

NO. 45668-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GARY R. COLE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's entry of judgment against the defendant for second degree burglary violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, because substantial evidence does not support each element of the crime charged.

2. The trial court erred when it denied the defendant's motion for a mistrial after Deputy Wilson told the jury that he arrested the defendant on outstanding warrants because this evidence was irrelevant and prejudicial and denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he argued in rebuttal that the jury should convict in disregard of the elements of the offence charged.

Issues Pertaining to Assignment of Error

1. Does a trial court's entry of judgment against a defendant for second degree burglary violate that defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if substantial evidence does not support the essential element of unlawfully entering or remaining?

2. Does a trial court err if it denies a defendant's motion for a mistrial after a police officer tells a jury that he arrested that defendant on outstanding warrants when that evidence is irrelevant and prejudicial and denies the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

3. Does a prosecutor commit misconduct and thereby deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if he or she argues in rebuttal that the jury should convict in disregard of the elements of the offence charged?

STATEMENT OF THE CASE

Factual History

In December of 2012, Alaska resident Jeffrey Berg did an inspection of an old defunct tavern on SR 109 in Moclips prior to making an offer on the property, which was owned by a person residing in Minnesota. RP 22-25.¹ During the inspection Mr. Berg noted that the building contained a great deal of filth, trash, and drug paraphernalia from persons who had apparently been using the building for illicit activities. *Id.* In spite of the filth and trash, Mr. Berg's inspection revealed that the building was structurally sound and the wiring was functional and adequate. *Id.* Based upon his inspection Mr. Berg made an offer to purchase which the owner accepted. RP 27-28. Mr. Berg's understanding of the deal was that he was purchasing the building that had housed the tavern, an adjacent trailer, and a small pump house, as well as all fixtures therein. RP 27-28, 42.

On January 10, 2013, a few days before escrow closed on the deal, Mr. Berg heard that there had been some problems at the property. RP 29-31. As a result he got the key from the caretaker and once again entered the main

¹The record on appeal includes two volumes of verbatim reports. The first includes the transcripts of the jury trial held on August 21, 2013, and the first sentencing hearing held on October 10, 2013. The second contains the transcript of the sentencing hearing held on November 7, 2013. The former is referred to herein as "RP [page #]." The latter is referred to herein as "RP 11/7/13 [page #]."

building. *Id.* Upon entry he discovered that wiring had been cut and taken, and fixtures had been damaged or stolen, that the pump and air tank was missing from the pump house, and that the wood stove was missing from the tavern building. *Id.* Upon seeing these things he called Gray's Harbor County Sheriff's Office, who dispatched Deputy Robert Wilson. RP 32-34, 59-61. Once on scene, Deputy Wilson examined the property with Mr. Berg and began an investigation. *Id.*

After leaving the property Deputy Wilson had occasion to interview a local resident by the name of Teresa Bushman. RP 66-68. Ms Bushman told him that she had recently purchased a used wood stove from the defendant Gary Cole for \$150.00, which she gave to her estranged husband to put in his home in Hoquiam. RP 44-46. She claimed that neither she nor her estranged husband knew the stove was stolen. RP 47-52. At this point the deputy called Mr. Berg and had him meet him at the home of Ms Bushman's estranged husband, where they retrieved the wood stove after Mr. Berg identified it as the stove taken from the old tavern building he was purchasing. RP 32-33, 54-57, 67-68.

After helping Mr. Berg get the wood stove back, Deputy Wilson went to the defendant's address and arrested him on outstanding misdemeanor warrants. RP 68. During a subsequent interview the defendant denied knowledge about any burglary. RP 682-83. However, he eventually told the

deputy and gave a written statement that he had retrieved the wood stove from the defunct Tavern at the request of Teresa Bushman, who told him that she had loaned the stove to the prior resident at the bar who had moved out without returning it. RP 82-88; Trial Exhibit No. 1. According to the defendant Ms Bushman paid him \$50.00 and some methamphetamine for his labors. *Id.*

Mr. Cole also told Deputy Wilson that a couple weeks after retrieving the stove he woke up at his property and found a pump that someone had discarded. Trial Exhibit No. 1. Not wanting it on his property he took it to the house of a friend by the name of Donald Waugh. *Id.* Upon learning this fact Deputy Wilson went to Mr. Waugh's house and retrieved the pump, which he found sitting on Mr. Waugh's front porch. RP 33-34, 57-59.

