crime. State v. Allen, 182 Wn.2d 364, 374-82, 341 P.3d 268 (2015) (reversing where prosecutor repeatedly misstated the law by arguing Allen was an accomplice because he "should have known" the principal was going to murder four police officers). Instead, the State must prove the accomplice actually knew he was promoting or facilitating the crime. Id. at 374.

The only remaining evidence against Blunt is his backpack in the Jeep, where Bruce was found. There is no evidence the contents of Blunt's backpack belonged to anyone but him. 7RP 553-62. In fact, officers returned Blunt's backpack to the Jeep after concluding there was nothing of evidentiary value inside. 7RP 557-58. The simple presence of the backpack in the Jeep does not establish Blunt stole Davis's property found in the

vehicle or that Blunt participated in the burglary. Only Bruce was seen placing stolen property in the Jeep. 5RP 99-101.

At most, Blunt's backpack in the Jeep established Blunt knew Bruce and possibly traveled to the location with him. But there is no evidence Blunt arrived at the location with knowledge of the burglary or that he planned to help carry it out. Even if Blunt knew Bruce was going to participate in a burglary, it does not establish accomplice liability: "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 61. And, as established, assent to the crime is insufficient for accomplice liability, as is foreseeability that another might commit the crime. Roberts, 80 Wn. App. at 355; Stein, 144 Wn.2d at 246.

The court of appeals put inordinate emphasis on Blunt's connection to Bruce. See Opinion, at 6 (reasoning "Bruce and Blunt were connected" and "Bruce received mail at Vik's house, which also contained stolen goods"). Blunt's association with Bruce does not establish guilt. State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980) (finding "mere proximity to others independently suspected of criminal activity does not justify the stop"); State v. Fuentes, 183 Wn.2d 149, 166, 352 P.3d 152 (2015) (González, J., concurring in part and dissenting in part) ("We do not indulge in guilt by association in our state, and a person does not become a

criminal simply by being with people or in places that are or are perceived to be associated with criminal activity.").

Thus, the only evidence against Blunt is his presence at the scene and his backpack in the Jeep. There is no evidence Blunt participated in the burglary, was ready to assist, or associated himself with it. Because there is insufficient evidence to sustain Blunt's conviction, this Court should grant review, reverse the court of appeals, and remand for dismissal of the charge with prejudice.

2. THE TRIAL COURT ERRED IN DENYING BLUNT'S REPEATED MOTIONS TO SEVER HIS TRIAL FROM HIS CO-DEFENDANTS.

The trial court denied Blunt's multiple motions to sever his trial from his co-defendants, made before trial and after the State rested its case-in-chief. CP 111-16; 1RP 72-76; 3RP 67-68; 8RP 832-36. A trial court abuses its discretion in denying a motion to sever when there is specific prejudice to the accused. State v. Jones, 93 Wn. App. 166, 171, 968 P.2d 888 (1998). Courts infer specific prejudice from the following:

> "(1) 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."

Id. at 171-72 (quoting State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)). Considering each of these factors demonstrates there was specific prejudice to Blunt in a joint trial.

First, Blunt's, Bruce's, and Vik's defenses were mutually antagonistic. Blunt's defense was he was intoxicated and fell sleep in the backyard of Davis's home. 5RP 191. He asserted he was merely present at the scene and was not associated with Vik or Bruce. 5RP 191; 10RP 1015-16. Bruce's defense was he went to a nearby party earlier that evening with Scott McKay, and slept in the back of the Jeep after it broke down. 5RP 186-87; 8RP 843-47. Vik's defense was he, Karabut, and Gorbunov went to Lake Serene to pick up Bruce because his car had broken down. 8RP 880. But Vik also testified Bruce and Blunt stopped by his house the night before. 9RP 918-19. Accordingly, these three defenses were irreconcilable, contrary to the court of appeals' conclusion. Opinion, at 8-9. Blunt's version of events could not be believed without the jury disbelieving Bruce's and Vik's, and vice versa. The disparate defenses made one or all seem fabricated.

