Supreme Court No. 98717-3
(Court of Appeals No. 79565-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OSCAR CHURAPE-MARTINEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Oscar Churape-Martinez, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Churape-Martinez*, No. 79565-1-I (filed June 1, 2019). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Both the Sixth Amendment and article I, section 22 of the Washington Constitution prohibit a defendant from being convicted of an uncharged offense. The Information in this case charged Mr. Churape-Martinez with malicious mischief based specifically upon damage done to a door and mirror belonging to Mr. Morrison, but presented evidence of other damaged items and other possible owners. Is a significant question of law under the state and federal constitutions involved where the to-convict instruction failed to identify either the owner or the item damaged, allowing Mr. Churape-Martinez to be convicted of an uncharged offense?

2. The Respondent concedes that the prosecutor in this case misstated the law by arguing that the jury should convict Mr. Churape-Martinez of residential burglary based upon the predicate offense of criminal trespass. Is a significant question of law involved where the misconduct substantially affected the verdict by directly undermining Mr. Churape-Martinez's sole defense?

C. STATEMENT OF THE CASE

1. Underlying events

Oscar Churape-Martinez was afraid; his girlfriend, Maisey Bradley, was in withdrawal and not opening the door. RP 171, 177. Earlier that day, Ms. Bradley fought with Mr. Churape-Martinez over her substance use and went to stay with her sister and her sister's friend, Jacob Morrison. RP 150-51, 170. Ms. Bradley was coming off of drugs and was sick, and fell asleep when she arrived. RP 170-71, 177. Mr. Churape-Martinez went to find her and, after she did not answer the door, he forced the lock, causing damage to the door handle and door frame. RP 155, 161, 171.

Ms. Bradley woke up when Mr. Churape-Martinez entered the bedroom. RP 171-72. Mr. Churape-Martinez felt that the home was not a good place Ms. Bradley to spend time and wanted her to leave with him. RP 172. The two began to fight, and a mirror and desk fan were damaged in the altercation. RP 173-74. Although Ms. Bradley did not initially want to leave with Mr. Churape-Martinez, she eventually walked to his car and the two left together. RP 177.

Once in the car, Mr. Martinez began to drive erratically. RP 179-81. Ms. Bradley told him she wanted to get out of the car, and asked him to slow down and to take her to her mother's house. RP 177-79.

Meanwhile, law enforcement observed the vehicle and attempted to stop Mr. Churape-Martinez. RP 182. He continued to drive, but was arrested after pulling into a nearby driveway. RP 182, 288-89.

The State charged Mr. Churape-Martinez with residential burglary, unlawful imprisonment, attempting to elude a pursuing police vehicle, and third-degree malicious mischief. CP 4-6. The Information specified that, for the malicious mischief charge, the property damaged was a mirror and a door/doorframe, both belonging to Mr. Morrison. CP 5-6.

2. Trial proceedings.

Mr. Churape-Martinez exercised his right not to testify at trial. *See, generally*, RP. Thus, the only eye-witness testimony regarding the circumstances of his entry and the subsequent events inside the residence came from Ms. Bradley. According to Ms. Bradley, Mr. Churape-Martinez came into the house because he was afraid when no one responded to his knocking. RP 171. Ms. Bradley implied that Mr. Churape-Martinez broke the mirror during their subsequent argument, but did not describe how the mirror was broken or give any further details regarding the argument. *See* RP 172-74.

Ms. Bradley believed Mr. Churape-Martinez's intention was only to help her. RP 175. She was explicit that Mr. Churape-Martinez never forced her to leave and she didn't believe he would have forced her to

leave. RP 173. Although she testified that she "probably" felt slightly threatened, Mr. Churape-Martinez did not verbally threaten her with consequences if she did not come with him. RP 174-75. Mr. Churape-Martinez vaguely mentioned that he had a gun, but Ms. Bradley testified it was obvious that he was lying and she did not believe he actually possessed a firearm. RP 175-76. He did not physically force her out of the home, and the two walked outside together and got into his car. RP 177-78.

