

64187-5

64187-5

NO. 64187-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW BRANCH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was arrested in his apartment on a warrant whereupon officers discovered a large-scale identify theft, forgery, counterfeiting operation, along with drugs and multiple stolen computers. Based on these facts, the defendant raises the following issues:

1. Could a rational trier of fact have found that the defendant "possessed" stolen means of identification, stolen property, and controlled substances?

2. Could a rational trier of fact have found that the defendant intended to use the stolen means of identification to commit a crime?

3. Could a rational trier of fact have found that the defendant knew the multiple computers found in his apartment were stolen?

4. Should this Court reject the defendant's claim that the prosecutor committed misconduct during closing argument?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted by a jury of one count of Possession of a Controlled Substance (Count XVIII--crack cocaine,

crystal meth, and methadone), one count of First-Degree Possession of Stolen Property (Count XVII--multiple computers), and 16 counts of Second-Degree Identity Theft (Counts I-XVI--each involving a separate victim). CP 37-47, 57-74. The defendant received a standard range sentence of 52 months on counts I through XVII, each count concurrent and concurrent to a standard range sentence of 24 months on count XVIII. CP 147.

2. SUBSTANTIVE FACTS

In the early hours of December 1, 2008, as part of a criminal investigation, officers were dispatched to 9030 Greenwood Avenue North, apartment 4, in an attempt to locate the defendant, Andrew Branch. 3RP 16, 18. The officers were familiar with the defendant from prior contacts and had previously attempted to serve a no-contact order on him at this same address, an address that was listed as his residence per the no-contact order court documents. 3RP 19-20. Although the lights were on inside the apartment, nobody answered the door and the officers left. 3RP 22.

Shortly thereafter, the officers discovered that the defendant was on active warrant status with the Department of Corrections and that the last time he was booked into jail, the defendant had

listed apartment 4 as his residence. 3RP 23-24. Approximately two hours later (2:30 a.m.) that same morning, the officers received word from a downstairs neighbor of the defendant's, that he had returned to his apartment. 3RP 24. Officers then went to the apartment to serve the arrest warrant. 3RP 25.

Although the officers could hear voices coming from inside the apartment, when they knocked and announced their presence, nobody answered the door. 3RP 25-26. The officers then forced entry into the one-bedroom apartment. 3RP 26. When the officers entered the apartment, the defendant was in the bedroom and attempted to escape out a back window. 3RP 29. However, an officer stationed outside was able to convince the defendant not to jump from the window, and he was placed under arrest. 3RP 29.

In clearing the apartment, the officers observed a computer, still on, in the bedroom with the screen showing counterfeit U.S. currency. 3RP 31. There were also sheets of counterfeit currency in plain sight, two counterfeit \$100 bills printed on white paper in plain sight, along with various narcotics (crack cocaine, crystal meth and methadone) and drug paraphernalia on the bed and headboard of the bed. 3RP 31-32, 35; 5RP 16. In addition, stacks of mail addressed to persons other than the defendant were

scattered throughout the entire apartment. 3RP 40, 49, 55; 4RP 14. The officers then secured the scene, exited the apartment, and obtained a search warrant based on the observations of what appeared to be illegal activity going on in the apartment. 3RP 32; 4RP 8-9. Later that day, officers executed the search warrant.

Recovered from a lamp stand/file cabinet in the living room were a large number of personal documents belonging to the defendant, including but not limited to, an envelope addressed to the defendant with his Monroe Department of Corrections address, a copy of a fax addressed to the defendant's corrections officer, a department of corrections envelope addressed to the defendant with a document listing his discharge date as September 16, a business card for the defendant's corrections officer, a prescription in the defendant's name, and a DSHS application form of the defendant's. 4RP 60-64. Also recovered from the lamp stand/file cabinet was an IRS W-2 form belonging to Jeffrey Grace. Jeffrey Grace suffers from cerebral palsy. 4RP 35. His ex-caregiver was a woman named Paula Lopez--a girlfriend of the defendant's. 4RP 29, 38, 157; 7RP 139.

Also recovered from the living room were a large number of checks and financial documents belonging to persons other than the defendant. These documents included, but were not limited to, a check on the account of Philip Chesterfield, a check on the account of David Swalwell and Jennifer Love, a number of checks on the account of Ridgeline Development, a credit card statement for Jason Albers, a check from Northwest Woman's Health Care payable to Cerise Brown,¹ a check from Food Services of America payable to Cerise Brown, and a check from Food Services of America paid to Anna Lopez. 4RP 44, 46-47.

