

NO. 45668-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

GARY R. COLE,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

Jeff Berg decided to purchase an “old shut down tavern” in Moclips in early fall of 2012. VRP 8/21/13 at 23. The property consisted of a brick building which contained the bar and grill and a modular home used as a house. *Id.* at 24. Mr. Berg had never met the owner, who apparently lived in Minnesota. *Id.* Mr. Berg toured the property in mid-December and found it quite filthy and old, but serviceable. *Id.* at 24-25. The residence contained an inoperable electric heater and a wood stove. *Id.* at 25. There was also a free-standing well shed on the property. *Id.* at 27. Mr. Berg entered into an agreement to purchase the property in the condition it was in when he toured it in early January. *Id.* at 28.

One day, while waiting for the transaction to close, Mr. Berg drove by the property and noticed that the well shed was open. *Id.* at 27. He investigated and found that the well pump, all the wiring, a pressure tank and the power box had been removed. *Id.* at 27 – 28. It was not a tidy removal; it appeared that the power box was ripped from where it belonged. *Id.* at 63. This was approximately in early January. *Id.* at 29. A few days before the sale was to close, Mr. Berg asked the caretaker for the key to make sure everything was still there. *Id.* at 30. Upon entry into the tavern, he noticed that much metal had been removed, including the

stainless steel behind the stoves, the fire suppression equipment and even some wiring. *Id.* at 30. Spans of wire were missing from between electrical boxes. *Id.* at 65. Mr. Berg called the sheriff's department and Deputy Wilson responded. *Id.* At that point, they investigated the house, saw that windows had been broken, and that the wood stove and the chimney and attachments had been removed. *Id.* at 64. It was not a neat removal; a mess was left. *Id.* at 31. Pieces of another wood stove, this one taken from the tavern, were found on the trails leading out of the property. *Id.* at 32. The stove was retrieved from a Mr. Bushman's residence in Hoquiam. *Id.* at 67. Deputy Wilson came back a few days later and returned some components of the well pump. *Id.* at 33. He had retrieved it from a Mr. Waugh's house on the "Taholah" (Quinalt) reservation. *Id.* at 83.

Defendant had apparently placed the stove in the shipping container that he lived in in Moclips. *Id.* at 46. Theresa Bushman, who knows Defendant as "Toot," purchased the stove from Defendant. *Id.* at 45. She claimed she paid \$150. *Id.* Defendant claimed she gave him cash and methamphetamine for the stove. Exhibit #1 8/21/2013. Mrs. Bushman claimed to have given the stove to her husband, Steve Bushman. VRP 8/21/2013 at 47.

After retrieving the stove, Deputy Wilson went to Defendant's property at the intersection of SR 109 and Otis Avenue in Moclips and made contact with him. *Id.* at 68. Deputy Wilson advised Defendant of the *Miranda* warning and asked if Defendant would speak with him, and Defendant indicated he would. *Id.* at 82. Defendant said that he knew where the well pump was. *Id.* Defendant led Deputy Wilson to the house where the well pump was located, then Deputy Wilson started transporting Defendant to the Grays Harbor County jail. *Id.* at 83-84. Deputy Wilson told Defendant that he knew Defendant was not being honest and that he wanted to show that Defendant had been honest in his report. *Id.* at 84. Defendant asked if Deputy Wilson was talking about the wood stove and Deputy Wilson said yes. *Id.* Defendant admitted that he had taken the wood stove from the residence located near the tavern. *Id.* at 84-85. Defendant gave a written statement. *Id.*

Deputy Wilson returned to the house where the well pump was located the next day and retrieved it. *Id.* at 91. He returned it to Mr. Berg. *Id.* at 91. Deputy Wilson walked through the tavern and the residence again. *Id.* at 91. He observed that a broken window in the residence was large enough for a person to crawl through. *Id.* at 92.

At trial, Deputy Wilson explained that when he first encountered Defendant in the course of his investigation, he was aware Defendant had misdemeanor warrants. *Id.* at 68. Deputy Wilson had arrested Defendant on those misdemeanor warrants. *Id.* at 77. Defendant interrupted the testimony and requested a side bar. *Id.* at 68. Defendant requested a mistrial. *Id.* at 69. The trial court denied the motion for a mistrial. *Id.* at 77. The court instructed the jury to disregard “the response of Deputy Wilson,” which was concerning Defendant’s misdemeanor warrants. *Id.* at 81.

In closing argument defense council implied that Mr. Rossley, who had sold the property to Mr. Berg, impliedly allowed Defendant to enter, saying, “And so the question is - the big question for me is why didn't the State call the owner? And I answer, because the owner probably told them I don't care.” *Id.* at 122. In rebuttal, the State pointed out that this was unlikely, saying, “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.” *Id.* at 127-28 (emphasis added.)

## **RESPONSE TO ASSIGNMENTS OF ERROR**

### **1. The evidence supports each element of the charged crime so defendant's rights were not violated.**

Defendant challenges the sufficiency of the evidence of illegal entry and additionally claims his confession should be barred by the *corpus delecti* rule for this same reason. Both claims are mistaken for the same reason; circumstantial evidence of an illegal entry was presented to the jury before Defendant's confession was entered into evidence.