Second, there was a large and complex quantity of evidence that would make it difficult for the jury to separately discern Blunt's innocence. Voir dire began on November 23, and the jury did not reach a verdict until December 7. 3RP 84; 10RP 1061-62. The presentation of evidence alone took several days, not including closing argument by the prosecutor and

three defense attorneys. Eight police officers and detectives testified to their involvement at the scene or with the investigation. Most witnesses were subjected to lengthy cross-examination by each of the three co-defendants, also making it difficult to discern each defendant's specific defense.

Several witnesses also testified at length, and in detail, about Davis's property found in the Jeep, the Dodge Caravan, at Vik's home, and staged in boxes outside Davis's home, making it confusing and difficult to remember what property was found where. This was particularly problematic for Blunt, who did not have any stolen property on his person or inside his backpack in the Jeep. But this could have easily been lost on the jury, given the significant amount of testimony regarding stolen property.

Third, Vik's statement that Blunt and Bruce came over to his house the night before the burglary inculpated Blunt. 9RP 918-19. The trial court recognized Vik's statement was incriminating for Blunt, because it demonstrated all three men knew each other and possibly planned the burglary that night. 1RP 66-67, 70-71. The court accordingly excluded Vik's reference to Blunt under Bruton if Vik elected not to testify. 1RP 70-71. But Vik did testify. Separate trials are required when "an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." State v. Campbell, 78 Wn. App. 813, 819, 901 P.2d 1050 (1995) (quoting State v. Grisby, 97 Wn.2d

493, 507, 647 P.2d 6 (1982)). With Vik's testimony, Blunt could no longer legitimately argue he did not know Vik, which undercut Blunt's ability to argue mere presence at the scene.

Fourth, there was a gross disparity of evidence against Blunt's co-defendants compared to Blunt. Campbell saw Bruce place a white bag in the back of the Jeep, which was later discovered to contain property stolen from Davis's home. 5RP 99-101; 6RP 333-35; 7RP 519. Campbell then saw Bruce get into the driver's seat of the Jeep. 5RP 101-01. A credit card belonging to Ansel Davis was found in the center console of the Jeep, next to the driver's seat. 7RP 516-17. The State accordingly asked the jury to convict Bruce as a principal to the residential burglary. 9RP 975-76.

Campbell also saw Gorbunov, Karabut, and Vik get into the van, which contained property stolen from Davis's home. 7RP 486-504. Vik admitted he drove to Lake Serene with Gorbunov and Karabut, and admitted he saw Gorbunov carrying a box of silver bowls to the van. 6RP 421-22, 457-60. Police also found a significant amount of Davis's property in Vik's home. 6RP 351-58; 7RP 523-33. Mail addressed to Bruce was found in Vik's nightstand and Bruce's registered address was Vik's home, establishing Vik and Bruce knew each other. 3RP 360-61, 378-79; 7RP 610-11. Vik also admitted to prior convictions for making a false statement and third degree theft. 9RP 925. The State accordingly asked the jury to convict

Vik as a principle to the residential burglary, as well as the separate charge of possession of stolen property. 9RP 976.

By contrast, Blunt was merely present at the scene. 5RP 243-45. He did not have any stolen property on his person, nor was he seen carrying any stolen property from the house. 5RP 116-17, 219. His backpack, though found in the Jeep, also did not contain any stolen property. 7RP 553-62. The State did not present any evidence of how Blunt arrived at the scene, of how his backpack ended up in the Jeep, or of his specific involvement in the burglary. Rather, the State relied on guilt by association. Blunt was the only co-defendant the State asked the jury to find guilty as an accomplice, demonstrating the gross disparity of evidence. 9RP 975.

A joint trial resulted in specific prejudice to Blunt because of the antagonistic defenses, the complex quantity of evidence, Vik's incriminating statement, and the gross disparity evidence. The trial court accordingly abused its discretion in denying Blunt's multiple motions to sever. This Court should grant review under RAP 13.4(b)(4), reverse the court of appeals, and remand for a new trial.

3. PROSECUTORIAL MISCONDUCT DEPRIVED BLUNET OF HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct warrants reversal, even without defense objection, where it is so flagrant and ill-intentioned that no curative

instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). While "the State has wide latitude to argue inferences from the evidence," "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012).

It is also impermissible for a prosecutor "to assert in argument his personal belief in the accused's guilt." State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Such misconduct violates the so-called advocate-witness rule, which "'prohibits an attorney from appearing as both a witness and an advocate in the same litigation.'" State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) (quoting United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir. 1985)).

