 72141-1

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Court of Appeals
Division I
State of Washington

No. 72141-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARREN MORRIS-WOLFF,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. On retrial, the court's jury instruction that violation of a court order "may or may not be a crime against a person" was an impermissible comment on the evidence.

2. On retrial, the court's response to the jury inquiry for a legal definition of "crime against a person" was inconsistent with its introductory instruction and improperly allowed the attorneys' arguments to substitute for the court's instructions on the applicable law.

3. Prosecutorial misconduct in rebuttal argument deprived Mr. Morris-Wolff of a fair trial.

4. On retrial, the court abused its discretion when it denied defendant's request for a curative instruction and motion for a mistrial due to prosecutorial misconduct in rebuttal argument.

5. On retrial, cumulative error deprived Mr. Morris-Wolff of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article IV, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. Where the court instructed the jury that violation of a court order "may or may not be a crime against a person," did the court impermissibly comment on the evidence by singling out and emphasizing a contested issue?

2. The only law upon which a jury may rely is that provided by the court in its instructions and not in attorneys' arguments. Where the jury requested "a more comprehensive or a legal definition be offered for 'a crime against a person,'" and the court responded "rely on all the evidence, instructions, and argument," was the response inconsistent with its introductory instruction and improperly allow the attorneys' arguments to substitute for the court's instructions on the applicable law?

3. The due process provisions of the Fourteenth Amendment and Article I, section 3 require a prosecutor to seek a verdict based on the evidence and free of prejudice. Where in rebuttal argument the prosecutor argued "facts" that were substantially misleading and were not in evidence and the majority of jurors told defense counsel after the verdict that they discussed those "facts" during deliberations and one juror stated the "facts" were a "nail in the coffin," did prosecutorial misconduct deprive Mr. Morris-Wolff of his constitutional right to due process?

4. A trial court abuses its discretion when it fails to give a curative instruction following prejudicial, improper argument by the State. Where in rebuttal argument the prosecutor argued "facts" that were substantially misleading and were not in evidence and the majority of jurors told defense counsel after the verdict that they discussed those "facts" during deliberations and one juror stated the "facts" were a "nail in the coffin,"

did the trial court abuse its discretion in denying Mr. Morris-Wolff's request for a curative instruction?

5. Superior Court Criminal Rule (CrR) 7.5 authorizes a new trial when a substantial right of a defendant was materially affected by prosecutorial misconduct. Where in rebuttal argument the prosecutor argued "facts" that were substantially misleading and were not in evidence and the majority of jurors told defense counsel after the verdict that they discussed those "facts" during deliberations and one juror stated the "facts" were a "nail in the coffin," did the second trial court abuse its discretion in denying Mr. Morris-Wolff's motion for a new trial due to prosecutorial misconduct?

6. A criminal defendant is entitled to a new trial when the cumulative effect of multiple errors results in a trial that was fundamentally unfair. Did the cumulative effect of the multiple instructional errors and prosecutorial misconduct in rebuttal argument result in a trial that was fundamentally unfair and requires reversal?

C. STATEMENT OF THE CASE

Darren and Lisa Morris-Wolff were married for ten years and had two children. 4/8/14 RP 2195. During their marriage, Mr. Morris-Wolff was the primary childcare provider and Ms. Morris-Wolff was the primary wage earner. 6/10/14 RP 80; 6/12/14 RP 60, 62. In January 2013, Ms.

Morris-Wolff announced she wanted a divorce but, at Mr. Morris-Wolff's urging, she agreed to participate in marital counseling. 3/27/14 RP 981; 3/31/14 RP 1242; 6/10/14 RP 94. After six months of counseling, Mr. Morris-Wolff thought their relationship was improving but Ms. Morris-Wolff still wanted to end the marriage and to stop counseling. 3/31/14 RP 1244; 4/10/14 RP 2243-44, 2245.