The State called the homeowner, Mr. Morrison, and Ms. Bradley's sister, Mikkiah,[1] to testify regarding the damaged property. Mikkiah and Mr. Morrison left the home after Ms. Bradley fell asleep, and the doorknob and lock were broken when they returned. RP 136. The bedroom was also in disarray, with a broken mirror and fan. RP 203. Mr. Morrison stated that he received the mirror for free. RP 156. Mikkiah, however, testified that the mirror was hers and was brand new. RP 141. The State also questioned Mr. Morrison about the broken desk fan, which he estimated was valued at approximately $30. RP 156.

Mr. Churape-Martinez's entire defense to the residential burglary charge was that the State failed to prove he intended to commit a crime

[1] Mikkiah Bradley is referred to herein as "Mikkiah" to avoid confusion.

when he entered the residence. *See* RP 330-31. In closing, defense counsel conceded that, because Mr. Morrison did not give Mr. Churape-Martinez permission to enter the home, the State met its burden to establish the element of unlawful entry. RP 330. The prosecution responded by arguing that Mr. Churape-Martinez's intent to break the door and the act of criminal trespass could both satisfy the second element of intent to commit a crime therein. RP 335.

Although the Information charging malicious mischief included only the mirror and door as the damaged property, the prosecutor argued that the jury should also find Mr. Churape-Martinez guilty based on damage caused to the fan. RP 325. The jury instructions did not list the specific property or property owner. CP 38.

The jury found Mr. Churape-Martinez guilty on all counts. CP 48-51. The Court of Appeals affirmed. Opinion at 15.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The violation of Mr. Churape-Martinez's constitutional right not to be convicted of an uncharged crime warrants review under RAP 13.4(b)(3).

In failing to identify the property owner or specific property damaged, the to-convict instruction for malicious mischief allowed Mr. Churape-Martinez to be convicted of an uncharged crime. Both the Sixth

Amendment and article I, section 22 of the Washington Constitution guarantee defendants in criminal proceedings the right to be informed of the nature of the charges against them. U.S. Const. amend. VI; Const. art. I, § 22. "It is a well-settled rule in this state that a party cannot be convicted for an offense with which he was not charged." *State v. Garcia*, 65 Wn. App. 681, 686, 829 P.2d 241 (1992); *see also Von Atkinson v. Smith*, 575 F.2d 819 (10th Cir. 1978) ("It is axiomatic that due process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified"). Thus, where the charging document alleges one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

As a corollary to this rule, Washington courts have held that once the charging document identifies specific conduct or a specific victim as a basis of a charge – even if not an essential element of the offense – jury instructions cannot be worded in a way that would allow for conviction based upon other, uncharged conduct. For example, in *State v. Jain*, the State charged the defendant with money laundering, listing two specific properties in connection with the charge. 151 Wn. App. 117, 121-23, 210 P.3d 1061 (2009). At trial, however, the State presented evidence of money laundering involving five properties and the jury instructions failed

to identify any specific property. *Id.* at 123. This Court reversed, finding that "the jury . . . could have returned a guilty verdict by finding that Jain committed acts [as to properties] not charged in the information." *Id.* at 124.

Similarly, in *State v. Brown*, the defendant's convictions were reversed after the jury instructions failed to identify the specific coconspirators elected in the Information. 45 Wn. App. 571, 575-76, 726 P.2d 60 (1986). While the identities of the coconspirators were not an essential element of the offense, once the State specifically named individuals in the charging document, jury instructions could not allow convictions based upon conspiracy with additional or differing coconspirators. *Id.* at 577; *see also State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010) (same); *State v. Morales*, 174 Wn. App. 370, 383-84, 298 P.3d 791 (2013) (jury improperly allowed to convict defendant of uncharged alternative where Information listed single victim of harassment but to-convict instruction identified two possible victims).

In this case, the Information alleged Mr. Churape-Martinez committed malicious mischief by causing physical damage to a "door and/or frame and/or mirror belonging to Jacob Morrison." CP 5-6. The charging document makes no reference to a desk fan or property belonging to Mikkiah. CP 5-6.