Also recovered in the living room was a quantity of "check stock," the paper checks are printed on. 4RP 46. There were multiple checks printed on some of the check stock paper, including multiple checks drawn on the account of Ridgeline Development and payable to Cerise Brown and multiple checks drawn on the account of Jubilee Fisheries Company payable to Cerise Brown or Kenneth Miller. 4RP 46, 48-51. Located inside the living room entertainment center was a shoebox full of financial documents belonging to Philip and Barbara McNassar and their son, Connor McNassar. 4RP 69-70. These were just some of the volumes of

¹ Brown is another of the defendant's girlfriends. 4RP 150; 7RP 137-38.

stolen identification materials and forged checks found in the living room. See 4RP 53-59.

In the bedroom was a black nylon bag containing multiple stolen checkbooks. 4RP 70. There were also a number of other checkbooks found throughout the bedroom. 5RP 100. In total, there were approximately 35 checkbooks found in the bedroom. 4RP 71. The ones introduced into evidence included checkbooks belonging to Hatfield & Dawson Consulting, Karim Lessard, Jay Potts, Connor McNassar, Kenneth Shovlin and Philip Chesterfield. 4RP 72-74.

Also recovered from the bedroom were a number of forged checks directly linked to the defendant. Specifically, there was a page of printed checks drawn on a Washington Mutual account with the defendant's name, a page of checks drawn on a Bank of America account with the defendant's name, another page of printed checks on the Washington Mutual account with the defendant's name but with slight variations to the checks, a Department of Corrections Identification card in the defendant's name, a Washington Identification card in the defendant's name and a debit MasterCard in the defendant's name. 4RP 80, 83. There were also multiple financial papers belonging to persons

other than the defendant and note pads with personal identification information of persons other than the defendant written on them. 4RP 80, 83-84.

In the kitchen, hallway and closet, officers retrieved a large number of driver's licenses and other cards containing personal identification belonging to individuals other than the defendant. 4RP 86-89. Additionally, sitting on the kitchen table was a stolen Dell laptop computer belonging to H & D Properties. 4RP 89-90. The hard drive had been removed from the computer and the monitor broken. 4RP 89. Sitting in the living room was a stolen Dell Optiplex computer belonging to Brian Williams. 4RP 91-92. And in the bedroom were three printers, including a stolen Hewlett Packard LaserJet printer belonging to H & D Properties. 4RP 92-93. Two custom tower computers belonging to H & D Properties were also found, one in the bedroom and one in the living room. 4RP 93-97.

A forensic computer search was done on the stolen custom computer towers. 4RP 99; 6RP 16. On the computer from the bedroom, there was a video clip, shot in the bedroom of the apartment, showing the defendant engaged in a "personal matter" with two other women. 4RP 99; 6RP 25-28. The computers also

contained evidence and programs showing that they had been used to print counterfeit currency, create checks and access gambling sites in the defendant's name. 6RP 22-28.

Physical evidence of identity theft was admitted for only about 5% of the number of persons for which financial information was recovered in the apartment. 4RP 100. In total, it was estimated that detectives recovered from the defendant's apartment financial information documents of various types for some 200 individuals and 20 businesses. 4RP 101-02. In addition, there were a total of nine computers and a number of hard drives recovered from the apartment. 4RP 146. Each of the victims on the charged counts testified that at some point in the prior year either their home, business or car had been broken into and documents, checkbooks, and/or computer equipment had been stolen.

The defendant did not testify. He did call Cerise Brown as a witness. She claimed that Anna Lopez was the renter of the apartment from October through December, and that the defendant merely visited the apartment at times to help Ms. Lopez with her on-line boutique business. 7RP 100-04. She insisted that the defendant did not have a key to the apartment. 7RP 125.

In discussing the evidence implicating herself in the identity theft/forgery operation, Brown claimed that she had never seen any of the 10 checks with her name on them that were recovered from the apartment and she implied that Lopez must have created the checks without her knowledge. 7RP 127-28, 141-42. She did admit that she used to date the defendant but claimed they were no longer an item. 7RP 138. In rebuttal, the State introduced evidence that in the few months pending trial, the defendant called Brown over 100 times. 8RP 9-12.