In rebuttal argument, the prosecutor began by asserting Blunt was an accomplice because, "why else would you be in there if you're not an accomplice? Why else would you get out of the vehicle and go onto the property, if you're not an accomplice?" 10RP 1047. But the prosecutor continued: "I have my own theory. He's probably the guy that had the crowbars, opened the door. I don't know that for sure, of course. I don't have pictures, I don't have video." 10RP 1047. Then, in his final rebuttal remarks, he asserted: "You know these three are involved. You can even kind of decipher the roles that each of them played, if you think about it.

And after you do all that, I'd ask that you find all three of them guilty of residential burglary." 10RP 1048.

On appeal, Blunt asserted the prosecutor committed flagrant and ill-intentioned misconduct by arguing facts not in evidence and expressing a personal opinion on Blunt's guilt. Br. of Appellant, at 28-34. In rejecting Blunt's argument, the court of appeals concluded the prosecutor's theory that Blunt was the one who gained access to the house "was a reasonable inference and relied on facts in the record." Opinion, at 12. The court pointed to the following evidence: "The crowbar was found outside the house. Blunt was found outside the house. His bag was found in the same car as bolt cutters. The other four suspects did not admit to being on the premises." Opinion, at 12. The court of appeals then essentially ignored the prosecutor's acknowledgment that it was his personal theory, unsupported by the evidence, reasoning "his remark was ultimately one about the State's theory of the case." Opinion, at 14.

Contrary to the court of appeals' conclusion, there was no evidence in the record that Blunt was the one who handled the crowbars or was responsible for gaining access to Davis's home. No fingerprints were obtained from the two recovered crowbars. 5RP 262. Blunt was seen walking out of Davis's carport and told officers he had been sleeping in the backyard. 5RP 243-45. No stolen property, burglary tools, or access devices

were found on his person. This, at most, established Blunt was on Davis's property. It does not allow the inference that Blunt used a crowbar to pry open Davis's gate or booted in her door.

By asserting his personal belief that Blunt was "that guy that had the crowbars, opened the door," the prosecutor urged the jury to decide the case based on facts not in the record. 10RP 1047. This is misconduct under Washington law. The prosecutor also implied he had special knowledge of the facts, outside the evidence introduced at trial. United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009) (noting it is misconduct for the prosecutor to imply he "has special knowledge of evidence not presented to the jury"). Such an argument could have invited the jury to speculate as to whether evidence about Blunt's role in the burglary was ultimately excluded at trial.

Given the dearth of evidence against Blunt, the prosecutor's comment, made in rebuttal, was prejudicial. In closing, the prosecutor only briefly discussed Blunt, arguing there were "too many coincidences" with Blunt's presence in the backyard and his backpack in the Jeep. 9RP 966-67. But "coincidences" were all the State had against Blunt. As such, the prosecutor argued Blunt was an accomplice to the burglary, rather than a principal like Vik and Bruce. 9RP 975-76.

Blunt's counsel then emphasized mere presence and knowledge of criminal activity are not sufficient to establish accomplice liability. 10RP

1014-15. Left with little to argue in rebuttal and knowing Blunt's mere presence was not enough for a valid conviction, the prosecutor resorted to improper speculation about Blunt's involvement in the burglary.

No instruction could have cured the resulting prejudice. The jury had no actual evidence or indication of Blunt's role in the burglary, or if he even had a role in the burglary. Even if there was sufficient evidence of accomplice liability, the evidence was thin. It would have to be based on Blunt's presence at the scene and guilt by association. The prosecutor's argument that Blunt was "the guy that had the crowbars, opened the door," gave the jury something to grasp on to. Then, in his final rebuttal statements to the jury, the prosecutor argued, "You know these three are involved. You can even kind of decipher the roles that each of them played, if you think about it." 10RP 1048. The prosecutor was clearly referring back to his speculation that Blunt's role was to gain access to the house, and asked the jury to find him guilty on that basis. 10RP 1048.

