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SUPREME COURT NO. 99757-8

NO. 53443-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SMITH,

Petitioner.

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

The Honorable Robert Lewis, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Michael Smith asks this Court to grant review of the court of appeals' part published decision in State v. Smith, No. 53443-6-II, filed April 14, 2021 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1a. In the published portion of its decision, Division Two held for the first time that "enters or remains unlawfully" are not alternative means of committing burglary. This creates a split among the divisions of the court of appeals, with Division One and Division Three holding that burglary is an alternative means crime. Is this Court's review necessary to resolve this new split among the divisions of the court of appeals?

1b. Also in the published portion of its decision, Division Two held prosecutorial election in closing argument can cure an alternative means unanimity error, even though the jury is instructed on the unsupported alternative means. Is review on this issue likewise necessary, where this Court has never directly resolved whether prosecutorial election will suffice in such circumstances?

2. Is this Court's review warranted where the trial court excluded relevant defense evidence impeaching the prosecution's complaining witness?

3. Is this Court's review further warranted to determine when prosecutorial misconduct that impermissibly shifts the burden of proof in rebuttal argument rises to the level of flagrant and ill-intentioned misconduct that cannot be cured by court instruction?

C. STATEMENT OF THE CASE

Petitioner Michael Smith lived in a small town outside Vancouver, Washington, with his longtime girlfriend and their three-year-old daughter. CP 44-45. Smith worked as a union framer for years and most recently as a journeyman glazier. CP 44. Smith supervised and was close friends with Corey Jones, who lived with his girlfriend, H.K., in Vancouver. RP 251-54. Smith and Jones hung out "[p]retty much daily." RP 252.

On November 17, 2017, Smith and his coworker Andrew Luna went to work as usual. RP 226. It was a slow day, though, so they left early to scout hunting locations. RP 226. They took a six-pack of beer and spent most of the day driving and hiking around the woods. RP 226-27. Luna recalled Smith had only one beer because he was driving. RP 227.

Smith and Luna returned to Vancouver that evening. RP 228. Luna had to get home, but Smith decided to go to Jones's house and check on him. RP 228-29. Jones had not shown up for work that day and Smith had not heard from him in a few days. RP 228, 304. Jones was about to be fired if

he did not start showing up regularly for work. RP 228. Smith stopped by, but left when he discovered only H.K. was home. RP 304.

H.K.'s story differed significantly. H.K. said she was home alone in her pajamas when Smith came over, looking for Jones. RP 151-53, 198. H.K. testified Smith entered without knocking, but it was common for him to do so. RP 152-53, 197. H.K. explained they left their door unlocked, so Smith would frequently stop by unannounced and come inside to visit Jones. RP 152, 196-98. Consistent with this, H.K. did not initially ask Smith to leave. RP 155, 218-19.

H.K. testified, however, Smith appeared very intoxicated and did not leave when he learned Jones was not home. RP 153-55. H.K. began to feel uncomfortable but still did not ask Smith to leave. RP 155, 199. H.K. testified Smith playfully grabbed her wrist and started to wrestle with her. RP 156. When she told him to stop, H.K. claimed, Smith got angry and tackled her to the floor. RP 156-58.

H.K. testified Smith straddled her, holding her wrists, as she tried to wriggle free. RP 158-60. H.K. repeatedly told Smith to stop and demanded that he leave. RP 159-61. H.K. testified Smith grabbed her breasts and she could hear him undoing his belt buckle. RP 160-61. H.K. claimed Smith also grabbed her vagina with one hand, over her pajamas, attempting to push his fingers inside her. RP 161-62. H.K. testified that, after trying to fight

Smith off for some time, she eventually freed herself. RP 164. H.K. told Smith to get out of her house, prompting Smith to storm out. RP 164-65.

A few days later, H.K. received a phone call at work. RP 282-83. H.K.'s coworker recalled that it sounded like an argument. RP 282-83. H.K. told her coworker afterwards that Jones had accused her of cheating on him with Smith. RP 287. H.K. left work, panicked and upset. RP 288. The trial court prohibited defense counsel from asking H.K. about her relationship troubles with Jones, RP 186-92, and sustained the prosecution's objection to defense counsel asking Jones whether he accused H.K. of cheating, RP 264.

H.K. went to the police station on November 22, 2017, with Jones accompanying her for "support." RP 258. H.K. gave a statement to police, with Jones present for at least a portion of it. RP 184, 247-249. Based on H.K.'s report, the prosecution charged Smith with one count of indecent liberties by forcible compulsion and one count of residential burglary with sexual motivation. CP 1.

Smith's jury was instructed that, to convict him of residential burglary, the prosecution needed to prove beyond a reasonable doubt that Smith "entered or remained unlawfully in a dwelling," even though there was no evidence Smith entered H.K.'s home unlawfully. CP 26. The jury

returned general verdicts, finding Smith guilty as charged. CP 33-35. Smith was sentenced to a minimum term of 102 months in prison. CP 60-62.

On appeal, Smith contended his right to unanimous jury verdict was violated where there was insufficient evidence that he entered H.K.'s home unlawfully, one of the alternative means of residential burglary. Br. of Appellant, 6-10. Additionally, Smith asserted that the trial court erroneously excluded relevant defense evidence (Br. of Appellant, 10-16) and the prosecutor improperly shifted the burden of proof in rebuttal argument (Br. of Appellant, 16-19).

Division Two agreed there was evidence only of unlawful remaining, where Smith lawfully entered H.K.'s home. Opinion, 1-2. In the published portion of its opinion, the court nevertheless affirmed Smith's burglary conviction, holding for the first time the "enters or remains unlawfully" are not alternative means of committing burglary. Opinion, 10. The court reached this conclusion "notwithstanding previous Court of Appeals cases," diverging from decisions by all three divisions holding that burglary is an alternative means crime. Opinion, 2, 5. The court alternatively held, where the prosecution elected unlawful remaining in closing argument, it did not need to present sufficient evidence of unlawful entry in order to avoid violating Smith's right to a unanimous jury verdict. Opinion, 12-3.

The court rejected Smith's remaining arguments in the unpublished portion of his opinion, likewise affirming his indecent liberties conviction. Opinion, 14-21.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- 1a. This Court's review is necessary to resolve a split among the divisions of the court of appeals as to whether "enters or remains unlawfully" are alternative means of committing burglary.

In State v. Klimes, 117 Wn. App. 758, 764-65, 73 P.3d 416 (Div. I, 2003), overruled on other grounds by State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (Div. I, 2005), Division One considered for the first time in a published decision whether "enters or remains unlawfully in a building" are alternative means of committing second degree burglary. The Klimes court concluded that they are. Id. at 768. For this conclusion, Division One relied heavily on two cases, State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988), and State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (Div. II, 1993). Klimes, 117 Wn. App. at 767.

