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FILED
COURT OF APPEALS
DIVISION ONE
SEP 18 2013

No. 69935-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NELSON STRUNK,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor's misconduct deprived Nelson Strunk of a fair trial.

2. The prosecutor's misconduct denied Mr. Strunk his right to a unanimous jury.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the court must instruct the jury it must unanimously agree upon a single alternative means. The prosecutor affirmatively misstated this standard, telling the jurors they need not unanimously agree. Does the prosecutor's misconduct require reversal of Mr. Strunk's conviction?

C. STATEMENT OF THE CASE

Mr. Strunk and his acquaintance, Dave, spent a good portion of the day drinking beer. 1/22-23/13 RP 88. While they were at a drug store, Mr. Strunk allowed Dave to borrow his phone. *Id.* at 88-89. Dave left Mr. Strunk at the store and did not return. *Id.* Trying to find Dave

and his phone, Mr. Strunk eventually attempted to retrace his steps to Dave's girlfriend's house where he had been previously. *Id.* at 89-90.

However, instead of Dave's girlfriend's home, Mr. Strunk was in fact the home of Hillary Hermes's family. Believing it was Dave's girlfriend's house, Mr. Strunk walked in. 1/22-23/13 RP 90. Mr. Strunk found what he thought to be Dave's girlfriend's phone and used it to dial his phone. *Id.* at 91. He walked out of the house while doing so, believing Dave's girlfriend was close by. *Id.* at 92.

Ms. Hermes testified she was getting ready to go to work when Mr. Strunk simply walked in the front door and down the hallway to one of the bedrooms. 1/22-23/13 RP 37. He then looked in a second bedroom and immediately picked up her phone. *Id.* at 38-41. Ms. Hermes left the house, waved down a passing motorist and called police. *Id.* at 42. While she was outside, Ms. Hermes saw Mr. Strunk walk out of the house and walk down the street. *Id.* at 43-44.

When police stopped Mr. Strunk a short time later a few blocks from the house, he was walking with the phone to his ear. 1/22-23/13 RP 66. Officers noticed a strong smell of alcohol on Mr. Strunk's breath. *Id.* at 77. When police returned the phone to Ms. Hermes she

noticed a several calls had been made to one number. *Id* at 45-47. Mr. Strunk told officers the number was for his phone. *Id.* at 72.

The State charged Mr. Strunk with residential burglary. CP 60-61. A jury convicted him as charged. CP 26-28.

D. ARGUMENT

Prosecutorial misconduct deprived Mr. Strunk of a fair trial and denied him his right to a unanimous jury.

1. The prosecutor affirmatively misstated the unanimity requirement in his argument to the jury.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21. When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to the support the conviction. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

Burglary consists of alternative means – unlawfully entering or unlawfully remaining. *State v. Klimes*, 117 Wn. App. 758, 766, 73 P.3d 416 (2003), *overruled in part*, *State v. Allen*, 127 Wn. App. 125, 110 P.3d 849 (2005).¹

Contrary to the clear holding of *Ortega-Martinez*, the deputy prosecutor told the jury:

. . . in fact, six of you can come back guilty that he intended to enter the house to commit a crime. Six of you can come back and believe that he remained with the intent to commit a crime. That's fine. It's either/or.

1/22-23/13 RP 138. Mr. Strunk immediately objected to this misstatement of the law. *Id.* The court responded to Mr. Strunk's objection by telling the jury to refer to their instructions. *Id.* However, the jury was not instructed that it must unanimously agree as to the alternative means. Thus, there were no instructions which could cure the prosecutor's misstatement of the law.

2. The prosecutor's misconduct deprived Mr. Strunk a fair trial and his right to a unanimous jury verdict requiring reversal of his conviction.

Where a prosecutor's misconduct violates a defendant's constitutional rights reversal is required unless State proves beyond a

¹ *Allen* overruled only that portion of *Klimes* which concluded the unlawfully-remains alternative was limited to circumstances in which the person had entered lawfully but subsequently exceeded their license.

reasonable doubt the misconduct did not contribute to the verdict obtained. *See, e.g., Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping in violation of constitutional right to impartial jury); *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se). Here the State affirmatively misstated the requirement of unanimity, a right guaranteed in the Washington Constitution. As with other constitutional errors, the State must prove that error is harmless beyond a reasonable doubt.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Strunk's conviction.

Respectfully submitted this ¹²day of September, 2013.



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

STATE OF WASHINGTON,)
)
 Respondent,)

NO. 69935-1-I

NELSON STRUNK,)
)
 Appellant.)

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DIVISION ONE

SEP 10 2013

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2013, 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:

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