Yet, the State presented evidence relating to both uncharged victims and uncharged items. First, although Mr. Morrison testified he received the used mirror for free, Mikkiah testified that the broken mirror belonged to her, and that it was "brand new." RP 136-37, 141, 156.

Second, the prosecutor emphasized the damage to the fan throughout the case, beginning in her opening argument. RP 117. She elicited testimony from Mr. Morrison that both a mirror and a fan were broken, the type of fan, verified that it belonged to Mr. Morrison, and asked Mr. Morrison to estimate the specific value of the fan, which he estimated as $30. RP 156. The prosecutor raised the issue yet again in closing, arguing that Mr. Churape-Martinez was guilty of malicious mischief because, in addition to other property, "he broke the fan." RP 325. Defense counsel compounded the error, arguing that there was little doubt as to the malicious mischief charge because Mr. Churape-Martinez "broke[] the mirror and the fan." RP 328.

The to-convict instruction required the State to prove only that Mr. Churape-Martinez knowingly and maliciously caused physical damage "to the property of another[.]" CP 38. In so doing, the instruction allowed Mr. Churape-Martinez to be convicted of a damaging the mirror, even if the jury believed it belonged to Mikkiah, and of damaging Mr. Morrison's fan, crimes for which Mr. Churape-Martinez was never charged.

The instructional error was undoubtedly prejudicial. "When the jury is instructed on an uncharged crime, a new trial is appropriate when it is possible that the defendant was mistakenly convicted of an uncharged crime." *Kirwin*, 166 Wn. App. at 669. Given the arguments and evidence at trial, the jury was able to find Mr. Churape-Martinez guilty of malicious mischief regardless of who it believed owned the mirror. It is certainly ***possible*** that the jury believed that Mikkiah – and not Mr. Morrison – was the true owner of the mirror. It is also likely that the jury verdict rested, in part, on damage to the fan.[2]

In focusing on whether Mr. Churape-Martinez engaged in a continuing course of conduct, the Court of Appeals erroneously framed the issue of one of jury unanimity. *See* Opinion at 9-13. The question here is not whether Mr. Churape-Martinez committed multiple acts of malicious mischief but whether he was convicted of an act of malicious mischief encompassed within the Information.

Contrary to the Court of Appeals' conclusion, Mr. Churape-Martinez' case is analogous to *Jain*, and similarly requires reversal. Opinion at 12. The *Jain* Court, although noting that the instructions violated Mr. Jain's right to a unanimous jury, reversed the conviction as a

[2] It is questionable whether the jury would have found Mr. Churape-Martinez guilty of malicious mischief based upon damage to the door given Ms. Bradley's testimony that he broke the door in order to make sure she was safe after she failed to answer.

violation of his right not to be convicted of an uncharged crime. 151 Wn. App. at 124. As in *Jain*, the jury instructions here allowed Mr. Churape-Martinez to be convicted of damage to property different than that alleged in the Information and against a different victim that than alleged in the Information. The violation of Mr. Churape-Martinez' constitutional rights warrants review under RAP 13.4(b)(3).

2. The prosecutor's flagrant and ill-intentioned misconduct violated Mr. Churape-Martinez's right to due process, warranting review under RAP 13.4(b)(3).

a. The prosecutor misstated the law on residential burglary.

A prosecutor commits misconduct by misstating or misrepresenting the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) ("A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury."). Where a prosecutor urges the jury to convict based upon an incorrect understanding of the law, the reviewing court cannot be certain that the jury's verdict rests on a legally valid theory. *State v. Allen*, 127 Wn. App. 125, 137, 116 P.3d 849 (2005).