In Collins, this Court was tasked with deciding whether an individual who lawfully enters a building can thereafter unlawfully remain by exceeding the implied scope of the invitation to enter. 110 Wn.2d at 254. Two women invited Collins inside their home to use the telephone, but then he grabbed both women and dragged them to the bedroom, where he raped

one of them. Id. at 254-55. This Court held: “Collins remained unlawfully on the premises, because he exceeded the scope of his invitation. Collins was invited to use the telephone. Once that purpose was accomplished, his license expired, and by remaining in the house and committing crimes, he committed first degree burglary.” Id. at 255. In Thomson, Division Two distinguished between felonious entry and felonious remaining, recognizing “Collins’ significance here is that it illuminates the difference between felonious entry and felonious remaining.” 71 Wn. App. at 637.

Focusing on the distinction between entering unlawfully versus remaining unlawfully, Division One in Klimes concluded “Collins and Thomson make it clear that ‘enters unlawfully’ and ‘remains unlawfully’ are separate acts, and that a person can enter lawfully but remain unlawfully in some factual circumstances.” Klimes, 117 Wn. App. at 767.

The Klimes court’s analysis did not end there. The court recognized “use of the disjunctive ‘or’ does not invariably indicate legislative intent to provide alternate means of committing a crime.” Id. at 769. Nor is it dispositive that enter or remain unlawfully are not “distinctly delineated subsections” of the burglary statute. Id. at 768. “Instead,” the Klimes court explained, “each case must be evaluated on its own merits.” Id. at 769.

Consistent with Klimes, this Court has held, “[i]n analyzing the statute at issue, the use of the disjunctive ‘or’ in the language in question, the

presence of statutory subsections, or the availability of definitional statutes do not necessarily create alternative means.” State v. Barboza-Cortes, 194 Wn.2d 639, 643-44, 451 P.3d 707 (2019). The “salient inquiry” is instead whether each alleged alternative describes “distinct acts” that amount to the same crime. Id. (quoting State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)).

All three divisions have followed Division One’s decision in Klimes. See, e.g., State v. Cordero, 170 Wn. App. 351, 365-66, 284 P.3d 773 (Div. III, 2012); State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (Div. I, 2006); State v. Johnson, 132 Wn. App. 400, 409-10, 132 P.3d 737 (Div. II, 2006); State v. Spencer, 128 Wn. App. 132, 141-43, 114 P.3d 1222 (Div. I, 2005); see also State v. Lawson, 185 Wn. App. 349, 340 P.3d 979 (Div. II, 2014) (unpublished portion).

As recently as 2014, Division One recognized “[t]here are two distinct physical acts that amount to residential burglary: (1) unlawfully entering a building with intent to commit a crime, or (2) unlawfully remaining in a building with intent to commit a crime.” State v. Sony, 184 Wn. App. 496, 500, 337 P.3d 397 (2014). “These constitute the alternative means of committing burglary.” Id. Applying the “distinct acts” analysis, the Sony court held intent to commit a crime against a person or against property are not alternate means of committing burglary. Id.

Despite nearly two decades of all three divisions following Klimes, Division Two in Smith’s case held, “notwithstanding previous Court of Appeals cases, residential burglary is not an alternative means offense under the analytical framework of more recent Supreme Court alternative means cases.” Opinion, 2. Division Two rejected the holding of Klimes, reasoning its “separate acts” analysis was “not the relevant inquiry” under this Court’s more recent precedent. Opinion, 8. But Division Two did not address either Collins or its own decision in Thomson; did not acknowledge the other analysis contained in Klimes; and did not explain why the Klimes “separate acts” test is at odds with this Court’s current “distinct acts” test. See Opinion, 8-9.

Furthermore, at oral argument before Division Two, Smith compared the burglary statute to the theft statute, which this Court has held to be an alternative means crime:

The alternative means available to accomplish theft describe *distinct acts* that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone’s property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his *conduct* varies significantly.

Peterson, 168 Wn.2d at 770; accord State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002) (holding (1) wrongfully obtaining or exerting control over another’s property and (2) obtaining control over another’s

property by color or aid of deception are alternative means of committing theft). Division Two likewise did not address why burglary is distinct from theft, where unlawful entry and unlawful remaining capture significantly different conduct.

For instance, prohibiting unlawful entry protects against unwanted entry into a private space, as well as entry into a space where the defendant has been previously excluded or trespassed. See also Cordero, 170 Wn. App. at 366 (even where a person’s initial entry into a building is unlawful, he does not “remain” unlawfully if he is thereafter detained by someone with authority over the premises). Conversely, prohibiting unlawful remaining empowers home and business owners to allow entry but thereafter revoke permission to enter or limit the scope of their invitation at any time.

Highlighting this distinction in conduct, Washington courts recognize “the unlawful remaining concept is intended primarily for situations in which the initial entry to a building is lawful, but the defendant either exceeds the scope of the license or privilege to enter, or the license is impliedly or expressly terminated.” Allen, 127 Wn. App. at 133. In fact, a specific legal test applies for determining whether a defendant has unlawfully remained. State v. Crist, 80 Wn. App. 511, 514, 909 P.2d 1341 (Div. II, 1996) (“Unlawful remaining’ occurs when (1) a person has lawfully entered a dwelling pursuant to license, invitation or privilege; (2)

the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct is accompanied by intent to commit a crime in the dwelling.”).

Division Two nevertheless concluded for the first time that “RCW 9A.52.025 identifies a single means of committing residential burglary: entering or remaining unlawfully in a dwelling.” Opinion, 10. The published decision in Smith's case creates a split among the court of appeals, with Division One and Division Three continuing to follow Klimes, and Division Two now holding burglary is not an alternative means crime. This Court's review is necessary to resolve this division split. RAP 13.4(b)(2). Furthermore, jury unanimity in burglary cases presents a significant question of constitutional law as well as an issue of substantial public interest, given the prevalence of burglary prosecutions. RAP 13.4(b)(3), (4).

- 1b. Review is also necessary to answer the significant constitutional question of whether prosecutorial election in closing can cure an alternative means unanimity error, an issue this Court has never directly resolved.

Division Two alternatively held prosecutorial election in closing argument cured any alternative means unanimity error in Smith's case: “We conclude that if the State expressly elects to rely on only one alternative means to obtain a conviction, the State need not present sufficient evidence of all alternative means in order to avoid violating the defendant's right to a

unanimous verdict.” Opinion, 12, 13. In reaching this conclusion, Division Two acknowledged “the Supreme Court has not addressed election in the alternative means context.” Opinion, 11. The court nevertheless reasoned, “if election can prevent a unanimity problem in a multiple acts case, we see no reason that election also should not prevent a unanimity problem in an alternative means case.” Opinion, 11.