The defendant's downstairs neighbor also testified and stated that it was indeed the defendant who lived in apartment 4, although he had told her his last name was Love. 7RP 10-11. The landlord for the apartments testified that he rented apartment 4 to the defendant sometime in September or October of 2008 and that the defendant paid him in cash each month until his arrest. 7RP 37-39, 47-48. The landlord testified that since the defendant's arrest, Cerise Brown was the current renter of the apartment. 7RP 37.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THERE WAS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT ON ALL CHARGES.

The defendant claims there was insufficient evidence for *any* rational trier of fact to have found that he was in actual or constructive possession of any illegal items, or that he knew any of the items in his apartment were stolen, or that he was in any way involved in identity theft. This claim must be rejected. The defendant's argument ignores the standard of review on appeal and the plethora of evidence clearly showing the defendant was directly involved in a large-scale identify theft/forgery operation.

a. The State Had To Prove Possession, Either Actual Or Constructive Possession.

The defendant first contends that the State was required to-- and limited to--proving he "actually possessed," instead of "constructively possessed," all of the items he was accused of illegally possessing. He claims the State was limited to proving "actual possession" because the jury instruction defining possession--an instruction that included the definition for "constructive possession" (CP 121, instruction 44), pertained only

to Count XVIII, the possession of a controlled substance charge.

This assertion is incorrect for a number of reasons.

The jury was provided with the relevant portion of Washington Pattern Jury Instruction 50.03, titled "Possession-- Definition." As provided, the jury was instructed as follows on both actual and constructive possession:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

CP 121 (Instruction 44); WPIC 50.03. There is nothing in this instruction specifically, or in any of the other instructions provided to the jury that limited the application of instruction 44, or the doctrine of constructive possession, to any one specific count. See CP 75-143.

Instead of relying on the instruction to support his assertion, the defendant points to a comment in the WPIC's "note on use." For an unknown reason, the "note on use" to WPIC 50.03 states that the instruction should be used only for controlled substance or

legend drug cases. However, it is clear from case law and the WPIC's that this limitation is not binding, nor is it appropriate--and it certainly was not read to the jury here.

Besides WPIC 50.03 (and WPIC 133.52²), there is no general WPIC definitional instruction on actual and constructive possession. When such an instruction is needed--as for all possessory crimes, the WPIC committee notes that the trial court can use WPIC 50.03. For example, in the "note on use" for the possession of stolen property instructions, the committee includes the following suggestion on use:

To convict a person of possession of stolen property, the State is required to prove. . . actual or constructive possession of the property that has been stolen and actual or constructive knowledge that the property has been stolen. *State v. Plank*, 46 Wn. App. 728, 731 P.2d 1170 (1987) . . . Constructive possession in possession of stolen property cases has the same meaning as it has in controlled substance cases—that the person has dominion and control over the goods. See *State v. Plank*, 46 Wn. App. at 731–33 (treating the definition from controlled substances cases as applying to stolen property cases).

² WPIC 133.52 pertains to the possession of a weapon. The committee notes that WPIC 133.52 "parallels" WPIC 50.03.

11A WAPRAC WPIC 77.02 at 161.³ While the court here certainly could have modified the language of the instruction, there is nothing in any of the instructions that limited the application of instruction 44, and the doctrine of constructive possession, to one specific count--and this is entirely consistent with how the parties argued the case below.

In addition, even if instruction 44 did not apply to the other possessory charges, the definition of theft that was provided here (CP 119, instruction 42), includes the language that the exerting of unauthorized control over the property of another constitutes theft. This definition would cover the doctrine of constructive possession as argued here.

And finally, while the law of the case doctrine does provide that the jury instructions become the law of the case when not objected to, there is nothing in the instructions here that limited the definition of possession to an incorrect statement of the law as the defendant argues. See State v. Salas, 127 Wn.2d 173, 182,

³ Considering the large number of possessory crimes wherein the term possession may need to be defined, there appears to be no discernable reason why there is not a single general WPIC instruction defining possession or why there is a WPIC note suggesting that the use of WPIC 50.03 be limited to certain drug possession cases. Clearly this is not consistent with court practice.

897 P.2d 1246 (1995) (if a party does not object to the proposed jury instructions, the instructions become the law of the case).