Procedural History

By information filed March 1, 2013, the Grays's Harbor County Prosecutor charged the defendant Gary R. Cole with one count of second degree burglary. CP 1-2. The case later went to trial before a jury with the state calling five witnesses: Jeffrey Berg, Teresa Bushman, Steve Bushman, Donald Waugh and Deputy Robert Wilson. RP 22, 43, 54, 57, 59. They testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. During Deputy Wilson's testimony the state elicited the fact from him that he had arrested the defendant on outstanding misdemeanor

warrants. RP 69-73, 74-81. The defense then moved for a mistrial on the basis that that evidence was irrelevant and sufficiently prejudicial to deny the defendant a fair trial. *Id.* The trial court denied the motion but offered to give the jury a curative instruction. *Id.* The defense declined the offer. *Id.*

During Deputy Wilson's testimony the state also attempted to introduce the defendant's oral and written statements into evidence before the jury. RP 100. The defense objected and argued that this evidence was not admissible because the state had failed to present evidence to establish a *corpus delicti* on the element of unlawfully entering or remaining. RP 100-105. The trial court overruled this objection and admitted both the defendant's oral and written statements into evidence. RP 105.

Following Deputy Wilson's evidence the state rested its case. RP 99. The defense then rested its case without calling any witnesses. RP 112. At this point the court instructed the jury without objection or exception from the defense and proceeded to closing arguments. RP 107-110, 112. During rebuttal argument the prosecutor made the following statement in response to the defendant's closing remarks that the state had failed to call the owner of the property to testify that the defendant did not have permission to enter. RP 121-127.

MR. WALKER: Thank you , Your Honor . I have the burden of proof so I get the last word. Is it reasonable to make an inference that this entry was lawful? The defense would suggest that there is. Oh,

sure, maybe some guy back in Minnesota said it was okay to go in and trash the place. Even if that were true, whether that's lawful is still a question for you once a guy has already put money in escrow.

RP 127-128.

Following argument the jury retired for deliberation, eventually returning a verdict of "guilty." RP 130-132; CP 85. At a subsequent sentencing hearing the state presented the following as the defendant's criminal history.

Crime	Crime Date	Sent. Date	Sentencing Court	A or J	Type	Points
DWLS 1	8/26/11	11/15/11	Jefferson Dist.	A	Misdo	0
Veh. Prowl 2	3/7/11	3/17/11	Aberdeen Muni.	A	Misdo	0
Resisting Arrest	5/28/09	4/26/13	Grays Harb. Dist.	A	Misdo	0
Escape	2/8/06	3/12/06	Quinault Tribal	A	Felony	1
DUI	5/23/04	6/16/05	Clallum District	A	Misdo	0
NCO Vio.	1/31/03	4/8/03	Grays Harb. Dist.	A	Misdo	0
Assault 4	1/9/03		Grays Harb. Sup.	A	Misdo	0
NCO Vio. DV	1/31/03	4/8/03	Grays Harb. Dist.	A	Misdo	0
UPFA	12/6/00		Grays Harb. Sup.	A	Felony	1
Comm. Lic. Vio.	10/5/96	11/27/96	Grays Harb. Dist.	A	Misdo	0
Reckless Driving.	6/11/95	1/17/96	W. Klickitat Dist.	A	Misdo	0
Obstructing	8/7/92	9/21/92	Clallum Dist.	A	Misdo	0
Neg. Driving 1	8/7/91	9/21/92	Clallum Dist.	A	Misdo	0
Unreg. Firearm	5/22/84	10/11/84	US Dist. Court	A	Felony	1
Assault 3	4/12/81	4/13/81	Whatcom Sup.	A	Felony	1
Burglary 2	1/11/79	2/23/79	Grays Harb. Sup.	A	Felony	2
Burglary 1	5/13/77	8/17/77	Multnomah Cir.	A	Felony	2

CP 93-94.