Division Two is correct that this Court has never directly resolved this issue. In the context of multiple acts cases, the jury must unanimously agree on which incident constitutes the crime. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). This means either the prosecution must elect the act on which it relies or the trial court must instruct the jury to unanimously agree the prosecution proved the same criminal act beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. The prosecution’s election of an act need not be ratified by the court or incorporated into the jury instructions. State v. Carson, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015). It is enough for the prosecution “tell the jury which act to rely on in its deliberations.” Id. (quoting Kitchen, 110 Wn.2d at 409).

However, this Court’s decision in State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017), suggests prosecutorial election does not suffice for alternative means. Unlike multiple acts, the jury need not be unanimous as

to the *means* of committing the offense. Id. at 164. However, there must be sufficient evidence to support each alternative means, unless there is a “particularized expression” of jury unanimity, like a special verdict. Id. (quoting State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). “When one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means.” Id. at 162.

The Woodlyn court recognized “a reviewing court is compelled to reverse a general verdict unless it can ‘*rule out the possibility* the jury relied on a charge unsupported by sufficient evidence.’” Id. at 165 (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)). Division Two in Smith’s case believed “a clear election by the State that it was relying on only one of the alternative means would allow a reviewing court to rule out the possibility that the jury relied on some other means.” Opinion, 11.

Woodlyn seems to indicate otherwise. Specifically, the complete lack of evidence supporting a means does not “rule out” the possibility the jury relied on that means. Woodlyn, 188 Wn.2d at 165-66. This Court emphasized “[a] post hoc review of the record does not allow an appellate court to see into the minds of jurors.” 188 Wn.2d at 166. Such an exercise cannot “dispel the possibility that the jury might have convicted based on insufficient evidence.” Id.

Instead, the Woodlyn court reasoned, “given that the trial court instructed the jury in this case on two alternative means, it would be reasonable for the jurors to think that either alternative represented a viable path to conviction.” Id. (record citation omitted). This Court therefore concluded, “[a]bsent some form of *colloquy or explicit instruction*, we cannot assume that every member of the jury relied solely on the supported alternative.” Id. (emphasis added). Colloquy or instruction indicates some type of action by the *trial court*. Prosecutorial election in closing argument is neither a colloquy nor an explicit instruction.

Contrary to Division Two’s conclusion, there is good reason to distinguish election in multiple acts versus alternative means cases. Unlike a multiple acts case, alternative means are codified in the jury instructions. By instruction of the court, Smith’s jury was allowed to consider whether he “entered or remained unlawfully in a dwelling.” CP 26. As recognized by the Woodlyn court, this indicated to the jury the unsupported alternative means “represented a viable path to conviction,” notwithstanding prosecutorial election in closing. 188 Wn.2d at 166.

Smith’s jury was further instructed it “must disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court’s] instructions.” CP 14. Prosecutorial election in an alternative means case is at odds with the court’s instructions, where the jury is

expressly allowed to consider the unsupported alternative. “Jurors are presumed to follow the court’s instructions.” In re Pers. Restraint of Phelps, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018).

In an analogous context, this Court has held a prosecutor’s election in closing argument cannot cure a double jeopardy problem where the trial court’s instructions still allowed the jury to find the same person to be the victim of both offenses. State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008). The Kier court recognized, “[w]hile the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel.” Id. at 813. So, too, in an alternative means case like Smith’s.

Division Two’s decision in Smith’s case is potentially in conflict with this Court’s decision in Woodlyn, as well as Kier. RAP 13.4(b)(1). A definitive decision from this Court on the constitutional question of whether prosecutorial election in closing argument can cure an alternative means unanimity error would also provide guidance to lower courts and practitioners. RAP 13.4(b)(3), (4). Review is warranted.

2. Review is warranted where the trial court erroneously excluded relevant defense evidence impeaching the prosecution’s complaining witness.

Defense counsel wanted to ask H.K. about her relationship troubles with Jones, to suggest a motive to fabricate the allegations. RP 186-89.

Specifically, H.K. would have testified she was thinking about leaving Jones, frustrated with his constant partying and not coming home. RP 186-87. The very night of the alleged attack, Jones was out drinking and partying with friends. RP 187. But the trial court excluded the impeachment evidence as “irrelevant,” reasoning “the motive [to fabricate] would have to be to make up a thing in the first place, and I’m not hearing any reason why her poor relationship with the boyfriend would be a motive to make something up in the first place.” RP 190-91.

The trial court erred in excluding relevant defense evidence regarding H.K.’s and Jones’s relationship troubles. The evidence was relevant to their credibility. Both denied any cheating accusations. RP 24, 215, 264, 285. But H.K.’s coworker, without any apparent reason to lie, testified Jones accused H.K. of cheating on him with Smith—right around the time H.K. told her coworker she had been attacked by Smith. RP 280. Why, then, would H.K. and Jones deny the cheating accusation unless they were trying to hide something? As the complaining witness, H.K.’s credibility was “a fact of consequence to the action,” making impeachment evidence relevant and admissible. State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). Jones’s credibility mattered, too, where he accompanied H.K. to the police station for “support,” suggesting he believed her allegations against Smith. RP 258.

The court of appeals nevertheless rejected Smith's argument, concluding the evidence was "not relevant as impeachment evidence" and reasoning "Smith's argument that the fact that HK was thinking about leaving Jones because of his behavior gave her a motive to fabricate does not make sense." Opinion, 17. In so holding, the court erroneously substituted its own judgment for that of the jury. The jury should have been the one to assess whether proffered defense evidence of H.K.'s and Jones's possible motives to lie undercut their credibility.

In State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281 (2017), Division Three addressed the prosecution's argument that "weak or false evidence is not probative." The court recognized "if the evidence is weak or false, cross-examination will reveal this, and any sting caused by the admission of false evidence not only will be removed, but will invite prejudice to the defendant who introduced such evidence." The trial court should therefore "admit probative evidence, even if suspect, and allow it to be tested by cross-examination." Id. In this way, the Duarte Vela court explained, "the jury will retain its role as the trier of fact, and *it* will determine whether the evidence is weak or false." Id.

Evidence impeaching a key prosecutorial witness is indisputably relevant. See, e.g., State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) ("Where a case stands or falls on the jury's belief or disbelief of

essentially one witness, that witness' credibility or motive must be subject to close scrutiny." Smith's jury should have had the opportunity to assess the impeachment evidence suggesting H.K. had a motive to fabricate the allegations against Smith. Division Two's decision is potentially at odds with Duarte Vela and, furthermore, exclusion of relevant defense evidence raises a significant question of constitutional law. RAP 13.4(b)(2), (3).