On the morning of July 3, 2013, Mr. Morris-Wolff packed some of his belongings and was prepared to move out but he wanted to continue marital counseling. 3/31/14 RP 1265; 4/10/14 RP 2260; 6/12/14 RP 79. Ms. Morris-Wolff was unwilling to discuss the issue at that time and prepared to leave for work. 3/27/14 RP 988; 6/10/14 RP 103. Mr. Morris-Wolff's car was parked behind Ms. Morris-Wolff's car in their driveway, blocking her. 3/27/14 RP 994; 3/31/14 RP 1268. He refused to move his car unless she agreed to continue counseling. 4/10/14 RP 2260. He then suggested she call a cab or, in the alternative, call the police. 3/27/14 RP 996-97; 3/31/14 RP 1268; 6/10/14 RP 105. Ms. Morris-Wolff called the police and Mr. Morris-Wolff was arrested. 3/27/14 RP 996-97; 6/10/14 RP 105-06. Ms. Morris-Wolff obtained protection orders prohibiting him from contacting her or their children or from being within 500 feet of the family home. 3/27/14 RP 1010; 3/31/14 RP 1295; Ex. 5, 6, 7, 8, 30.

On July 11, 2013, Mr. Morris-Wolff sent a text message to Ms. Morris-Wolff and went to a neighbor's house, but she told him to leave because he was within 500 yards of the family home. 4/3/14 RP 1696, 1698; 4/10/14 RP 2383.

On August 13, 2013, Mr. Morris-Wolff repeatedly called and sent text messages to Ms. Morris-Wolff. 3/27/14 RP 1108-23; 4/10/14 RP 2354; 6/10/14 RP 134, 136. Ms. Morris-Wolff finally responded that the children needed him and were proud of him but asked him to stop calling or texting her because it was not the "right way to resolve this and can only get you into trouble." 7/1014 RP 134, 136, 140; 6/10/14 RP 140. Mr. Morris-Wolff interpreted this response as an invitation to discuss joint parenting issues in person. 4/10/14 RP 2354-55; 6/12/14 RP 97-98.

The following morning, Ms. Morris-Wolff opened the back door to let out their cat and she saw Mr. Morris-Wolff running through the back yard. 3/31/14 RP 1155, 1157; 4/1/14 RP 1387; 6/10/14 RP 146. According to Mr. Morris-Wolff, he went to the back because he did not want neighbors to see him at the home. 4/10/14 RP 2355; 6/12/14 RP 99. He called out to Ms. Morris-Wolff but she quickly closed and locked the door. 3/31/14 RP 1157; 4/10/14 RP 2356; 6/10/14 RP 147; 6/12/14 RP 100-01.

Mr. Morris-Wolff ran up to the door and saw Ms. Morris-Wolff on the telephone. 4/10/14 RP 2357; 6/12/14 RP 101. He was in "shock,

disbelief" because he thought he was invited over. 4/10/14 RP 2357. When he saw her on the telephone, he realized she was calling the police to report his presence at the home in violation of the court orders. 4/10/14 RP 2357; 6/10/14 RP 148; 6/12/14 RP 101. Believing he would be arrested for the violation, he wanted to say good-bye to his children and tell them he loved them. 4/10/14 RP 2357; 6/12/14 RP 101, 107. He grabbed a sledge hammer that was near the back door, broke the glass around the door knob, and reached inside to unlock the door. 3/31/14 RP 1162; 4/10/14 RP 2357; 6/10/14 RP 149.

In the meantime, Ms. Morris-Wolff sent the children upstairs and she ran out the front door to the middle of the street screaming for help and talking to the 911 operator. 3/31/14 RP 1172-73; 4/1/14 RP 1390; 6/10/14 RP 151; 6/12/14 RP 48-49. Two neighbors came outside to assist. 3/31/14 RP 1173; 4/1/14 RP 1456; 4/3/14 RP 1747, 1801; 6/10/14 RP 151. While they waited for the police to arrive, Mr. Morris-Wolff walked outside with the children, sat down with them in the driveway, and talked quietly with them for a few minutes until a neighbor took the children to her house. 3/31/14 RP 1173-74, 1176-77; 4/1/14 RP 1393, 1464; 4/3/14 RP 1748, 1752, 1801, 1803; 4/10/14 RP 2361; 6/10/14 RP 152, 154-55; 6/12/14 RP 46-47. Shortly thereafter the police arrived and Mr. Morris-Wolff was arrested. 4/1/14 RP 1395; 6/10/14 RP 100.