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At the sentencing hearing the defense did not dispute the existence of each of the felonies claimed by the state. RP 11/7/13 1-16. Neither did the defense dispute the four points from the two burglary convictions and the one point from the December 2000 conviction for unlawful possession of a firearm. RP 11/7/13 16. However, the defense did dispute the point assigned to escape conviction out of the Quinault Tribal Court and the points assigned to the Assault 3 and Unregistered Firearm convictions. RP 11/7/13 6-18. In the first instance the defense argued that the state had failed to prove the comparability of the tribal conviction. RP 11/7/13 13. In the second instance the defense argued that the Assault 3 and Unregistered Firearm convictions washed because the state had failed to prove the existence of the intervening misdemeanor convictions. RP 11/7/13 6-13.

Specifically, the defense argued that the defendant was released on the federal firearm charge on 11/27/91, that the state had failed to prove any intervening misdemeanors, and that more than five years had then passed to the defendant's sentencing on his next offense, which was the Commercial License Violation sentenced on 11/27/96. RP 11/7/13 6-13. The court rejected the defendant's arguments, adopted the state's argument on the offender score and sentenced the defendant to 43 months, which was the low end of the range on eight points. RP 11/7/13 19-20. The defendant thereafter filed timely Notice of Appeal. CP 141-142.

ARGUMENT

I. THE TRIAL COURT'S ENTRY OF JUDGMENT AGAINST THE DEFENDANT FOR SECOND DEGREE BURGLARY VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT EACH ELEMENT OF THE CRIME CHARGED.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *Id.*

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16

(1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant with second degree burglary under RCW 9A.52.030. This statute provides:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030(1).

The gravamen of this offense is to (1) enter or remain unlawfully in a building, (2) with the “intent to commit a crime against a person or property therein. As used in this statute, the term “enters or remains unlawfully” is

given the following specific definition:

(5) “Enters or remains unlawfully.” A person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. . . .

RCW 9A.52.010(5).

In the case at bar the evidence from Mr. Berg at trial was that a number of days prior to closing on his purchase of the defunct tavern he received information that there was some problem at the property. At that point Mr. Berg was neither the owner nor lessor of that realty and he had no possessory interest in it. As if to emphasize that fact, he explained that he had to go to the caretaker of the property in order to get a key to gain entry to the building to determine if there had been a problem. Thus, at this point in time Mr. Berg had no authority to either exclude persons from the property or allow persons entry. The person with the current possessory interest in that realty was the owner in Minnesota and his agent in Washington from whom Mr. Berg obtained the keys.

At trial Mr. Berg did not presume to speak for either the owner of the property or the owner’s agent. Rather, he simply testified that he did not give anyone permission to enter the property. Ultimately this evidence was irrelevant because the issue at trial was whether or not either the owner in

Minnesota or his agent in Washington had licensed the defendant to enter. It was not the defendant's burden to prove that they had granted him license to enter. Rather it was the state's burden to prove that they had not. Thus, since the state failed to call either the owner in Minnesota or his agent in Washington, the state failed to present competent evidence to support a conclusion that the defendant entered or remained unlawfully on the property. As a result substantial evidence does not support this essential element and the defendant is entitled to dismissal of this charge.

In this case the state may point to the defendant's oral and written statements as sufficient to support the missing element of unlawfully entering or remaining. However, as the following explains, under the *corpus delicti* rule these statements cannot be so employed. The following sets out this argument.

Under the traditional *corpus delicti* rule, a defendant's extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48, 723 P.2d 1189 (1986). The "*corpus delicti*" usually involves two elements: "(1) an injury or loss (*e.g.*, death or missing property) and (2) someone's criminal act as the cause thereof." *Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Although the independent proof of the crime charged need not be sufficient to support a conviction, the state

must present “evidence of sufficient circumstances which would support a logical and reasonable inference” that the charged crime occurred. *Id.* at 578-79; *State v. Hamrick*, 19 Wn.App. 417, 576 P.2d 912 (1978).