3. Review is also warranted to determine when prosecutorial misconduct shifting the burden of proof in rebuttal rises to the level of flagrant and ill-intentioned misconduct.

H.K.'s credibility was the key issue at trial. A theme of the prosecution's closing and rebuttal arguments was that H.K. had no motive to fabricate and nothing to be gained from making up the allegations. At the end of rebuttal, the prosecution took this theme too far: "At the end of the day if you believe beyond a reasonable doubt that this happened, that the defendant sexually assaulted Hayley refusing to leave, *and nothing that defense counsel says shakes your abiding belief in that, your abiding belief in the charges, then that's it.*" RP 357 (emphasis added).

Though defense counsel did not object, Smith challenged the emphasized argument on appeal as misconduct. Br. of Appellant, 16-19. The argument improperly shifted the burden to defense counsel to supply a basis for reasonable doubt. The defense has no obligation to produce evidence and no obligation to articulate reasons to doubt the prosecution's

case. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015); State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). This Court has repeatedly held a prosecutor commits misconduct by misstating the reasonable doubt standard or shifting the burden of proof to the accused. See, e.g., State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

The court of appeals nevertheless held Smith waived the issue by failing to object: “If Smith had objected, the trial court could have simply referred the jury to that instruction and reminded the jury that argument inconsistent with the instructions should be disregarded.” Opinion, 19. This Court’s review is warranted to determine when misconduct that shifts the burden of proof in rebuttal argument rises to the level of flagrant and ill-intentioned misconduct that cannot be cured by court instruction. RAP 13.4(b)(3), (4); Lindsay, 180 Wn.2d at 443 (recognizing improper statements made during rebuttal “increase[es] their prejudicial effect”).

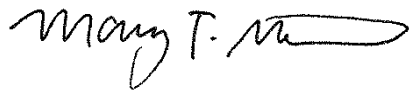
E. CONCLUSION

The published portion of Division Two's decision in Smith's case creates a new division split on whether burglary is an alternative means crime. This Court's review is necessary to resolve that split, and to definitively answer whether prosecutorial election in closing can cure an alternative means unanimity error. For these reasons, along with the additional reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for Smith to have a new trial.

DATED this 10th day of May, 2021.

Respectfully submitted,

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

April 14, 2021

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN SMITH,

Appellant.

No. 53443-6-II
Consolidated with
No. 54156-4-II

PART PUBLISHED OPINION

In the Matter of
the Personal Restraint of

MICHAEL ALLEN SMITH,

Petitioner.

MAXA, J. – Michael Smith appeals his convictions of residential burglary with sexual motivation and indecent liberties with forcible compulsion. These convictions arose from an incident in which Smith lawfully entered the home of an acquaintance, HK, but then sexually assaulted her.

Smith argues based on several Court of Appeals cases that residential burglary is an offense with two alternative means – unlawfully entering and unlawfully remaining in a residence – and that his constitutional right to a unanimous jury verdict was violated because there was insufficient evidence to support a finding that he unlawfully entered HK’s house. The State argues that we should not follow previous Court of Appeals cases and instead hold that residential burglary is not an alternative means offense, meaning that there is no unanimity issue. In the alternative, the State argues that Smith’s right to a unanimous verdict was not violated

because the State elected to rely only on the “remains unlawfully” means of residential burglary and sufficient evidence supported that means.

In the published portion of this opinion, we hold that (1) notwithstanding previous Court of Appeals cases, residential burglary is not an alternative means offense under the analytical framework of more recent Supreme Court alternative means cases; and (2) even if residential burglary was an alternative means offense, the right to a unanimous verdict was not violated because the prosecutor elected the “remains unlawfully” means and there was substantial evidence of that means. In the unpublished portion, we reject Smith’s other arguments as well as his claim in a personal restraint petition (PRP) but remand for the trial court to strike the interest accrual provision for legal financial obligations (LFOs).

Accordingly, we affirm Smith’s convictions, but we remand for the trial court to strike the interest accrual provision from his judgment and sentence.

FACTS

Background

HK lived in Vancouver with her boyfriend Corey Jones. Smith and Jones were coworkers and close friends. The two men would hang out almost daily and it was normal for Smith to show up at the home unannounced to visit Jones.

Around 8:00 PM on November 17, 2017, Smith visited HK and Jones’s house. Smith entered without knocking, which was common for him to do. HK was home alone. Smith appeared intoxicated and did not leave when he learned Jones was not there.

Smith playfully started to wrestle with HK. HK told Smith to stop, but he became angry and tackled her to the ground. While HK tried to fight Smith off, he straddled HK’s body, grabbed her breasts and vagina, and tried to penetrate her vagina with his fingers. HK screamed

for Smith to get off her and told him to get out of her house. Smith continued to grab at HK, but HK eventually broke free. HK again yelled at Smith to leave her house. Smith left.

The State charged Smith with residential burglary with sexual motivation and indecent liberties with forcible compulsion.

At trial, the trial court issued a to-convict instruction stating that the State was required to prove that Smith “entered or remained unlawfully in a dwelling.” Clerk’s Papers (CP) at 26. During closing argument, the prosecutor emphasized that the State was arguing only that Smith remained in HK’s home unlawfully, not that he entered unlawfully. The prosecutor noted that it was undisputed that Smith entered HK’s house lawfully, but once HK told him to leave he was required to leave.

The jury found Smith guilty of residential burglary with sexual motivation and indecent liberties with forcible compulsion. Smith appeals his convictions and the LFO interest accrual provision in his judgment and sentence.

ANALYSIS

The parties dispute whether residential burglary is an alternative means offense. We conclude that under the analytical framework of more recent Supreme Court cases, residential burglary is not an alternative means offense.

A. LEGAL PRINCIPLES

An alternative means offense is one where the statute defining the offense provides that the proscribed criminal conduct can be proved in multiple ways. *State v. Barboza-Cortes*, 194 Wn.2d 639, 643, 451 P.3d 707 (2019). Determining whether a statute provides alternative means of committing an offense is a matter of judicial interpretation. *Id.*

In general, a statute that describes an offense in terms of distinct acts will be interpreted as identifying an alternative means offense. *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015). But a statute that describes an offense in terms of closely related acts that are aspects of one type of conduct will be interpreted as not identifying an alternative means offense. *Id.*

The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct.

Id.

The alternative means determination relates to the required unanimous jury verdict under article I, section 21 of the Washington Constitution. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). For an alternative means offense, a defendant is entitled to a unanimous jury determination as to the specific means by which he or she committed the offense. *Id.* If the jury is not instructed to make an express statement of jury unanimity, the State must present sufficient evidence to support each of the alternative means. *Id.* But if the statute identifies only a single means of committing an offense, no unanimity instruction is required. *Barboza-Cortes*, 194 Wn.2d at 649.