Mr. Morris-Wolff was charged with burglary in the first degree alleged to have occurred on August 14, 2013, or, in the alternative, residential burglary based on the same incident, stalking alleged to have occurred from July 5 - August 14, 2013, harassment alleged to have occurred on July 3, 2013, violation of a court order protecting one of the children alleged to have occurred on July 9, 2013, and violation of a court order protecting Ms. Morris-Wolff on July 11, 2013. CP 19-22. Mr. Morris-Wolff requested the jury be instructed on the lesser included offense of criminal trespass for the charges of burglary and residential burglary. 4/14/14 RP 2442-43, 2445-46; CP 60-61, 82. The court gave the lesser included instruction on the first degree burglary charge only. 4/14/14 RP 2449-50, 2455; CP 124, 125, 126.

Mr. Morris-Wolff was found not guilty of burglary in the first degree, guilty of criminal trespass in the first degree, not guilty of stalking, not guilty of harassment, not guilty of violation of the court order protecting one of his children, and guilty of violating the court order protecting Ms. Morris-Wolff. The jury hung on the charge of residential burglary. 4/14/14 RP 2638; CP 162-63, 166-70, 176, 181. In addition, the jury found Mr. and Mrs. Morris-Wolff were members of the same family or household when the two offenses were committed and the offenses

were aggravated domestic violence offenses committed within the sight or sound of his children CP 164-65, 171-73.

Mr. Morris-Wolff was retried on the charge of residential burglary. On retrial, the court gave the defense proposed instruction on criminal trespass in the first degree as a lesser included offense to residential burglary. 6/12/14 RP 156; CP 252-54. Over defense objection, the court instructed the jury that a violation of a court order could be a crime against a person. 6/12/14 RP 157-58; CP 252-54. In closing argument, Mr. Morris-Wolff argued he entered the house unlawfully but contended he did not have intent to commit a crime against a person or property inside. 6/16/14 RP 46-59. Rather, he wanted to say good-bye to his children before he was arrested. *Id*. In rebuttal argument, the prosecutor argued Mr. Morris-Wolff was not attending supervised visits with his children. 6/16/14 RP 63. Mr. Morris-Wolff objected based on facts not in evidence and was overruled. *Id*. The prosecutor immediately repeated the allegation, defense again objected, and the second objection was sustained without explanation. 6/16/14 RP 63-65.

Based on the rebuttal argument, Mr. Morris-Wolff requested a curative instruction regarding visits with his children. 6/16/14 RP 69-70; CP 224. The request was denied. 6/16/14 RP 71-72.

During deliberations, the jury inquired, “Can a more comprehensive or a legal definition be offered for “a crime against a person” vis-à-vis instruction no. 17?” CP 229. The court responded, “There will be no additional jury instructions. Please rely on all the evidence, instructions and argument you have received.” CP 229.

Mr. Morris-Wolff was convicted of residential burglary. 6/17/14 RP 74-75; CP 225. In addition, the jury found Mr. and Ms. Morris-Wolff were members of the same family or household at the time of the offense. 6/17/14 RP 75; CP 226.

Mr. Morris-Wolff moved for a new trial pursuant to CrR 7.5. 6/27/14(AM) RP 82-84; CP 261-71. The motion was denied. 6/27/14 (AM) RP 88-91; CP 272.

At sentencing, the court dismissed the conviction for criminal trespass in the first degree and imposed a sentence for residential burglary and violation of a court order. 6/27/14 2648; CP 278-86, 287.

Additional facts are discussed in further detail in the relevant following sections.

D. ARGUMENT

1. The trial court's jury instruction that violation of a court order may or may not be a crime against a person was an impermissible comment on the evidence.

a. A trial court may not comment on the evidence.

Article IV, section 16 of the Washington Constitution provides:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

This section prohibits a judge from providing instructions that single out specific facts of the case when general instructions are sufficient to explain the law and allow each party to argue the theory of the case. *State v. Stone*, 24 Wn. App. 270, 273, 600 P.2d 677 (1979); *State v. Bradley*, 20 Wn. App. 340, 344, 581 P.2d 1053 (1978). The circumstances of the case "should [not] be singled out and emphasized" in jury instructions. *State v. Lewis*, 6 Wn. App. 38, 41-42, 491 P.2d 1062 (1972). In addition, a court should not provide unnecessary detailed instructions that "point up", "underline," or "buttress" one party's theory of the case. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969).

