

NO. 70255-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MELONI ANN TERRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
SAN JUAN COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-05027-6

BRIEF OF RESPONDENT

RANDALL K. GAYLORD
Prosecuting Attorney

JEREMY A. MORRIS
Special Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JAN 13 PM 1:37

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

I. COUNTERSTATEMENT OF THE ISSUES1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....14

A. The Defendant’s claim of prosecutorial misconduct must fail because the Defendant has failed to show: (1) that the prosecutor’s comments were improper; (2) that the comments were so flagrant and ill-intentioned that that they resulted in an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury; and (3) that the comments, even if improper, could have had a substantial likelihood of affecting the jury verdict given the overwhelming evidence against the Defendant.....14

B. The Defendant’s claim of insufficient evidence must fail because, viewing the evidence in a light most favorable to the state, a rational trier of fact could have found that the state proved the essential elements of the charged offense beyond a reasonable doubt.19

IV. CONCLUSION30

TABLE OF AUTHORITIES

CASES

<i>Jongeward v. BNSF R. Co.</i> , 174 Wn.2d 586, 278 P.3d 157 (2012).....	26
<i>Modern Sewer Corp. v. Nelson Distributing, Inc.</i> , 125 Wn.App. 564, 109 P.3d 11 (2005).....	24-26, 28
<i>State v. Argueta</i> , 107 Wn.App. 532, 27 P.3d 242 (2001).....	23
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	16
<i>State v. Bland</i> , 71 Wn.App. 345, 860 P.2d 1046 (1993).....	22
<i>State v. Elmore</i> , 139 Wn.2d 250, 985 P.2d 289 (1999).....	16
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	15, 16, 18
<i>State v. Jackson</i> , 137 Wash.2d 712, 976 P.2d 1229 (1999).....	27
<i>State v. Lillard</i> , 122 Wn.App. 422, 93 P.3d 969 (2004).....	20-21
<i>State v. Nicholson</i> , 119 Wn.App. 855, 84 P.3d 877 (2003).....	20
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	16
<i>State v. Rivas</i> , 97 Wn.App. 349, 984 P.2d 432 (1999).....	20, 22

<i>State v. Roggenkamp,</i>	
153 Wn.2d 614, 106 P.3d 196 (2005).....	27
<i>State v. Russell,</i>	
125 Wn.2d 24, 882 P.2d 747 (1994).....	18
<i>State v. Smith,</i>	
159 Wn.2d 778, 155 P.3d 873 (2007).....	20
<i>State v. Stenson,</i>	
132 Wn.2d 668, 940 P.2d 1239 (1997).....	15
<i>State v. Stinton,</i>	
121 Wn.App. 569, 89 P.3d 717 (2004).....	15
<i>State v. Thorgerson,</i>	
172 Wn.2d 438, 258 P.3d 43 (2011).....	15

STATUTES

RCW 9A.56.140	27
RCW 9A.82.010	27-28
RCW 9A.82.050	27

ADDITIONAL AUTHORITIES

13 Am.Jur. 2d BURGLARY § 3	16
----------------------------------	----

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of prosecutorial misconduct must fail when the Defendant has failed to show: (1) that the prosecutor's comments were improper; (2) that the comments were so flagrant and ill-intentioned that they resulted in an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury; and (3) that the comments, even if improper, could have had a substantial likelihood of affecting the jury verdict given the overwhelming evidence against the Defendant?

2. Whether the Defendant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the state, a rational trier of fact could have found that the state proved the essential elements of the charged offense beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Meloni Ann Terry, was charged by information filed in San Juan County Superior Court with one count of burglary in the second degree and one count of possession of stolen property in the third degree. CP 1. A jury found the Defendant guilty of both offenses, and the

trial court subsequently imposed a standard range sentence. CP 40-41; 44. This appeal followed.

B. FACTS

Richard and Emilie Rankin are both retired and live on Orcas Island at a residence on Hyla Lane. RP (3/25) 131. The Rankins also own an adjacent property that has a guest house and another building that they refer to as a “studio.” RP (3/25) 132-33. The Rankins used the studio building for storage. RP (3/25) 155. The main residence and the studio are approximately 100 feet apart and there are dense trees between them. RP (3/26) 56-57.

On September 22, 2012 the Rankins left the island for a few days and returned on October 7 around 2:00 in the afternoon. RP (3/25) 176-77. When they arrived home the Rankins first went to the main residence and then briefly went to the guesthouse to look to see if several packages they were expecting had been delivered. RP (3/25) 177-78. When the Rankins did not find the packages at the guesthouse, they returned to the main residence. RP (3/25) 179. Later that afternoon, at approximately 5:00, the Rankins again went down to the guesthouse. RP (3/25) 179-80. Ms. Rankin went up to the guesthouse to again look for the packages and

Mr. Rankin went to the studio to measure some windows that were stored in the studio building. RP (3/25) 181.