B. RESIDENTIAL BURGLARY AS AN ALTERNATIVE MEANS OFFENSE

1. Statutory Language

The starting point of the alternative means analysis is the language of the criminal statute at issue. *Barboza-Cortes*, 194 Wn.2d at 643. RCW 9A.52.025(1) states, “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.” (Emphasis added.) The statutes defining first degree burglary and second degree burglary contain the same “enters or remains unlawfully” language. RCW 9A.52.020(1); RCW 9A.52.030(1).

9A.52.010(2) contains a definition of the term “enters or remains unlawfully”: “A person ‘enters or remains unlawfully’ in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.”

2. Existing Law

In *State v. Klimes*, Division One of this court addressed RCW 9A.52.030(1), which states that a person is guilty of second degree burglary if the person enters or remains unlawfully in a building other than a vehicle or a dwelling with intent to commit a crime. 117 Wn. App. 758, 764, 73 P.3d 416 (2003). The court concluded that “enters unlawfully” and “remains unlawfully” constituted alternative means of committing burglary. *Id.* at 768. The court noted that “ ‘enters unlawfully’ and ‘remains unlawfully’ are separate acts, and that a person can enter lawfully but remain unlawfully in some factual circumstances.” *Id.* at 767.

Division One has applied the rule that burglary is an alternative means offense without any additional analysis in multiple cases. *E.g.*, *State v. Sony*, 184 Wn. App. 496, 500, 337 P.3d 397 (2014); *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). This court applied this rule without analysis 15 years ago. *State v. Johnson*, 132 Wn. App. 400, 409-10, 132 P.3d 737 (2006). Division Three also has applied the rule without analysis. *State v. Cordero*, 170 Wn. App. 351, 366, 284 P.3d 773 (2012).

We give respectful consideration to the decisions of other divisions of the Court of Appeals, but we are not bound by those decisions. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 147-49, 154, 410 P.3d 1133 (2018). And we are not even bound by decisions by different panels within our own division. *In re Marriage of Snider*, 6 Wn. App. 2d 310, 315, 430 P.3d 726 (2018). Therefore, we are free to disregard previous Court of Appeals cases if, for example, we believe that the law has changed.

3. Development of Alternative Means Analysis

In recent years, the Supreme Court has refined the alternative means analysis in a series of cases, including: *State v. Peterson*, 168 Wn.2d 763, 768-69, 230 P.3d 588 (2010); *Owens*, 180 Wn.2d 90; *Sandholm*, 184 Wn.2d 726; and *Barboza-Cortes*, 194 Wn.2d 639. Significantly, these cases do not agree with the apparent basis for the holding in *Klimes* – that a description in the statute of separate acts necessarily establishes an alternative means offense. *See Klimes*, 117 Wn. App. at 765-67.

In *Peterson*, the court addressed whether the failure to register as a sex offender statute created an alternative means offense. 168 Wn.2d at 768-71. The statute described the offense as failing to register (1) after becoming homeless, (2) after moving between fixed residences within a county, and (3) after moving from one county to another. *Id.* at 770. The court held that the three different ways of violating the statute did not create an alternative means offense because they merely described the same single act: failure to register as a sex offender after moving. *Id.*

In *Owens*, the court addressed whether the statute that prohibited trafficking in stolen property created an alternative means offense. 180 Wn.2d at 96-99. The statute provided that a person was guilty of trafficking if he or she “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others.” RCW 9A.82.050(1). The court emphasized that this group of terms together “ ‘relate to different aspects of a single category of criminal conduct – facilitating or participating in the theft of property so that it can be sold.’ ” *Owens*, 180 Wn.2d at 98 (quoting *State v. Lindsay*, 177 Wn. App. 233, 241-42, 311 P.3d 61 (2013)). Similarly, the court stated that “these terms are merely different ways of committing one act, specifically stealing.” *Owens*, 180 Wn.2d at 99. Therefore, the court concluded that this list of terms constituted a single means, not alternative means. *Id.*

In *Sandholm*, the court addressed whether the statute that prohibited driving under the influence (DUI) created an alternative means offense. 184 Wn.2d at 732-36. The statute provided that a person is guilty of driving under the influence if he or she drives a vehicle and one of three subsections is satisfied: the person: “within two hours after driving, [has] an alcohol concentration of 0.08 or higher”; is “under the influence of or affected by intoxicating liquor or any drug”; or is “under the combined influence of or affected by intoxicating liquor and any drug.” Former RCW 46.61.502(1) (2008). The court stated:

[T]he DUI statute’s “affected by” clauses do not describe multiple, distinct types of conduct that can reasonably be interpreted as creating alternative means. Rather, those portions of the DUI statute contemplate only one type of conduct: driving a vehicle under the “influence of” or while “affected by” certain substances that may impair the driver. Former RCW 46.61.502 (2008). These statutory subsections describe facets of the same conduct, not distinct criminal acts. Whether the defendant is driving under the influence of alcohol, or drugs, or marijuana, or some combination thereof, the defendant’s *conduct* is the same – operating a vehicle while under the influence of certain substances.

Sandholm, 184 Wn.2d at 735.

In *Barboza-Cortes*, the court addressed whether the statute prohibiting the unlawful possession of a firearm created an alternative means offense. 194 Wn.2d at 643-46. The statute provided that a person is guilty of second degree possession of a firearm if the person “owns, has in his or her possession, or has in his or her control any firearm” after having been previously convicted of certain felonies. RCW 9.41.040(2)(a)(i)¹. The court stated, “While there may be subtle distinctions in aspects of ownership, possession, and control that may be material in other contexts, in the present circumstances they all describe ways of accessing guns.” *Barboza-Cortes*, 194 Wn.2d at 646. The terms were merely “ ‘nuances inhering in the same [prohibited]

¹ RCW 9.41.040 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

act’ – accessing guns” and “ ‘facets of the same criminal conduct.’ ” *Id.* (quoting *Sandholm*, 184 Wn.2d at 734). Therefore, the court held that this statute did not establish an alternative means crime. *Id.*²

This court applied the analytical framework set forth in those cases to the animal cruelty statute in *State v. Roy*, 12 Wn. App. 2d 968, 466 P.3d 1142, *review denied*, 196 Wn.2d 1004 (2020). That statute stated that a person was guilty of second degree animal cruelty if that person “[f]ails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention” and thereby causes unnecessary pain. RCW 16.52.207(2)(a). The court stated:

Here, shelter, rest, sanitation, space, and medical attention represent different aspects of the basic necessities for an animal’s comfortable life. They are not independent, essential elements of the crime. Instead, they are “minor nuances inhering in the same act” and “facets of the same criminal conduct.” *Sandholm*, 184 Wn.2d at 734, 364 P.3d 87. *Read together*, the listed terms criminalize failing to provide an animal with basic necessities.