During deliberations, the jury asked, "Does an accomplice have to have entered the house to be guilty of Residential Burglary?" CP 28. This suggests the jury accepted the State's theory regarding Blunt's involvement, particularly because the State argued accomplice liability only as to Blunt. Allen, 182 Wn.2d at 378 (recognizing a jury question during deliberations revealed the jury was influenced by the prosecutor's improper statement of

law). A curative instruction could not have made the jury forget the clear image the prosecutor planted in their minds of Blunt prying Davis's gate open with a crowbar and kicking in her door.

The State's flagrant and ill-intentioned misconduct deprived Blunt of his due process right to a fair trial. This Court should grant review, reverse the court of appeals, and remand for a new trial. Fisher, 165 Wn.2d at 749.

E. CONCLUSION

For the aforementioned reasons, Blunt respectfully asks this Court to grant review under RAP 13.4(b)(3) and (b)(4).

DATED this 6th day of September, 2017.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EDWARD BYRD BLUNT, Appellant.	No. 74674-0-I DIVISION ONE UNPUBLISHED OPINION FILED: August 7, 2017

APPELWICK, J. — Blunt 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 prosecutor committed misconduct. In a statement of additional grounds for review, he also argues that the trial court lacked jurisdiction, and that he received ineffective assistance of counsel. We affirm.

FACTS

At about 5:30 a.m. on September 27, 2012, Bill Campbell was walking his dogs near Lake Serene. Campbell saw four men carrying boxes and large bags out of a neighbor's carport. Campbell, who frequently walked his dogs in the area at this time, sensed that "there was something that definitely was not right," and called 911.

Police arrived. 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 found stolen property from the residence inside the white van. Sergeant Langdon and his K9 swept the house, but they found no other individuals in the house.

Snohomish County Sheriff's Deputy Troy Koster also responded to the scene. He approached a Jeep parked on the side of the road. The hood was warm, as if the car had recently been running. He saw someone lying down in the back seat, later identified as Michael Bruce. He also saw bolt cutters and a backpack "full of something." Deputy Koster spoke with Bruce. Bruce stated that he had attended a barbecue in the area the night before, and was on his way home when the vehicle broke down, so he decided to sleep in it. Police ultimately found items belonging to the residence owner, Sandra Davis, inside the Jeep.

After Deputy Koster detained Bruce, he approached the residence. He saw someone walking towards him. This individual identified himself as Edward Blunt. Blunt stated that he had fallen asleep drunk in the residence's backyard with a woman named Teri. However, police found Blunt's driver's license, as well as a pawn ticket made out to Blunt, inside a backpack that was inside the Jeep in which Bruce claimed to have been sleeping. And, a crowbar was found outside the house.

Three suspects, Blunt, Bruce, and Vik, were tried at a single trial. The prosecution's theory of the case was that Blunt entered the house and committed residential burglary, or alternatively that Blunt was an accomplice to residential burglary. The jury found Blunt guilty of residential burglary. Blunt appeals.

DISCUSSION

Blunt makes three arguments in his brief. First, he argues that the evidence was insufficient to support his conviction. Second, he argues that the trial court abused its discretion in denying his multiple motions to sever trial from his codefendants. Third, he argues that the prosecutor committed misconduct. And, in a statement of additional grounds for review (SAG), he argues that his counsel was ineffective, that the trial court lacked jurisdiction, and he echoes the severance and sufficiency arguments made in his brief.

I. Sufficiency of Evidence

Blunt 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.[1] 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 Blunt 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).

A residential burglary clearly occurred at Davis's house. However, no direct evidence places Blunt in the house. Nor does any direct evidence place Blunt in actual possession of stolen property. But, Blunt admitted to being present on the property of the burglarized home, however he did not admit to being inside the

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[1] Blunt assigns error to the trial court's denial of his motion to dismiss after the State rested its case. He did not introduce any evidence in his defense. Therefore, he claims that his sufficiency challenge should be based only on the evidence admitted by the close of the State's case in chief, and that we should not consider any evidence introduced during his codefendants' case in chief. The State agrees, and concedes that it may only rely on the evidence that it presented in its case in chief. Thus, our sufficiency analysis considers only the evidence presented during the State's case in chief. See State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 945 (1996) ("At the end of the State's case in chief, a court examines sufficiency of the evidence admitted so far. . . . Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available.").

dwelling. Blunt correctly 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). While the key evidence against Blunt was circumstantial, circumstantial evidence alone can be sufficient to support a conviction. See State v. Schrager, 74 Wn.2d 75, 81, 442 P.2d 1004 (1968). Here the evidence allowed the jury to infer much more than mere physical presence.