Washington courts have followed this rule of evidence since statehood. *See e.g. State v. Munson*, 7 Wash. 239, 34 P. 932 (1893). Over the years, the Washington Supreme Court has repeatedly refused the state’s requests to replace it with the “trustworthiness” standard applied in federal courts. *See State v. Ray*, 130 Wn.2d 673, 679, 926 P.2d 904 (1996) (“[T]his Court has previously considered the arguments for adopting the “trustworthiness” standard, and it has consistently declined to abandon the *corpus delicti* rule”).

In *Bremerton v. Corbett*, *supra*, the court gave the following history behind this common law rule of evidence.

The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone. The requirement of independent proof of the corpus delicti before a confession is admissible was influenced somewhat by those widely reported cases in which the “victim” returned alive after his supposed murderer had been tried and convicted, and in some instances executed. It arose from judicial distrust of confessions generally, coupled with recognition that juries are likely to accept confessions uncritically. This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. Thus, it is clear that the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the

possibility that a confession, though voluntarily given, is false.

City of Bremerton v. Corbett, 106 Wn.2d at 576-577 (citations omitted).

In 2003, the Washington Legislature passed RCW 10.58.035 in order to eliminate the traditional *corpus delicti* rule and replace it with a “trustworthiness” doctrine. The first section of this statute states:

(1) In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

RCW 10.58.035(1).

The second paragraph of this rule creates four non-exclusive factors the court “shall” consider in determining whether or not a defendant’s statement will be admissible under the statute. This second section states:

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

(a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement;

and/or

(d) The relationship between the witness and the defendant.

RCW 10.58.035(2).

While an initial review of RCW 10.58.035 might indicate that it has replaced the *corpus delicti* rule in its entirety, any such conclusion would be inaccurate. The reason is that the *corpus delicti* rule has always addressed two issues. The first is the admissibility of evidence. The second is the sufficiency of evidence to sustain a conviction. As the Washington State Supreme Court explained in *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010), the new statute addresses only the former issue of the admissibility of a defendant's statement. Thus, while a defendant's statements would not have been admissible under the *corpus delicti* rule, they might now be admissible if the requirements of RCW 10.58.035 are met. However, absent independent proof of the existence of the crime charged, under the *corpus delicti* rule, those statements would still be insufficient to sustain a conviction. The court stated the following on this issue in *Dow*:

Subsection (4) provides that “[n]othing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.” RCW 10.58.035 (emphasis added). This subsection establishes that the legislature has left intact the requirement that a defendant cannot be convicted without sufficient evidence to establish every element of the crime, which is consistent with the *corpus delicti* doctrine and our cases. Considering RCW 10.58.035's plain language, we hold that any

departure from the traditional corpus delicti rule under RCW 10.58.035 pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. The corpus delicti doctrine still exists to review other evidence for sufficiency, i.e., corroboration of a confession. That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statement.

State v. Dow, 168 Wn.2d at 253-254 (citation omitted).

As has previously been stated in this argument, in this case the state charged the defendant with second degree burglary, which has two elements: (1) an unlawful entering or remaining in a building, (2) with the intent to commit a crime therein. Under the *corpus delicti* rule, the state had the burden of presenting some evidence on both of these elements as a condition precedent to the use of the defendant's oral and written statements as part of that quantum of evidence sufficient to sustain a conviction. However, as was also set out in this argument, the state failed to present any evidence on the essential issue of an unlawful entering or remaining apart from the defendant's statements. Thus, as the decision in *Dow* explains, while the defendant's oral and written statements were admissible as evidence in trial, under the *corpus delicti* rule they cannot be used as a substitute for the missing evidence on the element of unlawfully entering or remaining. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR A MISTRIAL AFTER DEPUTY WILSON TOLD THE JURY THAT HE ARRESTED THE DEFENDANT ON OUTSTANDING WARRANTS BECAUSE THIS EVIDENCE WAS IRRELEVANT AND PREJUDICIAL AND DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). They also guarantee a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer

found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar the state elicited evidence from Deputy Wilson that he arrested the defendant on outstanding misdemeanor warrants. This evidence put the defendant in an extremely unfavorable light in the eyes of the jury as both a person who committed crimes as well as one who potentially was then being sought for the commission of crimes. This evidence was entirely irrelevant under the facts of this case. Indeed, evidence of the fact that Deputy Wilson arrested the defendant was irrelevant. Once Deputy Wilson gave this evidence the defendant objected and moved for a mistrial. The trial court sustained the defendant's objection but refused to grant the mistrial.