A comment on the evidence may be express or implied. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 126 (2006); *State v. Lampshire*, 74 Wn.2d 888, 891, 447 P.2d 727 (1968).

> A statement constitutes a comment on the evidence "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement."

In re W.R.G., 110 Wn. App. 318, 326, 40 P.3d 1177 (2002) (quoting *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)).

b. Instruction No. 17 was a comment on the evidence.

Over defense objection, the court instructed the jury:

> A court order violation may or may not be a "crime against a person" depending on the facts and circumstances of the violation.

6/12/14 RP 157-58; CP 249 (Instruction No. 17). This instruction was proposed by the State and was not based on a statute or a pattern instruction, but was based on *State v. Stinton* in which the Court ruled that violation of a provision of a protection order that restrained the defendant from harassing contact with the protected party could serve as a predicate "crime against a person" for residential burglary. 121 Wn. App. 569, 574-77, 89 P.3d 717 (2004).

By singling out and emphasizing a disputed issue, this instruction constituted a comment on the evidence. The State did not propose an instruction that defined "crime against a person" in general terms, similar to the definitional instructions for such terms as "building," "intent," and "protection order." CP 242, 243, 246. In addition, the State did not

propose any parallel instructions to the effect that an attempted assault may or may not be a crime against a person or that breaking into the house may or may not be a crime against property therein.

In *State v. Eaker*, the defendant was convicted of rape of a child in the first degree based on an allegation that he demanded oral sex from an 8-year-old boy. 113 Wn. App. 111, 113, 53 P.3d 37 (2002). The court instructed the jury that to convict the defendant, the jury had to find that within the charging period the defendant had intercourse with the boy "on the day that" a woman was babysitting the boy. *Id*. at 118. On appeal, the defendant argued the instruction was a comment on the evidence in that it suggested that if a juror concluded the abuse occurred while the woman was babysitting, it did not also need to find the woman was babysitting during the charging period. *Id*. The appellate court agreed, and stated:

> Because the prosecution elected a specific act and sought to identify the specific act by reference to corroborating facts, the "to convict" instruction had to be framed in a way that does not impermissibly comment on the evidence establishing these facts.

Id. at 119. Similarly here, the instruction implicitly suggested the State proved a violation of a court order.

By emphasizing the contested issue, the court implicitly bolstered the State's argument that the alleged violation of a court order established Mr. Morris-Wolff's intent to commit a crime against a person.

Accordingly, the instruction was an impermissible comment on the evidence.

c. The comment was prejudicial and requires reversal.

A judicial comment on the evidence is presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). The State bears the burden of proving the error was harmless, unless the record affirmatively shows that no prejudice could have resulted. *Lane*, 125 Wn.2d at 838-39. A comment on the evidence requires reversal unless the record shows "the remark could not have influenced the jury." *Id*. at 839 (quoting *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963)).

The State cannot meet its burden here. The central disputed question was whether Mr. Morris-Wolff entered the house with the intent to commit a crime against a person or property therein. The instruction erroneously emphasized the State's theory of the case and suggested Mr. Morris-Wolff violated a protection order. Under these circumstances, the error cannot be deemed harmless. Reversal is required.

2. The trial court's response to a jury inquiry that it could rely on argument for a legal definition was inconsistent with its introductory instruction and improperly allowed the attorney's arguments to substitute for the court's instruction on the law.

The jury submitted an inquiry regarding the applicable law:

> Can a more comprehensive or a legal definition be offered for "a crime against a person" vis-à-vis instruction no. 17?

Rather than providing further instructions or referring the jury to its original instructions, the court responded:

> There will be no additional jury instructions. Please rely on all the evidence, instructions and argument you have received.

CP 229.

This response was inconsistent with its original instructions to the jury and allowed the prosecutor's argument to substitute for the court's duty to instruct the jury on the applicable law. The only law upon which a jury may rely is the law provided by the court in its instructions, not attorneys' argument. It is the duty of the court, not counsel, to define terms words used in an instruction when necessary. *State v. Stacy*, 181 Wn. App. 553, 572, 326 P.3d 136 (2014). As the jury was specifically and accurately instructed in the court's original instructions, "The law is contained in my instructions to you. You must disregard any remark, statement, or

argument that is not supported by the evidence or the law in my instructions." CP 232 (Instruction No. 1).