Blunt's story as to why he was at the scene in the early morning hours—that he fell asleep drunk with a woman named Teri—appeared inconsistent with other facts. Deputy Koster's colleague, Snohomish County Sheriff's Sergeant David Sorenson, first saw Blunt as he was walking out of the residence's carport.[2] But, Deputy Koster saw no blankets or pillows in the yard, even though the yard had a lot of dew on the ground. And, Blunt's clothes were not wet. There were no sleep lines on his face or body. He smelled no alcohol on Blunt's breath. No woman named Teri was found. And, Deputy Sadro observed that it was "odd" that Blunt was wearing shorts while sleeping outside all night without blankets, given that Deputy Sadro himself felt "chilled" while in uniform.

Blunt had been in the fenced backyard of the Davis house, from which many items had been taken. He exited from a gate the leads to the backyard, which was fully enclosed except for the gate. The lock on the gate to the backyard had been broken. On the patio in the back yard, items were found in a tote that, according

[2] The carport went from the backyard to the front. It was possible to walk from the backyard to the front of the house, through the carport, without entering the house itself.

to Deputy Sadro, would not normally be left outside and exposed to weather. A back door to the house had been pried open to gain entry.

The contents of the Jeep—which Bruce admitted he had driven to the scene—were probative. Inside the jeep, the police found pill bottles for Davis and mail addressed to Davis. The police also found a single glove in the glove box of the Jeep that matched a glove found inside of the residence. The Jeep contained additional tools that could be used to break in—bolt cutters, a pair of pliers, and a screwdriver. And, a backpack containing Blunt's driver's license was found in the Jeep.

Here, we look only at the evidence offered before the State rested. See State v. Jackson, 82 Wn. App 594, 608, 918 P.2d 975 (1996) ("At the end of the State's case in chief, a court examines sufficiency based on all of the evidence admitted at trial so far."). But, that included evidence that in the early morning hours Blunt was in the backyard of a residence that had been burgled, that Bruce and Blunt were connected, that the Jeep to which they were both connected contained stolen items, that the Jeep included bolt cutters and a glove that matched a glove found in the residence, and that Bruce received mail at Vik's house, which also contained stolen goods. The prosecutor's theory was that Blunt arrived at the scene with Bruce, and that Blunt had assisted in the break in given his proximity to the house and connection, albeit indirect, to the burglary tools.

Taking this evidence in the light most favorable to the State, it is sufficient to allow a reasonable jury to infer that Blunt was a principal or accomplice in the residential burglary.

II. Severance

Before trial and after the State rested its case, Blunt unsuccessfully moved to sever his trial from that of his codefendants. He argues that the trial court abused its discretion in denying his motions to sever. Specifically, he argues that the trial court abused its discretion in not severing 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. And, he alternatively argues that the trial court should have granted severance under CrR 4.4(d), which states:

> If . . . a defendant moves to be severed at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

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). We infer specific prejudice from the following:

> "(1) 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."

Id. at 171-72 (quoting State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)). Blunt argues that these four factors weighed in favor of severance.

A. Mutually Antagonistic Defenses

Blunt argues that this factor weighs in favor of severance, because his defense was irreconcilable with the other defendants. We disagree. Blunt's defense was that he had fallen asleep in the backyard after being intoxicated. Bruce's defense was that the Jeep had broken down after he had attended a nearby party. Vik's defense was that he was on his way, with Gorbunov and Vladimir Karabut, to pick up Bruce in the allegedly broken down Jeep.[3] And, relatedly, Vik testified that Bruce and Blunt had stopped by his house the night before.

While these defenses are all different stories as to what led each suspect to the scene of the alleged crime, they are not irreconcilable. Bruce could have been stuck on the side of the road sleeping. Vik could have been on his way to

[3] Bruce told officers that the Jeep had broken down. But, the evidence suggested that the owner of the Jeep, who was not Bruce, drove it away from an impound yard without issue. As the State notes, this leads to a reasonable inference that the Jeep was in fact not broken down.

help his friend, Bruce. Meanwhile, Blunt could have slept in the backyard of a random residence, all without the burglary taking place. And, Bruce and Blunt could have visited Vik the night before at Vik's residence. While these stories may not amount to a particularly cohesive defense narrative between all suspects, they are not mutually exclusive. Therefore, this factor does not weigh in favor of severance.