In this case, the prosecutor argued that the jury should convict Mr. Churape-Martinez for burglary based upon damage to the exterior door and/or criminal trespass when he entered the residence. However, crimes

committed outside the residence cannot serve as the predicate crime for a residential burglary. *See Devitt*, 152 Wn. App. at 913. The State conceded misconduct on appeal, and the Court of Appeals accepted the State's concession. Opinion at 13.

b. The misconduct was prejudicial.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct impacted the jury. *Monday*, 171 Wn.2d at 675. Contrary to the Court of Appeals' conclusion, prosecutor's misrepresentation of law as to an essential element of the crime meets this standard. Opinion at 15.

Over and over again, the prosecutor reiterated that Mr. Churape-Martinez did not need to intend to commit any crime beyond breaking the door and/or entering the home. RP 321-22, 335-36. In urging the jury to use either criminal trespass or damage to the exterior door as predicate crimes for residentially burglary, the prosecutor offered not one, but two, legally erroneous bases to convict Mr. Churape-Martinez.

A limiting instruction could not have cured the prejudice in Mr. Churape-Martinez's case. Any attempt to cure the harm caused by the prosecutor's misstatement of law would have required the court to break down both of the prosecutor's erroneous arguments, address the two criminal acts, and discuss the distinction between intent formed when

entering the residence versus intent formed once inside the residence. This would only serve to further confuse the jury.

The jury was operating under multiple misunderstandings of the law when it found Mr. Churape-Martinez guilty. The violation of Mr. Churape-Martinez' right to due process is a significant question of law warranting review under RAP 13.4(b)(3).

E. CONCLUSION

For the reasons set forth above, Oscar Churape-Martinez respectfully requests that this Court grant review.

DATED this 1st day of July, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OSCAR CHURAPE-MARTINEZ, Appellant.	DIVISION ONE No. 79565-1-I UNPUBLISHED OPINION

DWYER, J. — Following his convictions for residential burglary, unlawful imprisonment, attempting to elude a pursuing police vehicle, and malicious mischief in the third degree, Oscar Churape-Martinez appeals. On appeal, he asserts that insufficient evidence supported his residential burglary and malicious mischief convictions, that the wording of a jury instruction allowed him to be convicted of acts of malicious mischief with which he was not charged, and that prosecutorial misconduct denied him a fair trial. Finding no error, we affirm.

I

Jacob Morrison lived in a trailer in Friday Harbor with his girlfriend, Mikkiah Bradley, and Bradley's sister, M.J.B.[1] In September 2018, M.J.B. was 16 years old and dating 22-year-old Oscar Churape-Martinez. Morrison and Mikkiah were disinclined to support M.J.B. in this relationship because M.J.B. and Churape-

[1] Because Mikkiah Bradley and M.J.B.'s mother, Rashelle Bradley, share a surname, they are referred to herein by their first names to avoid confusion. No disrespect is intended.

Martinez argued frequently. Eventually, Morrison and Mikkiah told Churape-Martinez that he was not welcome at their house.

On September 26, 2018, at around 3:00 or 4:00 p.m., M.J.B. went to sleep at Morrison's house. Mikkiah was home at this time but left with Morrison while M.J.B. was still asleep. Mikkiah left a few cigarettes for M.J.B. with a note explaining that she and Morrison were out of the house but would return soon. Mikkiah and Morrison ensured that the front door of Morrison's home was locked before departing.

Upon leaving Morrison's home, Mikkiah saw Churape-Martinez across the street, helping a neighbor address an issue with the neighbor's vehicle. Mikkiah considered Churape-Martinez's presence in the area to be unusual.

After a few hours had passed, Mikkiah and Morrison returned home to find that "everything was messed up." The door knob and lock on the front door of the home had both been broken, and a chair and a pot on the front porch had been overturned. Although Mikkiah's note and the cigarettes were in the same place she had left them, M.J.B. was gone. The room in which M.J.B. had been sleeping was "trashed," with both a mirror and a fan that had been within broken. Mikkiah asked Morrison to telephone 911 because M.J.B. was missing. Morrison did so.

Churape-Martinez, meanwhile, had independently attracted the attention of local law enforcement when he was seen driving along area roads at speeds far above the posted speed limits. Two police vehicles followed Churape-

Martinez with their sirens activated, attempting to induce him to pull over, without success. Ultimately, Churape-Martinez drove into a residential driveway.