#### **Standard of review.**

“We review the evidence in a light most favorable to the State to determine ‘whether ... any rational trier of fact could have found guilt beyond a reasonable doubt’ where a criminal defendant challenges the sufficiency of the evidence.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410, 413 (2004) (quoting *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas* at 201 (citing *State v. Partin*, 88 Wash.2d 899 (1977).)

**Illegal entry is a question of fact for which circumstantial evidence will suffice.**

“The unlawful entry element of burglary may be proved by circumstantial evidence, as may any other element.” *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215, 218 (2005) (citing *State v. McDaniels*, 39 Wash.App. 236 (1984).) “Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court.” *Goodman* at 781 (citing *State v. Delmarter*, 94 Wash.2d 634 (1980).)

In *State v. J.P.*, the defendant “...was found crawling out of a window of a locked residence after he admittedly spray-painted graffiti on a wall.” *J.P.* at 893. To establish illegal entry the State had called the listing agent for the property. *Id.* at 891. *J.P.* was convicted of residential burglary. *Id.* at 890. On appeal the defendant claimed that “the State did not sufficiently establish that the witness it called had authority over the premises...” and therefore failed to prove unlawful presence or entry. *J.P.* at 890. The Court rejected this argument, noting that “[t]he evidence concerning his activity inside and his manner of exit can support an inference that his entry and presence was not ‘licensed, invited, or otherwise privileged’.” *Id.* at 893.

In the instant case, substantial circumstantial evidence supports the finding that Defendant’s entry was unlawful, including, as the trial court

noted, “[t]here's a lot of corroborating evidence that a burglary took place, it's not just based on the statement... There's a broken window, there's somebody entered there [*sic*], took a lot of stuff and there's corroborating evidence that it was not a legal clean entry with permission of the owner or owner's manager or that sort of thing...” VRP at 105-6. Additionally, Defendant’s own statement establishes that the entry was unlawful. Exhibit #1 8/21/2013.

**Circumstantial evidence of a burglary satisfies the *corpus delicti* rule.**

“An extrajudicial admission or confession may not be considered by the trier of fact unless the prosecution has *prima facie* established the *corpus delicti* of the crime by independent evidence.” *State v. Ashurst*, 45 Wn. App. 48, 50, 723 P.2d 1189, 1191 (1986) (footnote omitted) (citing *State v. Lutes*, 38 Wash.2d 475 (1951), *State v. Meyer*, 37 Wash.2d 759 (1951) & *State v. Hamrick*, 19 Wash.App. 417 (1978).) “*Corpus delicti* usually consists of two elements: (1) an injury or loss (e.g., death or missing property) and (2) someone's criminal act as the cause thereof.” *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135, 1138 (1986) (citing *Meyer* at 763.) “The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a

reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.” *Meyer* at 763-64.

In the instant case, the circumstantial evidence of a break-in and theft of the stove and other metal was sufficient to establish a *prima facie* case that there was (1) a loss (e.g. missing property) and (2) a criminal act as the cause (a break-in,) as the trial court noted. VRP at 105-6.

Therefore, Defendant’s argument fails and Defendant’s statement was properly admitted.

Defendant incorrectly states there must be “independent proof of the existence of every element of the crime charged” to satisfy *corpus delecti* and cites *State v. Ashurst* for this proposition. Brief of Appellant at 12. However, *Ashurst* does not state this proposition; *corpus delecti* has only two elements. *See Corbett, supra*. Defendant’s first assignment of error should be denied.

**2. The trial court did not abuse its discretion by denying Defendant’s motion for a mistrial because an instruction to disregard was given, and the evidence was admissible under the *res gestae* exception.**

The trial court’s denial of Defendant’s motion for a mistrial was not error because a) it is well within the trial court’s discretion, b) the Court gave an instruction to the jury to disregard, and c) the evidence of Defendant’s arrest due to unrelated misdemeanor warrants was admissible

under the *res gestae* exception because it explained how Defendant was taken into custody, led Deputy Wilson to the stolen pump, was taken to jail and made a custodial confession before reaching the jail.

**It is within the trial court's discretion to grant or deny a mistrial.**

Appellate courts apply “an abuse of discretion standard in reviewing the trial court's denial of a mistrial.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541, 545 (2002) (citing *State v. Hopson*, 113 Wash.2d 273, 284 (1989).) “A reviewing court will find abuse of discretion only when ‘no reasonable judge would have reached the same conclusion.’” *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667 (1989).) “A trial court's denial of a motion for mistrial will only be overturned when there is a ‘substantial likelihood’ that the error prompting the mistrial affected the jury's verdict.” *Id.* (citing *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994).) “[T]he trial judge is best suited to judge the prejudice of a statement...” *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102, 1107 (1983).