B. Massive and Complex Quantity of Evidence

Blunt argues that the amount of evidence weighs in favor of severance. He argues that, because eight officers testified over a number of days, the jury would have had difficulty sorting evidence between defendants. For example, he notes that, while codefendants were discovered to possess stolen property, the evidence did not suggest Blunt possessed any stolen property. Distinctions such as this could have been overlooked by the jury, he claims.

But, that there was a large amount of evidence does not mean that this factor weighs in favor of severance. Rather, this factor requires that the amount of evidence makes it "almost impossible" to separate the evidence. Id. And, here, the majority of the evidence pertained to a single sequence of events, on the same morning, at the same location, given by a group of officers that all responded to the same scene. That the officers had different interactions, with different suspects, that yielded different pieces of evidence, does not mean that it was almost impossible for the jury to separate the evidence.

C. Codefendant's Statements

Blunt argues that his codefendants' statements incriminated Blunt. Specifically, he notes that Vik's testimony that Blunt and Bruce came over to Vik's house the previous night showed that all three men knew each other, and therefore made it seem more plausible that all three men planned the crime together.

To support severance, a codefendant's statement regarding another codefendant must be "powerfully incriminating." Jones, 93 Wn. App. at 172. "Powerfully incriminating" evidence directly implicates the defendant in the crime charged. See id. (holding that evidence was not powerfully incriminating because it did not directly implicate a defendant in the crime). And, here Vik's statement that he saw Blunt the night before merely suggested that he knew Blunt. It did not contain any allegations about Blunt's involvement in the alleged burglary. It did not directly incriminate Blunt, and therefore was not powerfully incriminating. Vik's statements do not mandate severance.

D. Gross Disparity of Evidence Against Defendants

Blunt also contends that the relative lack of evidence against him, compared to the evidence against his codefendants, supports severance. His argument primarily turns on the fact that his codefendants were found to have possessed stolen property, while Blunt was never shown to actually possess any of the stolen property.

While it is true that the police did not find Blunt directly in possession of stolen property, we cannot say that the disparity in evidence was so substantial that severance was required. For example, Blunt was the only suspect that

admitted that he was on the property of the allegedly burglarized home. His backpack was located in a vehicle where stolen items were found. By contrast, no evidence directly placed Vik or Bruce on the property. The evidence was not so disparate that severance was required.

We hold that the trial court did not abuse its discretion in denying Blunt's motions to sever trial from his codefendants.

III. Prosecutorial Misconduct

Blunt also argues that the prosecutor committed misconduct by referring to facts not in evidence, and personally commenting on Blunt's guilt. In rebuttal, regarding Blunt's presence at the scene, the prosecutor stated:

> Well, I'm not going to sit here and say that I can prove that he went inside[the house,] okay? I think that's clear at this point. But why else would you be in there if you're not an accomplice? Why else would you get out of the vehicle and go onto the property, if you're not an accomplice?
>
> I have my own theory. He's probably the guy that had the crowbars, opened the door. I don't know that for sure, of course. I don't have pictures, I don't have video. But you can put these things together and ask yourself, why else would he be there; okay? Why else would your things be with Michael Bruce?

The defendant bears the burden of proving that the prosecutor's alleged misconduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). The failure to object to an improper remark constitutes a waiver of error unless it is so flagrant and ill-intentioned that it causes an enduring

and resulting prejudice that could not have been neutralized by an admonition to the jury. Id. at 443.

Blunt did not object to the prosecutor's statements that he alleges were misconduct. His arguments on this issue are therefore waived unless the remarks were flagrant, ill-intentioned, and unable to be cured by a supplemental instruction.

At trial, counsel are permitted latitude to argue the facts in evidence and reasonable inferences in their closing arguments. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). They may not, however, make prejudicial statements that are not sustained by the record. Id. Nor are prosecutors permitted to state their personal beliefs about the defendant's guilt. Id. at 577-78.