As Mr. Rankin approached the studio he “heard the sound of running feet” coming from the vicinity of the studio. RP (3/25) 181-82. Mr. Rankin called out to his wife that he had heard something. RP (3/25) 182. As he approached the door of the studio Mr. Rankin again heard the sound of running feet coming from inside the studio. RP (3/25) 183. Mr. Rankin explained that it sounded like there were several people or animals in the residence. RP (3/25) 183. Ms. Rankin suggested that perhaps he was hearing raccoons, as they had issues previously with raccoons on the property. RP (3/25) 184, 189. At trial Mr. Rankin explained that they never had people around the property and he had not seen any cars around, so he assumed that the noises were not being made by people. RP (3/25) 184.

Mr. Rankin opened the door of the studio and listened for a little while, but he did not hear anything. RP (3/25) 184-5. Mr. Rankin saw that inside there were lots of bags lying on the floor that had items pulled out of them and strewn about, including some clothes. RP (3/25) 185, 190. At this point Mr. Rankin believed that it must have been raccoons that were responsible for the mess and the noises. RP (3/25) 185. Ms.

Rankin came into the studio and Mr. Rankin picked up a metal vacuum cleaner “tube,” which made him feel safer. RP (3/25) 186. The Rankins entered the studio and noticed that a back window to the building was open. RP (3/25) 186. Still thinking that raccoons were responsible for the mess, the Rankins decided to close the window and deal with the issue later. RP (3/25) 188. Although the studio contained a loft and a bathroom, Mr. Rankin did not check or go into those areas. RP (3/25) 190. Rather, the Rankins only stayed in the building for approximately a minute. RP (3/25) 190-91. As she was leaving the studio building, Ms. Rankin found a black fleece vest near the door which shouldn’t have been there. RP (3/25) 191. She picked up the vest and noticed that it was wet. RP (3/25) 191. The Rankins then left the studio and made sure the doors were locked. RP (3/25) 192.

After they left the studio, the Rankins decided to drive to the post office to look for their packages. RP (3/25) 191. After they pulled out of their driveway and entered the road to begin driving to the post office, the Rankins soon saw a blue station wagon parked and facing one of the gates to their property. RP (3/25) 193-94. The station wagon was approximately two feet from the gate and was on their property. RP (3/25) 194; RP (3/26) 65. Ms. Rankin parked her truck behind the station wagon

and Mr. Rankin got out to investigate. RP (3/25) 194. As he approached the station wagon Mr. Rankin could see that the back seat was folded down and he immediately noticed that a plaid housecoat and a lime green “Polarfleece,” both belonging to Ms. Rankin, were in the back of the station wagon. RP (3/25) 195. Mr. Rankin also recognized a blue work jacket that belonged to him in the station wagon. RP (3/25) 195-96. Ms. Rankin also saw these items and recognized them. RP (3/26) 72.

At this point Mr. Rankin finally “put two and two together” and realized that there had been a burglary. RP (3/25) 196. The Rankins then discussed what to do next, as neither of them had a cell phone on them. RP (3/25) 200-01. Mr. Rankin then decided to try to let the air out of the tires on the station wagon, but he was ultimately unable to do so. RP (3/25) 200.

Shortly thereafter a red and black Honda came down the road, and Ms. Rankin began to flag the car down in order to see if the driver had a cell phone so they could call the police. RP (3/25) 202-03. The car stopped, and the Rankins saw that the driver was a young male with strange, stringy black hair and a bandana on his head. RP (3/25) 203-05. Ms. Rankin explained at trial that she thought the bandana and the stringy hair was a “Pirates of the Caribbean wig.” RP (3/26) 75. Ms. Rankin

asked the driver where he was heading, and the driver said he was going to see a woman at the end of the road. RP (3/25) 205. RP (3/26) 77. Ms. Rankin then asked, "What's her name?" RP (3/26) 77. The driver said he did not know her name, which concerned Ms. Rankin. RP (3/26) 77-78.

As Ms. Rankin spoke with the driver of the Honda, a woman (later identified as the Defendant) came walking down the road towards them. RP (3/25) 206-07; RP (3/26) 78. The Defendant called out to the Rankins that, "It's okay. My car broke down. I called my brother to help me." RP (3/25) 207; RP (3/26) 79. The Defendant also stated that her car had a "vacuum leak." RP (3/25) 208. Ms. Rankin then asked the Defendant why her jackets were in the Defendant's car. RP (3/25) 210; RP (3/26) 81. The Defendant responded that they were her (the Defendant's) jackets. RP (3/25) 211; RP (3/26) 81.