Roy, 12 Wn. App. 2d at 975. The court concluded that there was “a single means of committing second degree animal cruelty: failing to provide an animal with the basic necessities of life and thereby causing unnecessary or unjustifiable physical pain.” *Id.*

4. Updated Analysis

The State argues that the phrase “enters or remains unlawfully” in RCW 9A.52.025(1) does not create an alternative means offense. We agree.

In *Klimes*, the court suggested that entering and remaining unlawfully in a building were alternative means because they were “separate acts.” 117 Wn. App. at 767. But under *Owens*, *Sandholm*, and *Barboza-Cortes*, that is not the relevant inquiry.

² Significantly, the court disapproved of this court’s decision in *State v. Holt*, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), which stated without analysis that second degree unlawful possession of a firearm was an alternative means offense. *Barboza-Cortes*, 194 Wn.2d at 646 n.2.

In each of those cases, the applicable statutes described separate acts. *Barboza-Cortes*, 194 Wn.2d at 646 (owning, possessing, and controlling a firearm); *Sandholm*, 184 Wn.2d at 735 (driving while under the influence of three different kinds of intoxicating substances); *Owens*, 180 Wn.2d at 98 (multiple ways of assisting in the theft of property). The Supreme Court has made it clear that an alternative means offense is not created if those separate acts simply represent different aspects of a single type of criminal conduct. *E.g.*, *Barboza-Cortes*, 194 Wn.2d at 646. The focus is on the actual conduct that the applicable statute prohibits. *Id.* (accessing guns); *Sandholm*, 184 Wn.2d at 735 (operating a vehicle while under the influence of certain substances); *Owens*, 180 Wn.2d at 98 (facilitating or participating in the theft of property).

Here, RCW 9A.52.025(1) identifies two separate acts: entering and remaining in a dwelling. But the focus of the statute is the unlawfulness of the defendant's conduct. The actual conduct the statute prohibits is being present in a dwelling *unlawfully*. Entering and remaining are merely “ ‘nuances inhering in the same [prohibited] act’ ” and “ ‘facets of the same criminal conduct.’ ” *Barboza-Cortes*, 194 Wn.2d at 646 (quoting *Sandholm*, 184 Wn.2d at 734).

This conclusion is consistent with the language of RCW 9A.52.025(1). A person is guilty of residential burglary if the person “enters or remains unlawfully.” RCW 9A.52.025(1). This language treats entering and remaining as a single unit, suggesting that they be read together. If the legislature had intended to create an alternative means statute, it presumably would have changed the language to “enters *unlawfully* or remains unlawfully.” *See Owens*, 180 Wn.2d at 97-98 (relying on the placement of the word “knowingly” in the applicable statute to support a finding of no alternative means).

Similarly, RCW 9A.52.010(2) does not contain separate definitions for “enters unlawfully” and “remains unlawfully.” It includes those two acts under a definition of a single term: “enters or remains unlawfully.” RCW 9A.52.010(2).

We conclude that RCW 9A.52.025 identifies a single means of committing residential burglary: entering or remaining unlawfully in a dwelling. Therefore, the State was not required to present sufficient evidence to support both unlawfully entering and unlawfully remaining in HK’s home. And because it is undisputed that the State provided sufficient evidence that Smith remained unlawfully in HK’s home, we reject Smith’s unanimity argument.

C. ELECTION OF MEANS

The State alternatively argues that even if residential burglary was an alternative means offense, Smith’s right to a unanimous verdict was not violated here because the State elected to rely only on the “remains unlawfully” means of residential burglary and sufficient evidence supported that means. Smith argues that election does not apply in the context of alternative means offenses. We agree with the State.

1. Legal Principles

The State relies on *State v. Kitchen*, which stated that to avoid unanimity issues “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, *either the State must tell the jury which act to rely on in its deliberations* or the court must instruct the jury to agree on a specific criminal act.” 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (emphasis added). However, *Kitchen* addressed the situation where multiple acts could constitute the charged offense, not where the offense could be committed by alternative means. *See id.* at 410-11.

Smith argues that alternative means cases are different because those means are incorporated in the to-convict instruction. But if election can prevent a unanimity problem in a multiple acts case, we see no reason that election also should not prevent a unanimity problem in an alternative means case.

The State also relies on *State v. Woodlyn*, where the court stated that when sufficient evidence does not support all of the alternative means, “a reviewing court is compelled to reverse a general verdict unless it can ‘rule out the possibility the jury relied on a charge unsupported by sufficient evidence.’ ” 188 Wn.2d 157, 165, 392 P.3d 1062 (2017) (quoting *State v. Wright*, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)). However, *Woodlyn* did not expressly address election by the State.

Smith argues that *Woodlyn* requires some type of formal action by the trial court before a reviewing court can rule out the possibility that the jury relied on some other means. He relies on the statement in *Woodlyn* that “[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative.” *Id.* at 166. But the court made this statement in the context of holding that a complete lack of evidence regarding an unsupported means does not solve a unanimity problem. *Id.* at 165-67. And a clear election by the State that it was relying on only one of the alternative means would allow a reviewing court to rule out the possibility that the jury relied on some other means.

Although the Supreme Court has not addressed election in the alternative means context, Court of Appeals cases have recognized that when sufficient evidence does not support one of the alternatives, the right to a unanimous verdict is implicated only if the State does not elect the means on which it is relying. In *State v. Gonzales*, Division One of this court stated this principle after recognizing previous cases holding that second degree burglary was an alternative

means crime: “If the evidence is insufficient to support both means, *either the prosecutor must elect the means supported by the evidence*, or the court must instruct the jury to rely on that means during deliberations.” 133 Wn. App. 236, 243, 148 P.3d 1046 (2006) (emphasis added).

The court made a similar statement in *Klimes*. 117 Wn. App. at 770.

Division Three also has acknowledged this role for election in the context of alternative means offenses:

When the State fails to elect between alternative means, instructions that do not require unanimity on the same means of committing the criminal act are not required if there is substantial evidence supporting each alternative means presented to the jury.

State v. Boiko, 131 Wn. App. 595, 599, 128 P.3d 143 (2006) (emphasis added).

We conclude that if the State expressly elects to rely on only one alternative means to obtain a conviction, the State need not present sufficient evidence of all alternative means in order to avoid violating the defendant’s right to a unanimous verdict.³

2. Analysis

An election by the State need not be formally pled or incorporated into the information. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015). As long as the election clearly identifies the particular acts on which charges are based, verbally telling the jury of the election during closing argument is sufficient. *Id.* Whether a sufficient election has been made depends upon the facts of each particular case.