Due process requires that elements of a crime must be in the "to convict" instruction. State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002). When an element is added to an offense without objection, the State assumes the burden of proving the otherwise unnecessary element of the offense. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). At the same time, there is no constitutional requirement that definitional instructions be provided to the jury. State v. Scott, 110 Wn.2d 682, 689-91, 757 P.2d 492 (1988) ("we find nothing in the constitution, as interpreted in the cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined"); State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1987) (the term "dominion and control" need not be defined).

The defendant does not dispute that the definition of possession includes both actual and constructive possession of an item. However, the defendant seeks to create a new application for the "law of the case doctrine." Specifically, he argues that when a term is not defined for the jury, a reviewing court is required to limit the scope of the term to a definition that is an incorrect statement of

the law. There is simply no support for this proposition. If the defendant believed instruction 44 did not pertain to the other charges, or that a specific definition needed to be provided regarding the other count, he could have requested that one be provided. However, there is nothing in the instructions here that limited the scope of the term "possession" to only actual possession, and nothing that changes the standard of review on appeal.

b. The State Proved Constructive Possession.

Evidence is sufficient to support a conviction if viewed in the light most favorable to the State, the evidence permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced."

State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992)).

All of the charges here were based on the defendant or an accomplice⁴ having possession of the specific items--the means of identifications, checks, and financial documents, the computers and the controlled substances. CP 37-47. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. State v. Murphy, 98 Wn. App. 42, 988 P.2d 1018 (1999), rev. denied, 140 Wn.2d 1018 (2000). Constructive possession occurs where there is no actual physical possession but there is dominion and control over the item. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

⁴ A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime. The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. 11 WAPRAC WPIC 10.51; RCW 9A.08.020.

Whether a defendant has dominion and control over an item is not based on any one particular fact but on "the cumulative effect of a number of factors." State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Factors may include a person's paying of rent, possession of keys, presence at the location, personal possessions on the premises, knowledge of the presence of the contraband, mail listing the address as the person's residence and any other indicia showing dominion and control. Id. In reviewing whether these factors exist and whether the factors support the jury's finding, the Supreme Court has stated that the court must review "the record, keeping in mind the rule that when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." Partin, 88 Wn.2d at 906-07.

While the defendant quotes single propositions from a variety of cases, such as "mere presence is not sufficient," the State did not rely on any single factor. Instead, there is a plethora of evidence the defendant was in possession of an apartment that he used as a large-scale identify theft/forgery operation.

The landlord testified the defendant rented the apartment and paid in cash. A neighbor verified the defendant lived in apartment 4. He had personal documents in various locations in the apartment and was arrested inside. Further, his name was on many of the forged printed checks, he had used the computers in the apartment, including having a very personal video of himself on the computer showing him in the very bedroom he now claims no evidence supports he had control over. And virtually all of the illegally possessed items were in plain sight throughout the apartment he rented and possessed.

c. The State Proved That The Defendant Or An Accomplice Intended To Commit A Crime With The Stolen Means Of Identification.

The defendant contends that no rational trier of fact could have found the defendant or an accomplice intended to commit a crime with the stolen means of identification in his apartment--an element of the crime of identify theft. This claim ignores the evidence and must be rejected.

As charged here, to convict the defendant of identity theft, the State was required to prove that he knowingly obtained, possessed, used, or transferred a means of identification or

financial information of a particular real person with the intent to commit, or to aid or abet, any crime. See 89-104; RCW 9.35.020(1). The defendant claims that proof of his possession of the stolen means of identification alone is insufficient to prove he intended to commit a crime with the stolen means of identification. However, whether an apartment filled with stolen checks, bank statements and other financial documents is enough to prove intent to commit a crime with the stolen items is irrelevant here. There was much more evidence proving the defendant's intent to commit a crime with the stolen identities.

First and foremost, the defendant possessed fraudulent and stolen checks made out payable to him. The defendant makes no mention of this fact in his argument. The defendant also obtained check writing software and check paper stock. Further, virtually every single victim testified that their stolen means of identification had been used for further criminal activity, either fraudulently manufactured checks, forged checks, or attempts to open accounts using the stolen identifications. With this evidence, a rational jury could find the defendant or an accomplice intended to commit a crime with the stolen identification in the defendant's possession.

d. The State Proved The Defendant Knowingly Possessed The Stolen Computers.