"[A] conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir.1971) (citing *Bollenbach v. United States,* 326 U.S. 607, 613, 66 S.Ct. 402 90 L.Ed. 350 (1946)). Here, a "basic issue" was whether Mr. Morris-Wolff intended to commit a crime against a person, and the issue was addressed extensively by both parties during closing argument. 6/16/14 RP 31-34, 35-37, 38-41, 43, 46-48, 51-53, 54-57, 62-65. The court's inconsistent response to the inquiry that allowed the jury to substitute argument for the law on a contested issue requires reversal. *See State v. Lewis*, 6 Wn. App. at 40 (prejudicial error in inconsistent instructions requires reversal).

3. The prosecutor committed misconduct in rebuttal argument by arguing facts not in evidence, in violation of Mr. Morris-Wolff's constitutional right to a fair trial.

a. <u>Improper and prejudicial conduct by a prosecutor violates a criminal defendant's constitutional right to a fair trial</u>.

Prosecutors, as quasi-judicial officers, have a special duty to seek a verdict free of prejudice and based on the evidence. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The special duty is based on

a prosecutor's obligation to afford an accused a fair and impartial trial. *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amend. V, XIV; Wash. Const. Art. I, sec. 3. "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

A prosecutor commits misconduct when he or she "allude[s] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." RPC 3.4(e); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Although a prosecutor may argue the facts and inferences there from, he or she may not make prejudicial statements unsupported by the evidence. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). Argument intended to encourage a verdict based on facts not in evidence is improper. *State v. O'Neal*, 126 Wn. App. 395, 421, 109 P.3d 429 (2005).

Where a prosecutor violates his or her duty as quasi-judicial officer, prosecutorial misconduct "may deprive a defendant of a fair trial. And only a fair trial is a constitutional trial." *Charlton*, 90 Wn.2d at 665; *accord State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). As Justice Sutherland wrote eighty years ago:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Where, as here, the defense objected to the improper remarks and either requested a curative instruction or moved for a mistrial, the court's denial of the instruction or mistrial is reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). A court abuses its discretion when it fails to give a curative instruction following prejudicial, improper argument by the State. *State v. Lougin*, 50 Wn. App. 376, 383-84, 749 P.2d 173 (1988). In addition, CrR 7.5(a)(2) authorizes a new trial when a substantial right of a defendant was materially affected by prosecutorial misconduct.

b. The prosecutor's improper and prejudicial remarks in rebuttal argument violated Mr. Morris-Wolff's right to a fair trial.

Mr. Morris-Wolff's theory of the case was he did not enter the house with the intent to commit a crime against a person or to commit an assault. Rather, he had seen his children only once in the previous six weeks and he intended to say good-bye to his children, tell them he loved them, and explain that he not abandoning them but he was going to be arrested for violating the order protecting their mother. 6/16/14 RP 46-48, 50, 55. Even though there was no testimony regarding visitation and Mr. Morris-Wolff was prohibited by the court orders from contact with his children, in rebuttal argument at the end of the second trial, the prosecutor challenged the defense theory by alleging Mr. Morris-Wolff had not attended supervised visitation,:

> [H]e certainly did not go on August 14th as defined in State's Exhibit 8, the order for protection that Lisa asked for, to the supervised visitation that was ordered with his children.

6/16/14 RP 63. According to the declaration of defense counsel, "[t]he state then held up the page on the order of protection that indicated Mr. Morris-Wolff could have supervised visits with the children and walked it down the panel of juror [sic] so that it was held in front of each of them. The state did not do this with any other document or exhibit during its

closing." CP 263. Defense counsel immediately objected on the grounds the statement was misleading. *Id*. The objection was overruled. *Id*. The prosecutor quickly repeated the allegation:

> Because while Lisa followed a court process, she petitioned for a protection order, the defendant didn't show up for those hearings. He had supervised visitation.

6/16/14 RP 64. Defense counsel again objected to the rebuttal argument as misleading and the court sustained the second objection without explanation. 6/16/14 RP 65.