Once the vehicle had stopped, M.J.B. telephoned her mother, Rashelle Bradley, and asked to be picked up. She stated that she had been sleeping at Morrison's house when she was roused by Churape-Martinez breaking down the front door, that she had departed with Churape-Martinez in his vehicle after he claimed to have a firearm, and that the police were pursuing his vehicle. While she was talking to M.J.B., Rashelle had her husband telephone 911 and provide the address where M.J.B. was located. However, Churape-Martinez then drove to a different house, where police first located his parked vehicle, and then located Churape-Martinez and M.J.B. Churape-Martinez was arrested.

When San Juan County Sheriff's Detective Lachlan Buchanan arrived at the scene, she saw M.J.B. and her father standing in the house's driveway while Churape-Martinez was seated in the back seat of a police vehicle. Both M.J.B. and Churape-Martinez were questioned at the police station. Churape-Martinez initially denied that he had been driving his vehicle and claimed that it had been stolen. Later, he stated that he was working on a vehicle at a friend's house when he went to Morrison's house because "he was pissed off 'cause they used dope there."

Churape-Martinez was charged with four offenses: (1) residential burglary aggravated by domestic violence, (2) unlawful imprisonment, also aggravated by domestic violence, (3) attempting to elude a pursuing police vehicle, (4) and malicious mischief in the third degree.

Although Churape-Martinez did not testify at trial, M.J.B., still a minor, did so because of her belief that it would be "good for [Churape-Martinez]." According to M.J.B., she went to Morrison's house because she felt ill and needed rest after having an argument with Churape-Martinez the night before. She explained that Churape-Martinez kept her "on a really short leash." M.J.B. claimed that Churape-Martinez broke down Morrison's door out of concern for her because no one had answered his knocks and "he was freaked out." Because Churape-Martinez was angry with her, M.J.B. refused to leave and, while the two were arguing, he broke the mirror. Although she left the home barefoot, she denied that Churape-Martinez had shoved or otherwise forced her into his car, claiming that he only opened the door for her to enter the vehicle.

Once she had done so, M.J.B. testified, an argument ensued because Churape-Martinez was both intoxicated and was failing to heed posted speed limits. M.J.B. asked him to leave her with her mother and, when he refused, she telephoned her mother herself. Her statements to her mother, although inconsistent with M.J.B.'s own later testimony, were admitted as evidence under the excited utterance exception to the hearsay rule. As her mother testified:

> She said, Mom, I was sleeping at Oscar's and—I mean, at Jacob's, I'm sorry, and Oscar woke—I woke up to hearing banging and the—and then she said, I'm just really scared. He made me get into the car, and he was—and there was cops. And—and he said that he was taking me with him. And I said, let me out, and he would not let me out. And now we're here.[2]

[2] M.J.B. also told her mother that Churape-Martinez claimed to have a gun, although M.J.B. had not seen it.

The jury convicted Churape-Martinez on all four counts. The court sentenced him to a total of 17 months of confinement. He appeals.

II

First, Churape-Martinez claims that insufficient evidence supported his conviction for residential burglary. This is so, he asserts, because the State did not prove his intent to commit a crime in Morrison's residence. However, when the totality of the evidence adduced at trial is viewed in the light most favorable to the State, it is apparent that Churape-Martinez's averment is devoid of merit.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. CONST. amend. XIV, § 1; WASH. CONST. art. 1, § 3. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the

evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of residential burglary are set forth in RCW 9A.52.025, which provides:

> (1) 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.

Thus, to establish that Churape-Martinez was guilty of the offense, the State was required to prove (1) that he entered or remained unlawfully in a dwelling other than a vehicle and (2) that he intended to commit a crime against a person or property therein. State v. Stinton, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). A person enters or remains unlawfully in a dwelling if he does so without license, invitation, or privilege. RCW 9A.52.010(2). Permission to enter or remain in the dwelling may only be given by a person who resides in or otherwise has authority over the property. State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998).