Blunt contends that the prosecutor's statement was a statement of personal belief about Blunt's guilt. And, he contends that the statement relied on evidence not in the record. The State concedes that it is "fair to criticize" the prosecutor for describing his reasonable inference as his own theory, but argues that it does not rise to the level of flagrant, ill-intentioned, and incurable.

First, the prosecutor's "theory"—that Blunt "was probably the guy that had the crowbars, opened the door"—was a reasonable inference and relied on facts in the record. The crowbar was found outside the house. Blunt was found outside the house. His bag was found in the same car as bolt cutters. The other four suspects did not admit to being on the premises. Offering a theory to the jury that Blunt used the crowbars to break into the house was a reasonable inference. And, the prosecutor's statement explicitly noted that this was merely a theory. He noted that "I don't know that for sure, of course. I don't have pictures, I don't have video.

But you can put these things together and ask yourself, why else would he be there; okay?" This told the jury that it was no more than an inferential theory. He did not suggest that direct evidence proved this, but instead noted that direct evidence did not prove this. He therefore left adequate room for the jury to accept or reject this inference based on the indirect evidence in the record.[4] This did not reference evidence not in the record such that it was flagrant, ill-intentioned, and incurable.

Second, although the prosecutor stated "I have a theory," it was not in fact a personal opinion as to Blunt's guilt. To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context. State v. McKenzie, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006). As this court has observed:

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). And, here the prosecutor's statement that began with "I have my own theory" was made in the context of the evidence from which that theory drew inferences. The prosecutor was discussing the aspects of Blunt's story that seemed unlikely, such as Blunt

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[4] Moreover, the trial court's instructions noted to the jury that "It is important . . . for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits."

falling asleep drunk in the same yard as a house that was broken into, while some acquaintances were found nearby with stolen property. His backpack and a bolt cutter were found in the same car as Bruce. The prosecutor spoke in the first person, but his remark was ultimately one about the State's theory of the case, and the inferences that the State drew from the various pieces of evidence. When looking at the context of the remark, we cannot say that he expressed a personal opinion about Blunt's guilt that was flagrant, ill-intentioned, and incurable by instruction.

Because the comments were not flagrant, ill-intentioned, and incurable, Blunt's prosecutorial misconduct argument is waived.

IV. SAG

In a SAG, Blunt argues that the trial court lacked jurisdiction, and that his counsel was ineffective and committed misconduct.[5] First, with respect to jurisdiction, Blunt argues that the case should not have proceeded because he objected to the trial court's jurisdiction. But, superior courts have original subject matter jurisdiction over all felonies, and over all cases for which jurisdiction is not vested in some other court. State v. Werner, 129 Wn.2d 485, 492, 918 P.2d 916 (1996). And, Blunt points to nothing in the record that suggests that the trial court did not have personal jurisdiction over him. Blunt fails to establish that the trial court lacked jurisdiction.

[5] In his SAG, Blunt also argues that the trial court should have severed trial from his codefendants, and that the evidence was insufficient to prove residential burglary. But, these arguments mirror the arguments in his brief, which we addressed above.

Second, Blunt argues that his counsel was ineffective, because he did not adequately consult Blunt about his plea, performed a poor investigation, and was not adequately prepared. And, he argues that counsel committed misconduct by telling a potential witness that he or she should seek an attorney based on what that potential witness told Blunt's counsel. This witness, Blunt claims, did not testify as a result. But, the record does not show anything with respect to counsel's level of investigation. Nor does it reflect anything regarding a potential witness that did not testify based on Blunt's attorney's advice. It is Blunt's burden on appeal to furnish us with facts sufficient to support his assignment of error. State v. Holbrook, 66 Wn.2d 278, 280, 401 P.2d 971 (1965). He has failed to carry that burden. If material facts exist that have not been previously presented and heard, and require vacation of the conviction, then Blunt's recourse is to bring a properly supported personal restraint petition under RAP 16.4.

We affirm.[6]

WE CONCUR:

[6] Blunt asks that appellate costs not be imposed, because the trial court found Blunt indigent for the purposes of appeal. State does not contest Blunt'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.

NIELSEN, BROMAN & KOCH P.L.L.C.

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