Here, the prosecutor made a clear election as to the acts constituting residential burglary. During closing argument, the prosecutor specifically stated:

The first element is that on November 17, 2017 the defendant entered or remained unlawfully in her house. *And here the issue is that he remained unlawfully. It*

³ Despite this holding, we emphasize that the better course of action is for the State to remove the alternative means that it is not relying on from the to-convict instruction.

wasn't his entry that was unlawful. He'd come over like that before. But it was his remaining after she told him to leave. That's the part that's unlawful.

The second element is that the entering or remaining was with the intent to commit a crime against a person or property inside.

So remaining unlawfully, your instructions 13 tells you about that. When someone is not invited -- not invited to stay, that is enough. The defendant was not invited. She repeatedly told him to leave. He was remaining unlawfully.

Report of Proceedings (RP) at 330-31 (emphasis added).

In addition, during rebuttal the prosecutor stated:

Now, Defense raises this issue of residential burglary that he came in, and she offered him a drink. *That's undisputed. That's all good and fine.* But guess what, whether she invited him in with open arms or he just walked right in, it doesn't matter. She gets to revoke his invitation at any point.

He doesn't just get to stay because he got in there successfully, legally initially. The law recognizes that, that people might be invited into a home, things go sideways, and the law protects people. People have the right to be safe in their homes. [HK] had the right to have this safe space, to tell the defendant to leave, and the law required him to leave.

RP at 355 (emphasis added).

We conclude that the prosecutor's closing and rebuttal arguments expressly elected unlawful remaining as the means for which the jury should convict Smith. As stated above, it is undisputed that the State provided sufficient evidence that Smith remained unlawfully in HK's home. Because the State elected the "remains unlawfully" means and that particular means is supported by sufficient evidence, we hold that Smith's right to a unanimous verdict was not violated even if residential burglary was an alternative means offense.

CONCLUSION

We affirm Smith's convictions, but we remand for the trial court to strike the interest accrual provision for nonrestitution LFOs from Smith's judgment and sentence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion, we hold that (1) the trial court did not violate Smith's constitutional right to present a defense by excluding evidence of HK's relationship troubles with her boyfriend because that evidence was irrelevant and he was not prevented from arguing his theory of the case, (2) Smith waived his prosecutorial misconduct claim by failing to object when an instruction would have cured any misconduct, (3) the trial court properly exercised its discretion under the antimerger statute to punish both offenses regardless of whether they constituted the same criminal conduct, (4) Smith's PRP claim has no merit, and (5) the interest accrual provision for nonrestitution LFOs should be stricken.

ADDITIONAL FACTS

Trial

At trial, HK testified to the events described in the published portion of this opinion above. In addition, she described how after Smith left her house he returned and yelled at her while she was in the bathtub.

On cross examination, Smith sought to elicit testimony from HK that she was thinking about leaving her relationship with Jones because he was partying and not coming home. Smith argued that this testimony would be relevant support for a motive for HK to fabricate her allegations against Smith because of the possibility that Jones would believe that the incident with Smith was some type of cheating encounter. The trial court ruled that the evidence was inadmissible, stating that the evidence had no probative value regarding HK's motive or potential bias.

Andrew Stamper, HK's work colleague, also testified. Stamper testified that after the incident HK appeared emotionally distraught and called out sick a few times. He also testified that HK received a distressing telephone call from Jones in which Jones was upset with her. On cross examination, Smith sought to elicit testimony from Stamper that Jones had accused HK of cheating on him. The court allowed the line of questioning because the State had opened the door. Stamper then testified that, during the phone call, Jones had accused HK of cheating on him.

Smith did not testify. However, he presented the testimony of Andrew Luna, who had spent the day with Smith. Luna testified that Smith dropped him off at his house at around 8:00 PM and that Smith planned to stop by Jones's house to check on him.

Closing Argument

During her rebuttal argument, the prosecutor stated:

At the end of the day if you believe beyond a reasonable doubt that this happened, that the defendant sexually assaulted [HK] refusing to leave, *and nothing that defense counsel says shakes your abiding belief in that, your abiding belief in the charges, then that's it.*

RP at 357 (emphasis added). Smith did not object to this statement.

Sentencing

At sentencing, Smith argued that his convictions for indecent liberties by forcible compulsion and residential burglary with sexual motivation encompassed the same criminal conduct and asked the court to exercise its discretion under the antimerger statute by merging the convictions for the purpose of his offender score. The State urged the court to apply the antimerger statute, RCW 9A.52.050, to Smith's convictions. The trial court in the exercise of its discretion declined to merge the convictions under the antimerger statute. The court noted that there actually were two instances of burglary – when Smith remained after being told to leave

and when he came back into HK's house when she was in the bathtub. Therefore, the court counted each conviction separately in calculating Smith's offender score.

As part of the sentence, the court imposed mandatory LFOs. The judgment and sentence provided that Smith's LFOs would bear interest until paid in full.

Smith's PRP

In January 2020, Smith filed a PRP. This court consolidated Smith's PRP with his direct appeal.

ANALYSIS

A. ADMISSIBILITY OF RELATIONSHIP EVIDENCE

Smith argues that the trial court violated his constitutional right to present a defense by excluding evidence of HK's relationship troubles with Jones. We disagree.

1. Legal Principles

A criminal defendant has a constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010). This right to present a defense derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Wade*, 186 Wn. App. 749, 763-64, 346 P.3d 838 (2015). There also is a fundamental due process right to present a defense under the Fourteenth Amendment. *State v. Lizarraga*, 191 Wn. App. 530, 551-52, 364 P.3d 810 (2015).

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; *see also State v. Farnsworth*, 185 Wn.2d 768, 782-83, 374 P.3d 1152 (2016). Evidence that is not relevant is inadmissible. ER 402. "Impeachment evidence is relevant if (1) it tends to cast doubt on the credibility of the person being impeached

and (2) the credibility of the person being impeached is a fact of consequence to the action.” *State v. Horn*, 3 Wn. App. 2d 302, 313, 415 P.3d 1225 (2018).

In evaluating whether the exclusion of evidence violates the defendant’s constitutional right to present a defense, “the State’s interest in excluding evidence must be balanced against the defendant’s need for the information sought to be admitted.” *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019). In *Arndt*, the court found no violation of the right to present a defense when the evidence at issue was not excluded entirely and the defendant “was able to present relevant evidence supporting her central defense theory.” *Id.* at 813-14.