The defendant contends that no rational jury could have found that he knew the multiple computers in his apartment were stolen. Again the defendant's sufficiency argument must be rejected.

The defendant's argument is based on the fact that the computers did not have any obvious markings that they belonged to someone else. Stolen property seldom does. It is also generally true that mere possession of a stolen item does not create a sufficient presumption that the possessor knew that the item was stolen. See State v. Hatch, 4 Wn. App. 691, 694-95, 483 P.2d 864 (1971). However, there was much more here.

A jury may infer actual knowledge on the part of a defendant based on the circumstances of the case--for example, a punched ignition may be used to prove the driver knew the car he was in was stolen. See State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) (circumstantial evidence can prove actual knowledge); accord State v. Leech, 114 Wn.2d 700, 709-10, 790 P.2d 160 (1990). In short, actual knowledge can be inferred when the person "has information which would lead a reasonable person in the same

situation to believe that facts exist which facts are described by statute defining an offense." Shipp, 93 Wn.2d at 517; RCW 9A.08.010.

Here, you had nine computers in an apartment that was being used for an identification theft/forgery operation. One of the stolen computers was on the kitchen table and had been gutted of its hard drive. The apartment was filled with recently stolen means of identification and computers. The computers were stolen from the same places that some of the identification documents were stolen. The computers were used to create forged checks, including some with the defendant's name on them and some from the very companies the computers were stolen. The evidence was that the defendant rented the apartment and resided there, thus, the computers could only have come into his apartment with, at minimum, his permission. The defendant attempted to flee when officers arrived, indicating knowledge of the illegality of the items he possessed.⁵ State v. McDaniel, 155 Wn. App. 829, 854, 230 P.3d

⁵ While the defendant may respond that he attempted to evade arrest because he had a warrant out for his arrest, there is no evidence in the record that he was aware of the warrant, and drawing this inference is contrary to the standard of review for a sufficiency claim, that all reasonable inferences must be drawn in the State's favor. Partin, at 906-07.

245 (2010) (evidence of flight supports inference of consciousness of guilt). With these facts, viewed in the light most favorable to the State, the jury certainly cannot be considered irrational for finding the defendant possessed the knowledge that the computers in his apartment had been stolen.

2. THE DEFENDANT'S CLAIM OF MISCONDUCT SHOULD BE REJECTED.

The defendant asserts that the prosecutor committed such flagrant misconduct in closing argument that his failure to object should be excused and all his convictions reversed. This claim should be rejected. Foremost, the prosecutor did not commit misconduct. However, even if the complained of comment could be considered misconduct, the defendant cannot show that a simple objection would not have stopped the misconduct and obviated any prejudice. Finally, the defendant cannot show that but for the alleged misconduct there is a substantial likelihood the results of his trial would have been different.

A defendant alleging prosecutorial misconduct must prove to a reviewing court (1) that the prosecuting attorney's conduct was actually improper, and (2) that the misconduct actually resulted in

prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If a defendant fails to object to the alleged misconduct, the issue is waived, unless the defendant can prove that the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. Fisher, 165 Wn.2d at 747.

a. There Was No Misconduct.

In regards to the first requirement, it is the defendant who bears the heavy burden of establishing the impropriety of the prosecutor's conduct. State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). To this end, it must be "clear and unmistakable" that the actions complained about actually constitute misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, reversed on other grounds, 111 Wn.2d 641 (1985).

The defendant cites to one sentence wherein he claims the prosecutor told the jury that the defendant had the burden of proving his innocence and that he had failed to meet this burden. Def. Br. at 38. The defendant points to one sentence in asking this Court to reverse his conviction.

So the question is, is there an innocent explanation for any one thing becomes suddenly much greater when this innocent explanation needs to cover all of this.

8RP 65.

The prosecutor uttered this one sentence during rebuttal closing argument, an argument that occurred after the defendant's trial counsel had told the jury that while the State wanted the jurors to use their common sense, he wanted them to view each count, each item, and each piece of evidence, separately and that when they did so, there would be insufficient evidence of guilt. 8RP 40, 46. The State responded with the following complete passage that includes the single sentence complained of by the defendant:

One of the reasons I ask you to consider common sense is because this case ultimately comes down to the facts. There are explanations for many of these individual pieces of evidence. Many of the individual pieces of testimony. Yes, there are innocent explanations for a great deal of this stuff, but common sense tells you that you don't look at one thing and then look at another thing and then look at a third thing and look at all of those individually. No, common sense tells you that you are allowed to do as jurors is not just look at one individual point at a time but also to consider all of the points together. So the question is, is there an innocent explanation for any one thing becomes suddenly much greater when this innocent explanation needs to cover all of this. So that's why I ask you to use your common sense. Not to get stuck in that trap of saying well, I only look at each individual thing separately. As jurors, you are

allowed and you are encouraged to look at the global picture of what's going on in this case.