To argue that he did not intend to commit a crime against a person or property within the dwelling, Churape-Martinez relies on M.J.B.'s testimony. M.J.B. indicated that Churape-Martinez broke into Morrison's home because he was "freaked out" and "he just wanted to protect me, honestly." He also highlights M.J.B.'s failure to recall how or when Morrison's mirror was broken. In making this argument, Churape-Martinez misapprehends the standard of review to which we adhere: when an appellant challenges the sufficiency of the evidence supporting his conviction, all evidence, and all reasonable inferences

therefrom, must be construed in the light most favorable to the State. Salinas, 119 Wn.2d at 201.

A juror could find that the evidence herein showed that Churape-Martinez did not have permission to enter the home and that he was angry. He chose to wait outside the home under the pretense of helping Morrison's neighbor until Morrison and Mikkiah had left. Upon their departure, he broke down the home's front door, broke several objects inside, argued with M.J.B. and told her that he was armed, and forced her to leave the home in his vehicle without allowing her to put on shoes. M.J.B. admitted to feeling "threatened" and told her mother that she was scared. She also admitted that Churape-Martinez broke Morrison's mirror. This was consistent with Detective Buchanan's testimony, in which he indicated that Churape-Martinez admitted to breaking the mirror because he was angry.

A rational trier of fact could conclude from this evidence that Churape-Martinez unlawfully entered Morrison's home with the intent to commit a crime therein. Churape-Martinez was angry when he broke down the front door and proceeded to damage personal property. In doing so, he also accosted a sleeping M.J.B., told her that he had a gun, and coerced her into leaving the house barefoot and departing in his vehicle. Thus, viewed in the light most favorable to the State, the evidence is clearly sufficient to support the verdict finding Churape-Martinez guilty of residential burglary.

III

Churape-Martinez also attacks the sufficiency of the evidence supporting his conviction for malicious mischief in the third degree. Specifically, he claims that the evidence adduced at trial does not support a finding that he acted with malice when he destroyed Morrison's personal property. As overwhelming evidence supports such a finding, his claim is meritless.

Again, in challenging the sufficiency of the evidence, Churape-Martinez admits the truth of both the evidence against him and all reasonable inferences supported by that evidence. Salinas, 119 Wn.2d at 201. We construe both the evidence and the inferences in the light most favorable to the State and will reverse only if no reasonable juror, when presented with this evidence, could find Churape-Martinez guilty of the charged offense. Jackson, 443 U.S. at 319.

The applicable definition of malicious mischief in the third degree is provided in RCW 9A.48.090.

> (1) A person is guilty of malicious mischief in the third degree if he or she:
>
> (a) Knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to malicious mischief in the first or second degree.

As to the definition of "malice,"

> "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

RCW 9A.04.110(12).

As the evidence makes clear, Churape-Martinez destroyed property inside Morrison's home without just cause or excuse. Churape-Martinez himself stated that he was angry when he broke Morrison's mirror. It may be easily inferred from the evidence that these actions were intended to vex, injure, or annoy M.J.B., Morrison, Mikkiah, or all three.

Thus, his challenge fails.

IV

Churape-Martinez next alleges a violation of his Sixth Amendment right to be convicted only of a crime with which he was charged. This is so, he asserts, because the information charging him with the crime of malicious mischief in the third degree identified property which Churape-Martinez was alleged to have damaged, but the jury's "to-convict" instruction did not mention the property that was damaged with any particularity. Churape-Martinez's argument relies on conflation of the respective purposes, and requirements, applicable to the information and to the jury instructions.

"Jury instructions and charging documents serve different functions." State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995). The purpose of a charging document is to provide notice to the defendant of the charge against him and its factual basis. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). It is not to inform the jury of the same—for the jury, the case is contained in an elements instruction and the accompanying definitional instructions. State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). "Jury instructions 'allow[ ] each party to argue its theory of the case' and 'must convey to the jury

that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.'" State v. Porter, 186 Wn.2d 85, 93, 375 P.3d 664 (2016) (alteration in original) (quoting State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007)).