The error in the court's ruling was that it failed to recognize the level of prejudice that this evidence caused the defendant. In this case the jury was presented with two alternative theories of the case. The first was the claim

by Teresa Bushman, which was that the defendant offered to sell her a wood stove and that she had no idea that it was stolen. Under this alternative the defendant had no excuse for entry into the tavern. The second theory of the evidence came from the defendant's statements to Deputy Wilson, which was that he entered the tavern and retrieved the stove on Teresa Bushman's specific representation that the stove belonged to her and that the defendant could lawfully get it for her.

In this case the introduction of the evidence that the defendant had outstanding warrants was that quantum of evidence sufficient to swing the jury from belief in the defendant's alternative of evidence to Ms. Bushman's. Thus, but for the admission of the irrelevant, prejudicial evidence of an arrest on outstanding warrants, the jury would more likely than not have acquitted the defendant. Consequently the admission of this evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED IN REBUTTAL THAT THE JURY SHOULD CONVICT IN DISREGARD OF THE ELEMENTS OF THE OFFENCE CHARGED.

As was mentioned in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution,

Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *Bruton v. United States*, *supra*; *State v. Swenson*, *supra*. The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this claim by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence. The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct

here. First, the violation of the trial court's order is blatant and the original motion *in limine* was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the prosecutor committed misconduct when he made rebuttal argument that the jury should ignore the law and convict the defendant anyway. In rebuttal the prosecutor stated:

MR . WALKER: Thank you , Your Honor . I have the burden of proof so I get the last word. Is it reasonable to make an inference that this entry was lawful? The defense would suggest that there is. Oh, sure, maybe some guy back in Minnesota said it was okay to go in and trash the place. Even if that were true, whether that's lawful is still a question for you once a guy has already put money in escrow.

RP 127-128.

In this case the undisputed evidence presented at trial was that the true owner of the property the defendant entered was the seller who lived in Minnesota. Mr. Berg did not become the property owner until after the entry from which the defendant was charged. Thus, the defense argued in closing

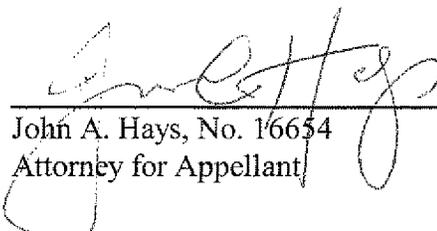
that the state had failed to prove the offense charged because it had failed to present evidence from the property owner that the defendant was not licensed to enter. The prosecutor's argument that the jury was free to convict even if it believed that the owner of the property had licensed the defendant's entry was an argument directly contrary to the law. As a result this argument constituted misconduct and denied the defendant his right to a fair trial. Consequently this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

The defendant's conviction should be vacated and his case remanded for dismissal because substantial evidence does not support each and every element of the crime charged. In the alternative, this court vacate the defendant's conviction and remand for a new trial based upon (1) the state's introduction of irrelevant, prejudicial evidence, and (2) prosecutorial misconduct.

DATED this 14th day of May, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9A.52.010(5)

(5) "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.

RCW 9A.52.030

Burglary in the Second Degree

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 45668-1-II

vs.

**AFFIRMATION OF
OF SERVICE**

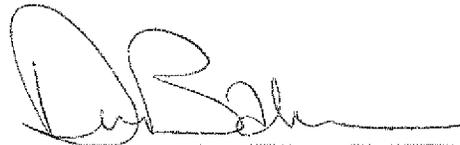
GARY R. COLE,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service

Attached with postage paid to the indicated parties:

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Dated this 19th day of May, 2014, at Longview, Washington.



Donna Baker

HAYS LAW OFFICE

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