**The court instructed the jury to disregard.**

Courts presume, “in the absence of evidence to the contrary, that the jury heeded the trial court's explicit instructions.” *State v. Yates*, 161 Wn.2d 714, 787, 168 P.3d 359, 398 (2007) (citing *State v. Grisby*, 97

Wash.2d 493 (1982).) In the instant case, the trial court instructed the jury to disregard Deputy Wilson's revelation that Defendant had misdemeanor warrants at the time of his first encounter. This court should presume, to the extent that the fact that Defendant's warrants were prejudicial, that the jury disregarded the information as instructed.

**Defendant's arrest on unrelated misdemeanor warrants was admissible under the *res gestae* exception.**

Under ER 404(b), evidence of other crimes is not admissible unless relevant for another purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, "[u]nder the *res gestae* or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime *or to provide the immediate context for events close in both time and place to the charged crime.*" *State v. Lillard*, 122 Wn.App. 422, 432, 93 P.3d 969 (2004) (citing *State v. Fish*, 99 Wash.App. 86, 94 (1999)) (emphasis added.) "A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." *Id.* at 431 (citing *State v. Tharp*, 27 Wash.App. 198, 205 (1980).)

In the instant case, Defendant's arrest on unrelated misdemeanor warrants was probative to explain why 1) Defendant was arrested, 2) Defendant was given the *Miranda* warning, and 3) why Defendant was taken to jail before confessing to the burglary. The remark by Deputy Wilson that Defendant had misdemeanor warrants (and that Defendant was arrested on those warrants) was admissible under the *res gestae* exception to give the jury an unfragmented version of events.

Defendant asserts the jury had two theories to choose from, and that the revelation of the misdemeanor warrants must have "swung the jury." However, Defendant's two versions of events are haphazardly slapped together from cherry-picked portions of the record and do not represent scenarios the jury had to choose from. There was abundant evidence that the buildings on the property had been forcibly entered and ransacked for all salvageable metal, as both Deputy Wilson and Jeff Berg testified, as well as a confession signed by Defendant. The fact that Defendant had a few misdemeanor warrants is relatively unremarkable. Defendant's second assignment of error should be denied.

**3. Arguing that it was unreasonable to believe Defendant's entry was lawful is not misconduct.**

Defendant mischaracterizes the State's rebuttal, where the State argued it was unreasonable to believe Defendant's entry was lawful and

authorized by the absent owner, as an appeal to the jury to convict whether they believed unlawful entry was proven or not. In fact, it was a response to an assertion by defense counsel that Defendant's entry was lawful because the building had been neglected by the owner.

**This argument was not preserved for appeal.**

“[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747, 785 (1994) (citing *State v. Hoffman*, 116 Wash.2d 51, 93 (1991) and *State v. York*, 50 Wash.App. 446, 458–59 (1987).) Courts presume, “in the absence of evidence to the contrary, that the jury heeded the trial court's explicit instructions.” *Yates* at 787, *supra*. The Court's instructions to the jury included instructions that all elements must be proven by the State. CP at 82 & 83.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a).

In the instant case there was no objection to the State's rebuttal argument and the alleged misconduct. The jury was properly instructed

that all elements must be proven. The issue was not preserved for appeal, and the third assignment of error should be denied for that reason.

**Standard of review.**

To the extent that the issue was preserved for appeal, Defendant bears the burden of proof. “Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *Russell* at 85 (citing *Hoffman* at 93 & *State v. Hughes*, 106 Wash.2d 176, 195 (1986).) “Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Id.* at 85-86 (citing *State v. Graham*, 59 Wash.App. 418, 428 (1990) & *State v. Green*, 46 Wash.App. 92, 96 (1986).) “[A] conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” *Id.* (citing *State v. Lord*, 117 Wash.2d 829, 887 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992) & *State v. Wood*, 44 Wash.App. 139, 145, *review denied*, 107 Wash.2d 1011 (1986).) “It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory.” *Id.* (citing *Graham* at 429 & *State v. Contreras*, 57 Wash.App. 471, 476, *review denied*, 115 Wash.2d 1014,

797 P.2d 514 (1990).) “Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.”

*United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978).

In the instant case, defense council argued, over the State’s objection, that the man Mr. Berg was purchasing the property from “probably” didn’t care if someone broke into the buildings. VRP 8/21/13 at 122. The State’s rebuttal argued that it was ludicrous to believe that the previous owner condoned Defendant’s acts, or that the alleged lack of concern somehow transformed Defendant’s entry into a lawful one.

The State’s argument was a response to Defendant’s argument and was not misconduct. Defendant’s third assignment of error should be denied.

### **CONCLUSION**

Defendant was convicted of burglary by a jury who could tell the circumstantial evidence proved he entered into a building unlawfully. His motion for a mistrial was properly denied because evidence of his warrants was part of the *res gestae* and probative to explain why he was arrested and taken to jail before there was enough evidence to arrest him of burglary. In closing argument Defendant argued that the owner’s

neglect of the property justified his breaking and entering into the property, an argument the State rebutted by pointing out it was fallacious.

Defendant received a fair trial and was convicted. His assignments of error should be denied and the conviction affirmed.

DATED this 30 day of June, 2014.

Respectfully Submitted,

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JFW/jfa

# GRAYS HARBOR COUNTY PROSECUTOR

**July 07, 2014 - 5:54 PM**

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