"In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)). However, the inclusion of an otherwise unnecessary element of the offense in an information does not mandate that element's inclusion in the jury's instructions. "[N]ot every omission of information from a 'to convict' jury instruction relieves the State of its burden of proof; only the total omission of essential elements can do so." State v. Sibert, 168 Wn.2d 306, 312, 230 P.3d 142 (2010).

In fact, our courts have repeatedly held that references to specific pieces of evidence in to-convict jury instructions may be constitutionally prohibited comments on the evidence. See, e.g., State v. Levy, 156 Wn.2d 709, 716, 720-21, 132 P.3d 1076 (2006) (instruction providing State had to prove defendant entered or remained unlawfully in a "building, to-wit: the building of Kenya White," when whether alleged victim Kenya White lived in building was a question for the jury, necessitated reversal of conviction); State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (special verdict form asking jury whether defendants were within 1,000 feet of school, "to-wit: Youth Employment Education Program

School," was unconstitutional because whether program office was actually a school was fact question for the jury). The Washington Constitution prohibits a judge from expressing to the jury his or her opinion about the merits or facts of a case. CONST. art. IV, § 16. "[A]n instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence." State v. Winings, 126 Wn. App. 75, 90, 107 P.3d 141 (2005) (citing State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981)).

The information charging Churape-Martinez with malicious mischief in the third degree stated:

> That the defendant OSCAR CHURAPE MARTINEZ in the County of San Juan, State of Washington, on or about September 26, 2018, did commit the crime of Malicious Mischief in the Third Degree: did knowingly and maliciously cause physical damage in an amount not exceeding $750.00 to the property of another, to-wit: door and/or frame and/or mirror, belonging to Jacob Morrison contrary to RCW 9A.48.090(1)(a), and against the peace and dignity of the State of Washington.

The to-convict instruction for malicious mischief herein provided, in relevant part:

> To convict the defendant of the crime of malicious mischief in the third degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about September 26, 2018, the defendant knowingly and maliciously caused physical damage to the property of another, and
> (2) That this act occurred in the State of Washington County of San Juan.

These elements reflect those set forth in RCW 9A.48.090. The evidence adduced at trial showed only one continuing course of conduct in which Churape-Martinez broke into Morrison's home and damaged property inside. There was

no evidence adduced of Churape-Martinez damaging property at any other location on this date.

This case is not analogous to State v. Jain, 151 Wn. App. 117, 210 P.3d 1061 (2009) or State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986), as Churape-Martinez would have us believe. In Jain, the defendant had been charged with two counts of money laundering based on the transfer of two parcels of real property, but the evidence at trial adduced that he had actually transferred seven different properties on the same day. 151 Wn. App. at 120-23. Although only two money laundering offenses were charged, the existence of seven possible offenses meant that a unanimity instruction or an election of the specific transfers giving rise to the charges was necessary. Jain, 151 Wn. App. at 124. In Brown, the defendant was charged by information of conspiring with 11 specifically named people to commit theft, but the to-convict instruction required the jury only to find the defendant agreed with "one or more persons" to engage in the conduct. 45 Wn. App. at 576. As several witnesses not named in the information nonetheless testified to their involvement in the conspiracy, we held that the instruction improperly allowed the jury to convict the defendant of conspiring with an uncharged witness. Brown, 45 Wn. App. at 576.

However, here, there is no evidence indicating that Churape-Martinez committed multiple incidents of malicious mischief on September 26, 2018, and thus nothing that would give rise to the possibility of a conviction for an uncharged offense. That evidence tended to prove that he broke several items of Morrison's personal property when he was in the home does not mean a new

or separate course of conduct ensued such that he could be convicted of an incident of malicious mischief for which he was not charged. The ambiguities fostered by the improvidently worded jury instructions in Brown and Jain are not present here. There was no error.