8RP 64-65.

The defendant claims that the one specific sentence was improper because the prosecutor was telling the jury that the defendant had the burden of proving his innocence. Only taken out of context can the defendant make this argument.

It is not misconduct for the prosecutor to make a fair response to a defense argument. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). It is also not misconduct for the prosecutor to argue that the evidence does not support the defense theory. Id. Here, taken in context, it is clear the prosecutor was merely asking the jurors to look at all the evidence together, not separately as defense counsel wanted. The prosecutor posited that taken together, using common sense, while one could come up with a plausible innocent explanation for one piece of stolen property or ID being in the apartment without the defendant's knowledge, taken as a whole, this could not be the case. Taken in context, the defendant cannot show that it was "clear and unmistakable" that the prosecutor was telling the jury that it was the defendant who had the burden of proving his innocence.

b. The Defendant's Failure To Object.

A defendant's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. Fisher, 165 Wn.2d at 747. In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Such is the case here.

If the prosecutor's statement really did constitute a misstatement of the law as alleged, there is no possible reason why a timely objection followed by the judge indicating the prosecutor's comment was an incorrect statement of the law and restating the correct statement of the law would not have obviated any potential prejudice. It is not as if the jurors, because of the prosecutor's comment, would have suddenly believed that they could simply ignore the judge's admonishment of the prosecutor and correct statement of the law. After all, jurors are presumed to follow the court's instructions and the jury had already been instructed that it is the court that provides the law, not the attorneys. CP 76; State v.

Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). In fact, the jury was specifically instructed that "[t]he law is contained in my [the court's] instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 78. There is no reason that an admonishment and additional correcting instruction at the time of the alleged misconduct would not have been successful. Thus, the defendant's failure to object constitutes a waiver of his claim.

c. There Is Only One Standard Of Review In Evaluating The Potential Prejudice From Alleged Misconduct.

The defendant asserts that a prosecutor's comment made during closing argument pertained to a constitutional right or issue and therefore, on appeal, a constitutional harmless error standard applies, specifically, the defendant asserts that the State is required to prove that the "error was harmless beyond a reasonable doubt." Def. Br. at 40-41. This is incorrect. There is but one standard applicable to situations involving trial irregularities: did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.

Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.

Lastly, failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. In other words, *a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.*

Russell, 125 Wn.2d at 85-87 (emphasis added).

In concise terms, the Russell decision lays out the only test for analyzing a claim of prosecutorial misconduct. There is no other standard of review for such a claim. See Davenport, 100 Wn.2d 757; State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983). Where the claim is that there were "trial irregularities," the Supreme Court has said, "the harmless error analysis is not appropriate."

Davenport, 100 Wn.2d at 762. It does not matter the nature of the prosecutor's comments, the "appropriate inquiry is directed at the effect of the statement." Weber, 99 Wn.2d at 164; Davenport, at 762.

In Weber, a felony flight case, an officer testified that after being arrested, Weber told him that he knew he was in a lot of trouble. Defense counsel objected. The court ruled the statement was inadmissible and instructed the jury to disregard. Later, the prosecutor elicited the same statement. A defense request for a mistrial was denied. The Court of Appeals reviewed the case and applied a constitutional harmless error standard. See Weber, at 163. The Washington Supreme Court held that this was not the applicable standard to use. Weber, at 163.

The Supreme Court stated that the harmless error reasonable doubt analysis "does not . . . lend itself to problems involving trial irregularity." Weber, at 163. In a harmless error case, two inquiries are made: First, was there an error of law implicating a constitutional or nonconstitutional right? Second, was the error prejudicial? Id. In a misconduct case, "the legal error, if it exists, is that the petitioner's trial was unfair." Id. Thus, the

two-part analysis required by the reasonable doubt harmless error standard does not aid the inquiry. Id.