Around this point the driver of the red and black Honda drove away quickly without offering to help the Defendant in any way. RP (3/25) 210-11; RP (3/26) 80. The Defendant continued walking towards the station wagon and walked right up to the driver's side door. RP (3/25) 212. While the Defendant was at the door of the car, Mr. Rankin noticed that the Defendant had an orange and black "garden knife" tucked into her waistband. RP (3/25) 212-13; RP (3/26) 82. Mr. Rankin recognized the

knife since it belonged to him and had been stored in the studio building. RP (3/25) 213. Mr. Rankin testified that at this point the situation “was getting to be a much different situation than we had been expecting.” RP (3/25) 214. He explained that this was due to the fact that “not only do I have somebody on my property, but they have a knife.” RP (3/25) 214. Mr. Rankin then gestured to his wife and pointed out the knife to ensure that she saw it. RP (3/25) 214.

The Defendant unlocked the station wagon, got in, and started the car with no apparent problem. RP (3/25) 214. The Defendant then “gunned” the station wagon, backed up, and drove away quickly. RP (3/25) 214-16. The Rankins worked together to memorize the license plate number of the station wagon, and immediately drove to the guesthouse (where there was a phone) and called the police. RP (3/25) 217. Ms. Rankin told the 911 operator that there was a burglary in progress and reported the station wagon’s license plate number. RP (3/25) 217; RP (3/26) 84-85.

After calling the police from the guesthouse, the Rankins returned to their main residence and picked up their cell phones, as they were worried about the red and black Honda that had driven into their neighborhood. RP (3/25) 218. Mr. Rankin also grabbed an (unloaded)

rifle. RP (3/25) 218. The Rankins then decided to drive around to look for the red Honda and to warn their neighbors, but they couldn't find anyone at home. RP (3/25) 218; RP (3/26) 86. They also saw no sign of the red and black Honda. RP (3/25) 218; RP (3/26) 86. During this time the sheriff's office called the Rankins on their cell phone and told them that they did not need to look for the Honda and that it was best if they just returned to their residence. RP (3/25) 218-19; RP (3/26) 86.

Deputy Distler¹ and Deputy Wilsey from the San Juan County Sheriff's office soon responded to the Rankins' property. RP (3/25) 219-20; RP (3/26) 107-08. The Rankins told the deputies what had happened and described the jackets that they had seen in the station wagon. RP (3/26) 187. Deputy Distler went to the studio with Mr. Rankin and Mr. Rankin noticed that one of the doors to the studio was open, even though he had closed and locked the door earlier after leaving the studio for the post office. RP (3/25) 225-26. This concerned Mr. Rankin because he then realized that someone had been inside the studio when he had gone through the studio earlier. RP (3/25) 226-28.

¹ Bruce Distler was a deputy Sheriff at the time of the investigation of the present case, but he is now the Undersheriff. RP (3/26) 145. Since he was a deputy at the time of this

Deputy Distler then went through the studio with Mr. Rankin and also took photographs of the scene. RP (3/25) 220-21. Mr. Rankin noticed a razor-bladed “box knife” that was laid out in the “open” position. RP (3/25) 222. Mr. Rankin explained that this was significant to him because he does not keep knives out “open” and because the knife was out of place. RP (3/25) 222-23. Mr. Rankin also saw that a number of chainsaws and a weed-eater were missing. RP (3/25) 223-24.

Around this time the deputies were advised that the vehicle registration for the license plate number the Rankins had provided was associated with a residence at 520 Point Lawrence Road. RP (3/26) 146-47. Deputy Wilsey then went to the residence on Point Lawrence Road (which was about a mile to a mile and a half from the Rankins’ property) to look for the Blue Ford Taurus with the license plate number provided by the Rankins. RP (3/26) 109, 111. The deputies were familiar with the residence and knew that it is owned by Erling and Juanita Manley. RP (3/26) 110; RP (3/26) 147.

When he arrived at the residence, Deputy Wilsey found the Defendant sitting in the front seat of the station wagon, and he also saw the Honda. RP (3/26) 111-12; 115. Deputy Wilsey contacted the

incident, he is referred to in this brief as Deputy Distler.

Defendant and explained that he was investigating a report of a car on Hyla Lane and that he was looking for some property. RP (3/26) 113. The Defendant admitted that she had been on Hyla Lane and that she had spoken to some people there. RP (3/26) 113. Deputy Wilsey asked the Defendant what she had been doing there, and the Defendant stated that she had been going to see a woman who lived at the end of the road. RP (3/26) 113-14. The Defendant, however, was unable to identify the person's name or address. RP (3/26) 113-14.