When the jury was sent to deliberate, Mr. Morris-Wolff requested a curative instruction to inform the jury that he was prevented from visiting his children because of the protection orders, or, alternatively, an instruction to disregard the State's argument regarding supervision. 6/16/14 RP 69, 71; CP 224. The requests were denied. 6/16/14 RP 71-72. Following the verdict, defense counsel spoke with the ten jurors who remained in the jury room. CP 265. The majority of jurors indicated supervised visitations were discussed during deliberations, and one juror stated Mr. Morris-Wolff's failure to attend supervised visitations was a "nail in the coffin." CP 265. Due to the prosecutor's rebuttal argument based on facts not in evidence, Mr. Morris-Wolff moved for a new trial pursuant to CrR 7.5. 6/27/14 RP 82-84, CP 261-71. The motion was denied. 6/27/14 RP 88-90.

The prosecutor's comments regarding court-ordered supervised visits were not supported by any admissible evidence and, in fact, were incorrect. All protection orders prohibited Mr. Morris-Wolff from contact with his children. Ex. 5, 6, 7, 8, 30. There was no evidence that the protection orders were modified to allow visitations or that visitations had been arranged, much less that Mr. Morris-Wolff failed to attend visits.

In *Jones*, the defendant's conviction for unlawful delivery of a controlled substance was reversed due in part to prosecutorial misconduct in closing argument where the prosecutor bolstered the credibility of the investigating officer and the confidential informant by arguing facts not in evidence. 144 Wn. App. at 292-93. Similarly here the prosecutor committed misconduct in rebuttal argument by disparaging Mr. Morris-Wolff and undermining a primary defense theory based on facts not in evidence.

The misconduct was prejudicial. As explained in defense counsel's declaration, the jurors discussed visitation during deliberations, several jurors indicated they assumed Mr. Morris-Wolff had supervised visits that he failed to attend, and one juror stated his failure to attend was "a nail in the coffin." CP 265.

c. The misconduct requires reversal.

Prosecutorial misconduct is prejudicial and requires reversal where there is a substantial likelihood the misconduct affected the verdict. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). As this court has noted, "'[T]rained and experienced prosecutor's presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.'" *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (quoting defense counsel's brief).

Here, as indicated by the jurors' comments to defense counsel after the verdict, there is a substantial likelihood that the prosecutor's improper remarks affected the jury and contributed to a verdict that was not based on the evidence. It may be noted, the first trial was unable to reach a verdict on the charge or residential burglary and the prosecution obtained a conviction only after improper rebuttal argument alleging facts not in evidence. The misconduct was not harmless and reversal is required.

4. The cumulative errors resulted in a fundamentally unfair trial.

The cumulative effect of the errors deprived Mr. Morris-Wolff of his fundamental right to a fair trial. Under the cumulative error doctrine, a criminal defendant may be entitled to a new trial when errors cumulatively resulted in a trial that was fundamentally unfair. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The cumulative error doctrine requires reversal where several trial errors standing alone may not require reversal but, when the cumulative effect of those errors materially affected the outcome of the trial. *State v. Greiff*, 141 Wn.2d at 929; *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In *State v. Badda*, the defendant's conviction was reversed on the grounds the prosecutor's improper remarks during voir dire and the court's several instructional errors cumulatively constituted prejudicial error. 63 Wn.2d 176, 179-83, 385 P.2d 859 (1963). Similarly here, the second trial court gave an instruction that was an impermissible comment on the evidence and inaccurately responded to a jury inquiry, both of which addressed the primary issue in dispute. In addition, the second trial court erroneously denied Mr. Morris-Wolff's motion for a curative instruction following the prosecutor's improper argued facts not in evidence that

severely undermined his theory of the case. The cumulative effect of these errors deprived Mr. Morris-Wolff of his right to present a defense and his right to a verdict based on the evidence. Reversal is required. *See State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

E. CONCLUSION

The second court provided a jury instruction that impermissibly commented on the evidence. The court's response to a jury inquiry erroneously allowed attorneys' arguments to substitute for the court's instructions on the law. In rebuttal argument, the prosecutor committed misconduct by arguing facts not in evidence but the court refused to give a curative instruction or grant a new trial. These errors, individually and cumulatively require reversal. For the foregoing reasons, Mr. Morris-Wolff respectfully requests this Court reverse his conviction for residential burglary.

DATED this 1st day of April 2015.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72141-1-I
v.	)	
	)	
DARREN MORRIS-WOLFF,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] DARREN MORRIS-WOLFF [darren@morris-wolff.com]	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF APRIL, 2015.

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