We review a trial court’s evidentiary rulings for abuse of discretion. *Id.* at 797-98. We review de novo whether an evidentiary ruling violated the defendant’s right to present a defense. *Id.*

2. Analysis

At trial, Smith sought to elicit testimony from HK that she was thinking about leaving her relationship with Jones because he was partying and not coming home. Smith argues that this evidence was relevant to show a motive for HK to fabricate her allegations against him to avoid further conflict with Jones or because she knew that Jones would accuse her of cheating with Smith.

However, Smith’s argument that the fact that HK was thinking about leaving Jones because of his behavior gave her a motive to fabricate does not make sense. Smith does not explain why HK’s concerns about her relationship with Jones would cause her to fabricate allegations against Smith. The evidence Smith sought to elicit simply is not relevant as impeachment evidence.

Smith references Stamper’s testimony that Jones accused HK of cheating. However, Smith’s offer of proof did not include asking HK whether Jones had accused her of cheating. In any event, evidence regarding HK’s relationship troubles were not excluded completely – Jones’s accusation of cheating was admitted into evidence through Stamper. Therefore, Smith was free to argue the fabrication theory he presents on appeal.

We conclude that the trial court did not abuse its discretion in finding that the proffered evidence regarding HK’s relationship troubles was not relevant. In addition, we find no constitutional violation. Accordingly, we hold that the trial court did not violate Smith’s constitutional right to present a defense.

B. PROSECUTORIAL MISCONDUCT

Smith argues that the prosecutor engaged in misconduct during rebuttal by improperly mischaracterizing the reasonable doubt standard. We hold that Smith waived this argument by failing to object at trial.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In assessing whether a prosecutor’s closing argument was improper, we recognize that the prosecutor has “wide latitude to argue reasonable inferences from the evidence.” *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

When the defendant failed to object at trial, the defendant is deemed to have waived any error unless the prosecutor’s misconduct was “so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The defendant must show that (1) no curative instruction would have eliminated the

prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.* at 761.

2. Analysis

Smith argues that this statement undermined the presumption of innocence and improperly shifted the burden of proof to the defense to supply a basis for reasonable doubt. However, Smith failed to object to the prosecutor's statement. Therefore, the question is whether the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61.

Smith argues that the prosecutor's argument could not have been cured by a proper instruction because it was made at the end of the State's rebuttal and immediately before jury deliberations.⁴ But the trial court properly instructed the jury on the presumption of innocence and reasonable doubt standard before closing argument. If Smith had objected, the trial court could have simply referred the jury to that instruction and reminded the jury that argument inconsistent with the instructions should be disregarded. Also, we note that the prosecutor properly articulated the burden of proof on multiple occasions elsewhere in her closing argument.

Accordingly, we hold that Smith waived his prosecutorial misconduct argument.

C. SAME CRIMINAL CONDUCT AND ANTIMERGER STATUTE

Smith argues that the trial court erred in concluding that his burglary with sexual motivation and indecent liberties convictions did not constitute the same criminal conduct. We disagree.

⁴ Smith also argues that the resulting prejudice was compounded by the trial court's exclusion of evidence of HK's relationship troubles with Jones. But we hold that the trial court did not err in excluding that evidence.

1. Legal Principles

In calculating an offender score, the trial court counts a defendant's current and prior convictions. RCW 9.94A.589(1)(a). The offender score for a defendant's current offense includes all other current offenses unless "the court enters a finding that some or all of the current offenses encompass the same criminal conduct." *Id.* "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* We do not disturb a sentencing court's determination of same criminal conduct unless it abuses its discretion or misapplies the law. *State v. Aldana Graciano*, 176 Wn.2d 531, 533, 295 P.3d 219 (2013).

However, the burglary antimerger statute permits courts to punish an offender for both burglary and offenses committed during the commission of the burglary. RCW 9A.52.050. This statute gives a sentencing judge discretion to punish for burglary even where burglary and an additional offense constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

2. Analysis

Smith argues that the trial court's ruling that the burglary and indecent liberties convictions did not constitute the same criminal conduct was the basis for the court's offender score determination. However, the trial court did not make a same criminal conduct determination. A fair reading of the court's oral ruling compels the conclusion that the court decided to sentence Smith based on the antimerger statute, not on a finding that the two convictions did not constitute the same criminal conduct.

The State argued that the court should exercise its discretion to apply the antimerger statute. Smith argued that the court should exercise its discretion not to apply the antimerger statute. In response, the court stated:

Well, I did have a chance to review the [antimerger] statute and the cases that were indicated by counsel. It is discretionary with the Court in situations like this where both the substantive crime and the burglary are charged. And looking closely at the information and . . . the testimony that I heard at the time of the trial, *it appears to me that it's appropriate that the matters not merge*, and they be treated as separate criminal conduct.

RP at 376.

In other words, the court stated that the two offenses should be treated as separate criminal conduct under the antimerger statute, not that the offenses did not constitute the same criminal conduct. Therefore, we reject Smith's same criminal conduct argument.

D. PRP CLAIM

In his PRP, Smith argues that location-tracking information from the Google Maps history in his personal cell phone constitutes newly discovered evidence that undermines the State's theory that he was at HK's home at the time she said he arrived and attacked her. We disagree.

To prevail on a claim of newly discovered evidence, a PRP must show evidence that "(1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching." *In re Pers. Restraint of Fero*, 190 Wn.2d 1, 15, 409 P.3d 214 (2018) (plurality opinion). The absence of any one of these five factors is fatal to the claim. *Id.*

Here, Smith's Google Maps history is not newly discovered evidence. It was available on Smith's personal cell phone at all times. Smith fails to demonstrate how or why his personal

phone was unavailable before trial. He details how he discovered the information after his home was burglarized and the phone was taken from the home. However, he does not explain why this information could not have been discovered earlier with due diligence. Therefore, we deny Smith's PRP.


E. INTEREST ACCRUAL PROVISION FOR LFOs

Smith argues, and the State concedes, that we should strike the interest accrual provision for nonrestitution LFOs imposed in his judgment and sentence. We agree.

RCW 10.82.090(1) states that no interest will accrue on nonrestitution LFOs after June 7, 2018. But the court nevertheless imposed an interest accrual provision for nonrestitution LFOs. Therefore, we remand for the trial court to strike the interest accrual provision.

CONCLUSION

We affirm Smith's convictions, but we remand for the trial court to strike the interest accrual provision for nonrestitution LFOs from Smith's judgment and sentence.

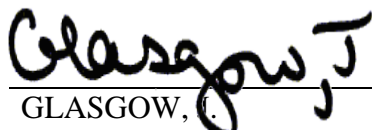


MAXA, J.

We concur:



SUTTON, A.C.J.



GLASGOW, J.

NIELSEN KOCH P.L.L.C.

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