Deputy Wilsey shined his flashlight into the station wagon and saw a blue coat, which was one of the items he was looking for. RP (3/26) 114. Deputy Wilsey asked the Defendant where she got the coat, and she said it was her coat. RP (3/26) 114. Deputy Wilsey then called Deputy Distler and asked him to bring one or both of the Rankins to the scene. RP (3/26) 114.

The Rankins went with Deputy Distler to the house at 529 Point Lawrence Road, where they saw the Defendant, the station wagon, and the red and black Honda that they had seen earlier by their property. RP (3/25) 228-31; RP (3/26) 90. The deputies also had the Rankins look in the back of the station wagon to see if he could see any of their property, and when they did so they Rankins did not see the plaid jacket or the lime

green fleece. RP (3/25) 235; RP (3/26) 91. The Rankins did see Mr. Rankin's blue jacket, however, and they also saw a red plaid blanket that had not been there before. RP (3/25) 225; RP (3/26) 91-92.

Mr. Rankin told Deputy Distler that the jacket was his. RP (3/25) 235. The Defendant, however, told the deputy that the jacket was hers. RP (3/25) 236. Deputy Wilsey asked the Defendant if she would mind bringing the coat out so that they could look at it, and the Defendant agreed to do that. RP (3/26) 115-16. Deputy Wilsey asked Mr. Rankin if there was anything about the coat that he could identify to show that it was his. RP (3/26) 116. Mr. Rankin said that there was a tear in the jacket, although he couldn't remember exactly where. RP (3/26) 116.² Deputy Wilsey inspected the jacket and found a tear. RP (3/26) 116.

Deputy Wilsey then asked the Defendant if she had been inside the house at 529 Point Lawrence, and the Defendant said that she had gone in to visit her mother, Juanita. RP (3/26) 117. Deputy Wilsey then walked towards the house to contact Juanita to see if the other items were in the house. RP (3/26) 117. As Deputy Wilsey approached some stairs leading

² At trial Mr. Rankin testified that he remembered the tear because it had exposed some "white" underneath, which he had thought was odd for a blue colored jacket. RP (3/25) 236-37. He also testified that he kept blue jacket in the studio because he wore it when he was weed-eating. RP (3/25) 238.

to the door of the residence, he saw a box at the base of the stairs containing a lime green fleece and a red housecoat that appeared to match the items described by the Rankins. RP (3/26) 118-19. Deputy Wilsey knocked on the door, contacted Ms. Manley, and asked her if she had ever seen the items before. RP (3/26) 122. Ms. Manley said that she had not seen them and she gave Deputy Wilsey permission to take them. RP (3/26) 122.³

Deputy Wilsey then took the red plaid coat and lime green fleece and returned to the station wagon where everyone else was waiting. RP (3/26) 122. The Rankins indicated that the jackets or coats belonged to them. RP (3/26) 122. Deputy Wilsey asked the Defendant “Did you have these jackets,” and the Defendant responded, “Those are my jackets.” RP (3/26) 123.

Deputy Wilsey then arrested the Defendant. RP (3/26) 123. Deputy Wilsey also seized the blue jacket, the red housecoat and the lime colored fleece and placed them into evidence. RP (3/26) 116, 121.⁴

³ While Deputy Wilsey had walked up to the residence, Deputy Distler asked the Defendant who the Honda belonged to. RP (3/26) 161. The Defendant said that it belonged to David Thompson (her brother). RP (3/26) 148, 161. Deputy Distler then asked her who had been driving the Honda earlier by the Rankins property, and the Defendant said that it was David. RP (3/26) 161.

⁴ Although the Defendant was arrested, she was released from custody the following day, October 8th, around 2:00 p.m. RP (3/26) 129. Deputies served a search warrant on the

At trial, the Rankins identified the blue jacket, the red housecoat and the lime colored fleece (which were all admitted as exhibits) and testified that these items belonged to them. RP (3/25) 237-39, RP (3/26) 94-95. Furthermore, a photograph from the late 1990's showing Ms. Rankin wearing the plaid housecoat was admitted at trial. RP (3/25) 196; RP (3/26) 96. In addition, two photographs (from the 1990's) of Mr. Rankin wearing the blue coat and two photographs (from 2008) of Ms. Rankin wearing the lime green "Polarfleece" jacket were also admitted at trial. RP (3/25) 197-200.

At the end of the trial gave the jury numerous instructions. CP 21-38. Instruction number 12 provided as follows:

A person commits the crime of possessing stolen property in the third degree when he or she knowingly possesses stolen property.

Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

CP 34. The "to-convict" instruction for this count mirrored this language

residence at 529 Point Lawrence Road on October 9th. RP (3/26) 129. The residence, as well as a secondary building and the station wagon and the Honda, were searched, but the deputies were unable to find the chainsaws or weed-eaters or any of the other items that the Rankins had reported as missing. RP (3/26) 129-30.

but omitted the word “or” before the word “dispose.” CP 37. The relevant portion of Instruction 15, thus read as follows:

- (1) That on or about October 7, 201, the defendant knowingly received, retained, possessed, concealed, disposed of stolen property.

CP 37. The jury was also given an “accomplice” instruction. CP 29.

III. ARGUMENT

- A. **THE DEFENDANT’S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW: (1) THAT THE PROSECUTOR’S COMMENTS WERE IMPROPER; (2) THAT THE COMMENTS WERE SO FLAGRANT AND ILL-INTENTIONED THAT THAT THEY RESULTED IN AN ENDURING AND RESULTING PREJUDICE THAT COULD NOT HAVE BEEN NEUTRALIZED BY AN ADMONITION TO THE JURY; AND (3) THAT THE COMMENTS, EVEN IF IMPROPER, COULD HAVE HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY VERDICT GIVEN THE OVERWHELMING EVIDENCE AGAINST THE DEFENDANT.**

The Defendant first argues that the prosecutor committed prosecutorial misconduct during closing argument. App.’s Br. at 5. This claim is without merit because the prosecutor’s comments were not improper. In addition, even if the comments could be deemed to be

improper, the Defendant has failed to show that the comments were so flagrant and ill-intentioned that they caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Furthermore, given the overwhelming evidence at trial, the Defendant has failed to show that the prosecutor's comments, even if improper, could have had a substantial likelihood of affecting the jury verdict.

To succeed on a claim of prosecutorial misconduct made for the first time on appeal, the appellant must show that the prosecutor's behavior was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012), citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Emery*, 174 Wn.2d at 761, citing *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

There can be little doubt that the crime of burglary, by its very nature, creates a potentially dangerous situation. See, e.g., *State v. Stinton*,

121 Wn.App. 569, 577, 89 P.3d 717 (2004), *quoting* 13 Am.Jur. 2d BURGLARY § 3 (2003) (“[B]urglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation.”).

In the present case the Defendant failed to object below and has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury. As was the case in *Emery*, the prosecutor's comments were not the type of comments which the Supreme Court has held to be inflammatory. *See e.g., Emery*, 174 Wn.2d at 763, citing *State v. Belgarde*, 110 Wn.2d 504, 506–07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was “a deadly group of madmen” and “butchers,” and told them to remember “Wounded Knee, South Dakota ”); *State v. Reed*, 102 Wn.2d 140, 143–44, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar, stated the defense had no case, said the defendant was a “murder two,” and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars). The prosecutor's comments in the present case “simply do not rise to such level.” *State v. Elmore*, 139 Wn.2d 250, 292, 985 P.2d 289 (1999).

In the present case, the prosecutor's statements in closing argument did little more than to point out that the Rankins behavior was naïve and that the crime of burglary (especially when the property owner is present) creates an extremely volatile and dangerous situation. This argument was not improper as it was a permissible inference from the evidence presented. The evidence clearly demonstrated that the Rankins unknowingly walked into a burglary in progress and that the burglar or burglars were present inside the studio when the Rankins made their initial entry into the building. This fact, combined with the fact that Mr. Rankin had armed himself with a metal vacuum cleaner and that an open box knife was found in the studio, as well as the fact that the Defendant was seen carrying a gardening knife that the Rankins kept in the studio, clearly established that the Rankins had unwittingly walked into an extremely volatile situation. The prosecutor's comments stating "what would have happened" if Mr. Rankin had made a more thorough search of the building did little more than to highlight the inherently volatile nature of the crime of burglary.

In any event, even if the prosecutor's remarks were improper, the Defendant has failed to show that these comments were so flagrant and ill-intentioned that they caused an enduring and resulting prejudice that could

not have been neutralized by an admonition to the jury. *Emery*, 174 Wn.2d at 760-61. The facts of the present case, for instance, are distinguishable from the *Russell* case cited by the Defendant. App.'s Br. at 7, citing *State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994).