V

Finally, Churape-Martinez avers that prosecutorial misconduct during the State's closing argument denied him a fair trial. His claim of misconduct is premised on the prosecutor's statements regarding the elements of burglary—statements that, as the State concedes on appeal, were incorrect. Because Churape-Martinez cannot show prejudice resulting from this misstatement, his claim fails.

A defendant alleging prosecutorial misconduct bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant establishes that a prosecutor's statements were improper, the appellate court determines whether the defendant is entitled to relief by applying one of two standards of review. Emery, 174 Wn.2d at 760. The first standard, which applies if the defendant timely objected at trial and the objection was overruled, requires that the defendant show that the prosecutor's misconduct led to prejudice that had a substantial likelihood of affecting the jury's verdict. Emery, 174 Wn.2d at 760.

The second standard applies if the defendant did not object at trial. In that event, the defendant is deemed to have waived the claim of error unless the defendant can show that "(1) 'no curative instruction would have obviated any

prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Here, given that Churape-Martinez did not object to the prosecutor's comment at trial, the latter standard applies. The prosecutor's statement as to the elements of residential burglary was as follows:

> Now, as far as residential burglary goes, intent is defined for you. . . . [T]hey don't have to intend to commit a crime. They have to intend to commit an act that happens to be a crime. So when he entered that home unlawfully, when he crossed that threshold, when he committed trespass going in there, he committed residential burglary.
>
> It doesn't matter that he committed more crimes later that he may not have preconceived as he crossed the threshold. It's not complicated. He broke the door down; that's a crime. And then he committed a variety of crimes when he's . . . inside.
>
> So all he's got to intend is crossing that threshold. Breaking that door, he's got to intend that. . . .
>
> . . . .
>
> . . . Residential burglary was committed the moment he walked up on that door and crossed that threshold.

Churape-Martinez fails to show that the prosecutor's comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. In fact, he does not demonstrate any likelihood of prejudice stemming from these remarks. As is discussed above, abundant evidence supported Churape-Martinez's conviction for residential burglary. Further, the jury was instructed that

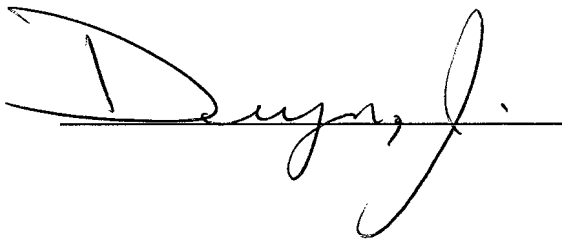
> [t]he lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You

> must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

The court also instructed the jury as to the statutory elements of residential burglary. "We presume that juries follow lawful instructions." Spivey v. City of Bellevue, 187 Wn.2d 716, 738, 389 P.3d 504 (2017). Churape-Martinez points to nothing that would rebut this presumption.

In light of the abundant evidence supporting the jury's guilty verdict, and in light of the jury's proper instruction on the elements of residential burglary, Churape-Martinez does not show any prejudice resulting from the asserted instance of prosecutorial misconduct. Thus, his claim fails.

Affirmed.



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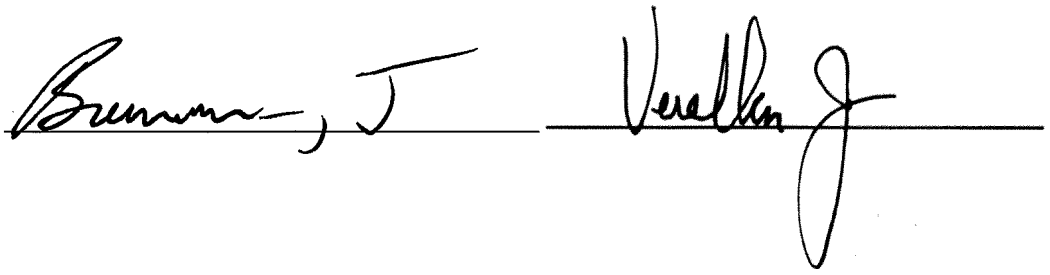

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79565-1-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:

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