Instead of applying the test the defendant here asks this Court to apply, the Supreme Court has held that the "[m]ore appropriate inquiry is directed at the effect of the statement." Id. at 163-64. The "[c]orrect" test, the Court said, is to determine whether the remark prejudiced the jury, thereby denying the defendant his right to a fair trial. Id. at 165 (referring to Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

In Davenport, the Court reaffirmed that there is but one standard for reviewing allegations of trial irregularities. Davenport was one of two defendants charged with burglary. He was not charged as an accomplice, and no accomplice liability instruction was provided to the jury. Defense counsel argued that if the jury found Davenport had not entered the residence, he could not be found guilty of burglary, even though he was at the scene and in possession of property from the home. In rebuttal, the State inappropriately argued that it did not matter whether Davenport actually entered the house; he was an accomplice to the co-defendant who was caught inside the home. The Court of Appeals found the prosecutor committed misconduct, but applied a

harmless error analysis and found the misconduct "was harmless beyond a reasonable doubt." State v. Davenport, 33 Wn. App. 704, 708, 657 P.2d 794 (1983).

The Supreme Court agreed the prosecutor's argument was misconduct, rejected the Court of Appeals' application of the harmless error standard, and affirmed the Weber court's conclusion that in cases of "trial irregularities the harmless error analysis is not appropriate." Davenport, at 762. The question to be resolved, the Court said, is whether there is a substantial likelihood that the misconduct affected the jury verdict. Id.

The Court's conclusion that only one standard applies to trial irregularities, makes sense for many reasons. First, a harmless error test considers the remaining evidence introduced, absent any evidence improperly admitted. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986). In a case of prosecutorial misconduct, the issue is not an evidentiary issue; there is no improperly admitted (or omitted) evidence. Second, the level of prejudice to a defendant is not governed by whether the comment touches upon a constitutional right or not. For example, a prosecutor could tell a jury that the standard of

proof at trial is a preponderance of the evidence. Upon an objection, this misstatement of law about the constitutional standard of proof in a criminal case is easily corrected. On the other hand, if the prosecutor were to inform the jury that the defendant had previously been convicted of murder but the judge had not let them hear that, no objection could cure the prejudice caused by such a remark.

There is but one standard to apply in evaluating prejudice in a prosecutorial misconduct case: whether there is a substantial likelihood that the misconduct affected the verdict. The State has found no United States Supreme Court case or Washington Supreme Court case that has applied any other standard.⁶ Still, there are a few Court of Appeals cases that have applied a

⁶ The defendant cites two cases to support his claim, Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) and State v. Easter, 130 Wn.2d 228, 992 P.2d 1285 (1996). Neither case involves misconduct and neither case is applicable here. Chapman was a Fifth Amendment case involving the admission of evidence of the defendant's silence to infer guilt, previously allowed under California's constitution. Easter was also a Fifth Amendment case and involved the introduction of trial testimony regarding the defendant's silence and refusal to answer a police officer's questions about a vehicle accident. In both cases, the issue was not whether the defendant received a fair trial; rather, the issue was whether the defendant's constitutional right to remain silent had been violated.

constitutional harmless error standard to misconduct cases.⁷

These cases apply an incorrect legal standard. The genesis of the error in these cases can be traced back to a misreading of a footnote from a 25-year-old Supreme Court case.⁸

The misapplication of the harmless error standard began in Traweck. In closing argument of Traweck's robbery case, the prosecutor told the jury that Traweck could have called witnesses on his behalf but did not. This was clearly misconduct, the constitutional burden of proof being on the State, a defendant has no burden to present evidence.

In analyzing the misconduct, the Court of Appeals stated that "[w]hen a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter standard of constitutional harmless error." Traweck, 43 Wn. App. at 108. In making this statement, the Court cited to footnote 1 of

⁷ See e.g., State v. Traweck, 43 Wn. App. 99, 715 P.2d 1148 (1986); State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996); State v. Moreno, 132 Wn. App. 663, 132 P.2d 1137 (2006); State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001); and State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990).

⁸ Recently, when the issue was brought to the Supreme Court's attention that some lower courts were using a different standard, the Supreme Court stated that the approach used by these courts was inconsistent with the Court's long-used approach to evaluating prejudice in misconduct cases. See State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008); also State v. Dixon, 150 Wn. App. 46, 57 n.4, 207 P.3d 459 (2009).