In *Russell*, the prosecutor argued that if found not guilty, the Defendant would likely go to another State and kill again. *Russell*, 125 Wn.2d at 89. The prosecutor's comments in the present case fell far short of the statements made in *Russell*. Furthermore, although the court in *Russell* found the prosecutor's comments were inappropriate, the court did not find that these comments were sufficiently flagrant to warrant a new trial. *Id.*

Furthermore, given the overwhelming evidence in the present case, the Defendant simply cannot show that the prosecutor's remarks, even if improper, caused any prejudice. The defense theory in the present case essentially boiled down to the fact that the Defendant had claimed the three coats at issue belonged to her. The Rankins' observations at the studio, their testimony stating that the three jackets belonged to them, as well as the Defendant's suspicious behavior, were all strong evidence of the Defendant's guilt. The fact that multiple photographs were admitted at trial showing the Rankins wearing the three coats at issue removed all

doubt and created an overwhelming case against the Defendant. Given all of the evidence, the prosecutor's statements in closing simply could not have "had a substantial likelihood of affecting the jury verdict." The Defendant, therefore, has failed to demonstrate the prejudice that is required when a defendant asserts a claim of prosecutorial misconduct.

B. THE DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

The Defendant next claims that the State failed to provide sufficient evidence to support the conviction on the charge of possession of stolen property in the third degree because the State failed to show that the Defendant "disposed of" stolen property. App.'s Br. at 13. This claim is without merit because, viewing the evidence in a light most favorable to the state, a rational trier of fact could have found that the state proved the essential elements of the charged offense beyond a reasonable doubt.

Where there is more than one way to commit a single offense, the jury must be unanimous that the defendant is guilty for the single crime

charged. *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003) overruled on other grounds, *State v. Smith*, 159 Wn.2d 778, 155 P.3d 873 (2007). The jury need not be unanimous as to the means by which the crime was committed, as long as each alternative means is supported by substantial evidence. *Nicholson*, 119 Wn. App at 860 (citation omitted). “Substantial evidence exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” *State v. Lillard*, 122 Wn.App. 422, 434, 93 P.3d 969 (2004). If one of the listed means is not supported by substantial evidence and there is only a general verdict, the reviewing court must vacate the conviction unless it can determine that the verdict was founded upon one of the means supported by substantial evidence. *Nicholson*, 119 Wn.App. at 860 (citation omitted). If it is clear from the trial record, including the closing argument of both counsel, that the verdict was based solely on means for which there was substantial evidence, the verdict will stand. *State v. Rivas*, 97 Wn.App. 349, 351–52, 984 P.2d 432 (1999), *overruled on other grounds*, *Smith*, 159 Wn.2d 778 (2007).

In the present case Instruction 15 (the to-convict instruction) required the State to prove that the defendant knowingly received, retained, possessed, concealed, disposed of stolen property.” CP 37. The

State acknowledges that in *Lillard*, this Court held that when the to-convict instruction includes the “alternative definitions of ‘possession’” there must be sufficient evidence to support each alternative, unless the court can determine that the verdict was based on only one alternative means and that substantial evidence supports that means. *Lillard*, 122 Wn.App. at 435.⁵

In the present case the evidence was clearly sufficient to demonstrate that the Defendant knowingly received, retained, possessed and concealed stolen property, and the Defendant does not argue otherwise.⁶ Rather, the Defendant’s sole claim is that the evidence was insufficient to demonstrate that she “disposed of” stolen property. App.’s Br. at 10-15.

As the Defendant concedes, however, the “dispose of” alternative becomes irrelevant if the record were to show, based on the information, the evidence presented, and the closing argument, that the jury could not

⁵ This court further noted in *Lillard* that the first three of these alternatives (receiving, possessing and retaining the stolen property) were by necessity demonstrated by a showing of possession because a person could not possess stolen property without receiving it and a person could not “retain” the property without possessing it. *Lillard*, 122 Wn.App. at 435. Thus, all three means were necessarily supported by evidence showing actual possession. *Id.*

⁶ Specifically, the record clearly shows that the Defendant had the three coats belonging to the Rankins in her car and later moved two of them to a box near the door to her mother’s residence. This evidence, and the other evidence at trial, viewed in a light most

have relied on this alternative. App.'s Br. at 14-15, citing *State v. Rivas*, 97 Wn.App. 349, 351-53, 984 P.2d 432 (1999) and *State v. Bland*, 71 Wn.App. 345, 354, 860 P.2d 1046 (1993). In the present case the defense did not argue that the Defendant did not possess the three jackets at issue. Rather, the claim was merely that the jackets were hers. Given the fact that the Rankins identified the jackets as belonging to them and were able to produce photographs of themselves wearing the three jackets, the evidence overwhelming showed that the jackets belonged to the Rankins and that the Defendant thus possessed stolen property. Given this fact, the jury had no reason to look to any of the listed alternatives other than possession, since possession was never contested. The record as a whole, therefore, shows that the jury had no reason to look beyond the "possession" alternative, and thus there was "no danger that the jury's verdict rested on an unsupported alternative means." *Rivas*, 97 Wn.App. at 355.

In addition, although the jury did not need to address the issue of whether the Defendant "disposed of" stolen property, as explained below, the evidence at trial was sufficient to show that the Defendant "disposed of" stolen property when she moved the red plaid coat and the lime green

favorable to the State, was sufficient to demonstrate that the Defendant knowingly

fleece out of her car and into a box near the door of her mother's residence.

The Defendant's specific claim in the present case is that the state failed to present evidence that she "disposed of" stolen property, and the Defendant's claim is centered on her argument that the definition of "disposed of" is limited to a transfer to another person. App.'s Br. at 10-14. The definition of "dispose of" however, is not as narrow or limited as the Defendant suggests.

An examination of the dictionary definitions of "dispose" and "dispose of" clearly show that these terms apply to a far broader range of actions than the Defendant suggests.⁷ For instance the Oxford English Dictionary's first three definitions of "dispose" are as follows:

- (a) To place (things) at proper distances apart and in proper positions with regard to each other, to place suitably, adjust; to place or arrange in a particular order.
- (b) To put into the proper or suitable place; to put away, stow away, deposit; to put (a number of things) each into the proper place, distribute.
- (c) To dispose of, deal with in any way.

received, retained, possessed and concealed stolen property.

⁷ As the Defendant properly notes, when a term is not defined in a statute, it is proper to look to the ordinary dictionary definition of the term at issue. App.'s Br. at 14, citing *State v. Argueta*, 107 Wn.App. 532, 536, 27 P.3d 242 (2001).

Oxford English Dictionary, page 491 (1971). Furthermore, the Oxford English Dictionary's definition for "dispose of" includes the following,

To put or get (anything) off one's hands; to put away, stow away, put into a settled state or position; to deal with (a thing) definitively; to get rid of; to get done with, settle, finish.

Oxford English Dictionary, page 492 (1971).

Furthermore, the Washington Court of Appeals has previously examined the definition of the word "dispose." See, *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn.App. 564, 109 P.3d 11 (2005). In that case, Nelson Distributing argued that the undefined statutory term "dispose" should be limited to mean "discard or throw away." *Modern Sewer*, 125 Wn.App. at 569. The Court of Appeals agreed that the undefined term should be given its ordinary meaning, but the Court disagreed that term's meaning was as narrow as had been suggested. Rather, the Court explained turned to the dictionary to determine the ordinary meaning of the word "dispose," and explained that,

The root of the word is influenced by the Middle French *poser*, which means to put or place. Webster's Third New International Dictionary (1971). The word "dispose" has the following definitions:

[T]o place, distribute, or arrange esp. in an orderly or systematic way; to apportion or allot; to

transfer into new hands or to the control of someone else; to get rid of; throw away. Webster's Third New International Dictionary (1971).

[T]o pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away. Blacks Law Dictionary 471 (6th ed.1990)

The ordinary meaning of “disposal” that Nelson Distributing advocates is the act of discarding or throwing away. While these dictionary definitions encompass Nelson Distributing's proposed definition, the definition of “disposal” is not limited to this narrower concept. It encompasses putting, placing, transferring, distributing, discharging, discarding, delivering, abandoning, depositing, injecting, dumping, and spilling.

Modern Sewer, 125 Wn.App. at 570-71. In short, a party in *Modern Sewer* attempted to limit the definition of “dispose” to mean only “discard or throw away.” The Court of Appeals rejected this definition and held that “dispose” can also mean “putting” or “placing,” among other things. This definition is entirely consistent with the origin of the word and with the Oxford English Dictionary’s definition of “dispose of” which includes “To put or get (anything) off one’s hands; to put away, stow away, put into a settled state or position.” In addition, this definition is consistent with the very first definition of dispose found in Webster's Third New International Dictionary (1971): “[T]o place, distribute, or arrange esp. in an orderly or systematic way.”

With respect to the dictionary definition of “dispose of,” the Defendant in the present case claims that,

Webster’s Dictionary defines ‘dispose of’ as ‘to transfer into new hands or to the control of someone else (as by selling or bargaining away); relinquish bestow . . . to get rid of, throw away, discard . . .

App.’s Br. at 14 (ellipses in App.’s Br), citing Webster’s Third New Int’l Dictionary 654 (1993). The Defendant, however, fails to mention the very *first* definition of “dispose of” that occurs in Webster’s Third New International Dictionary, which reads,

1a: to place, distribute, or arrange esp. in an orderly or systematic way (as according to a pattern) (the men disposed of the weapons in convenient quickly accessible places)

Webster’s Third New Int’l Dictionary, page 654.⁸

In short, the definitions provided in the Oxford and Webster’s dictionaries, as well as in the *Modern Sewer* opinion, all encompass far more behavior or actions than merely transferring an item to another person.