Davenport. See Traweek, at 108 (citing Davenport, at 761-62 n.1).

The problem is that Davenport did not say what the Court of Appeals asserted.

In Davenport, the Supreme Court stated that trial irregularities do not independently violate a defendant's constitutional rights. Davenport, at 761-62. In footnote 1, the Court contrasted situations wherein defendant's constitutional rights are violated. Specifically, the Court cited to State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981), followed by the parenthetical "(improper comments on the defendant's right to remain silent)." Davenport, at 761 n.1. Apparently, this language in the parenthetical was interpreted by the Court of Appeals to mean that improper comments by the prosecutor about a defendant's right to remain silent must be reviewed under a different standard. This is not the case.

Evans was not a "trial irregularity" case; it was a "trial error" case. In Evans, testimony was improperly admitted of Evans' post-arrest silence. Two officers testified that after being advised of his right to remain silent, Evans declined to talk about the incident, suggesting guilt from the exercise of his constitutional right. Evans,

at 3. It is this trial error that was reviewed, appropriately, under a constitutional harmless error standard. Evans, at 4.

There was also misconduct alleged in Evans, this involved the prosecutor's questions about the defendant's post-arrest silence. Evans, at 5. The misconduct was analyzed under a different standard. The Court reviewed the alleged misconduct to determine "whether there was a substantial likelihood that the misconduct affected the jury's verdict, thereby depriving the defendant of his right to a fair trial." Id. Thus, contrary to the assertion in Traweek, neither Davenport nor Evans stands for the proposition that there is anything but one standard for reviewing misconduct cases.⁹

⁹ A close review of the Court of Appeals cases shows that they all ultimately refer back to Traweek, or the misinterpretation first promulgated in Traweek. See e.g. Contreras, 57 Wn. App. at 473 (citing Traweek); Fleming, 83 Wn. App. at 215-16 (citing Traweek); French, 101 Wn. App. at 386 (citing Traweek and Griffen--see below); Moreno, 132 Wn. App. at 671-72 n.23 (citing Traweek and Contreras). In none of these cases did the State ever argue that any other standard applied. Instead, the parties merely accepted the incorrect proclamation from Traweek. While not cited by the defendant here, many defendants also cite to two United States Supreme Court cases, but neither is a misconduct case. See Griffen v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (California's constitution allowed the jury to consider a defendant's silence in determining guilt--the Supreme Court found this violated the United States Constitution); Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (a case holding for the first time that post-arrest silence could not be used to impeach a defendant).

d. There Was No Prejudice.

In order to sustain a claim of prosecutorial misconduct, a defendant must show that the misconduct had a prejudicial effect.

State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Prejudice exists only where the defendant can prove that there is a substantial likelihood that the misconduct affected the verdict.

State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

There was substantial evidence, direct and circumstantial, that the defendant rented and lived in the apartment and that the apartment was set up as an identity theft/forgery and counterfeiting operation--in operation at the time the defendant was arrested in the apartment. At the time of his arrest, the defendant was in the bedroom with the computer on, the screen showing counterfeit currency, and washed bills and counterfeit currency were on the table. Also in the bedroom with the defendant, in plain sight, were three different controlled substances and drug paraphernalia. There were stolen and forged checks with the defendant's name on them that had been created on the computer. With the quantity of evidence in this case, even if the prosecutor's comment was found to be misconduct, it did not impact the verdict under any standard of review.

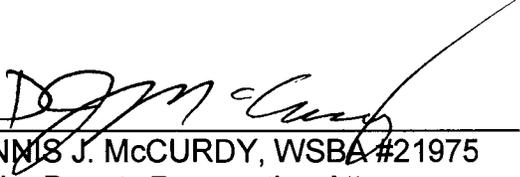
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions.

DATED this 12 day of August, 2010.

Respectfully submitted,

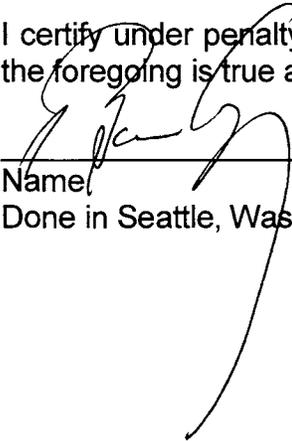
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BRANCH, Cause No. 64187-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name,
Done in Seattle, Washington

08/13/10

Date

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