Furthermore, under the principle of *noscitur a sociis*, “a single word in a statute should not be read in isolation.” *Jongeward v. BNSF R.*

Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012) quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Instead, “the meaning of words may be indicated or controlled by those with which they are associated.” *Jongeward*, 174 Wn.2d at 601, citing *Roggenkamp*, 153 Wn.2d at 623 (quoting *State v. Jackson*, 137 Wash.2d 712, 729, 976 P.2d 1229 (1999)). With respect to the present case, RCW 9A.56.140 explains that possession of stolen property means “to receive, retain, possess, conceal, or dispose of” stolen property. In this context, properly defining “dispose of” to include such concepts as to put or place an object somewhere, to put away, stow away, put or get (anything) off one’s hands, and the like, is entirely consistent with the other statutory words such as receive, retain, possess, and conceal.

In addition, the Defendant’s suggested definition (that the term “dispose of” is limited to mean “transfer into new hands or the control of someone else”) would lead to an absurd result. Pursuant to RCW 9A.82.050, a person commits the crime of trafficking in stolen property in the first degree when he or she, “knowingly traffics in stolen property.” “Traffic” is defined to include sell, transfer, distribute, dispense, or otherwise dispose of stolen property **to another person.**” RCW

⁸ This method of citation calls to mind Judge Posner's warning, “[b]eware a [party]

9A.82.010(19). The possession of stolen property definition, of course, does not require that the property be disposed of to another person. Furthermore, under the Defendant's proposed definition, the crime of possession of stolen property (when committed under the "disposed of" definition) would be exactly the same as the crime of trafficking in stolen property.⁹ This, of course, would be absurd.

Under the true definition of "dispose of," however, no such absurdity is created. Rather a person who disposes of stolen property (by any of the dictionary definitions of "dispose of") commits the crime of possession of stolen property. A person who disposes of stolen property *to another person* commits the crime of trafficking in stolen property.¹⁰

In short, the *Modern Sewer* opinion, the Oxford English Dictionary, and Webster's Third New International Dictionary, all explain that the definition of "dispose of" includes the concepts of "putting" or "placing" an object somewhere, and the dictionaries further define the

bearing ellipses." Posner, *Overcoming Law*, 277 (1995).

⁹ The crimes would be the same because possession of stolen property would be committed when a person "disposes of" stolen property, which under the Defendant's definition would require a finding that the person dispose of the property to another person. Similarly, the crime of trafficking would be committed when a person disposed of stolen property to another person. The two crimes, therefore, would be indistinguishable.

¹⁰ Furthermore, if the term "dispose of" means to transfer *to another person*, then the Legislatures' language in the trafficking statute ("dispose of to another person") would be

term to include the following: to put away, stow away, deposit, arrange, distribute, get rid of, deliver, put or get (anything) off one's hands, or to put into a settled state or position. This is exactly what the Defendant in the present case did with the red plaid coat and the lime green fleece.

Viewing the evidence below in a light most favorable to the State, the evidence showed that (prior to the deputies arrival at her mother's house) the Defendant had moved the red plaid coat and the lime green fleece out of her car and into a box near the door of her mother's house, where the coats were later found by Deputy Wilsey. RP (3/26) 118-19. This evidence was clearly sufficient for a jury to conclude that the Defendant had "disposed of" the two coats. Stated another way, this evidence was sufficient to demonstrate that the Defendant placed or put (or arranged, stowed away, put away, got rid of, got off of her hands, or deposited) the coats into the box near the front door of her mother's residence. Similarly, as in the (omitted) example from Webster's, the Defendant "disposed of the [the coats] in [a] convenient quickly accessible place."

In short, given the true and complete dictionary definition of "dispose of," and viewing the evidence in a light most favorable to the

redundant and unnecessary.

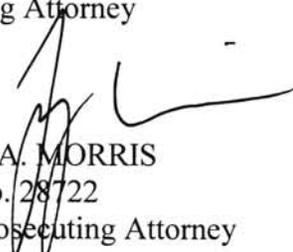
State, the evidence below was sufficient to show that the Defendant “disposed of” the red plaid coat and the lime green fleece. The Defendant’s claim that the State presented insufficient evidence is without merit.

IV. CONCLUSION

For the foregoing reasons, the Defendant’s conviction and sentence should be affirmed.

DATED January 10, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

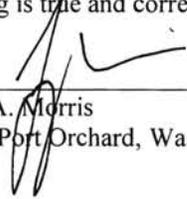


JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

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 Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the brief of respondent in State v. Meloni Terry, No. 70255-6-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.



Jeremy A. Morris
Done in Port Orchard, Washington

January 10, 2014
Date