NO. 79565-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OSCAR CURAPE-MARTINEZ,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Oscar Churape-Martinez was scared; his girlfriend, Maisey Bradley, had recently used drugs and was not answering the door to the home where she was visiting her sister. After he forced his way into the home and discovered she was only sleeping, the two began to argue. A mirror and fan belonging to the homeowner, Jacob Morrison, were broken during the argument. When Ms. Bradley left with Mr. Churape-Martinez in his car, he failed to pull over after police signaled for him to stop. He was later convicted of residential burglary, malicious mischief, unlawful imprisonment, and attempt to elude.

The evidence at trial was insufficient to establish residential burglary or malicious mischief. Ms. Bradley's testimony was unequivocal: Mr. Churape-Martinez entered the home out of concern for her safety, and his ultimate intention was to protect her. But the prosecutor misstated the law on residential burglary, influencing the jury's verdict, and the to-convict instruction for malicious mischief allowed Mr. Churape-Martinez to be convicted of uncharged property damage. This Court should reverse the convictions as unsupported by the evidence, the result of prosecutorial misconduct, and entered in violation of Mr. Churape-Martinez's constitutional rights.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to establish the offense of residential burglary.

2. The evidence was insufficient to establish the offense of third-degree malicious mischief.

3. The jury instructions allowed Mr. Churape-Martinez to be convicted of a crime for which he was not charged, in violation of his rights under the Sixth Amendment and article I, section 22 of the Washington Constitution.

4. The prosecutor committed flagrant and ill-intentioned misconduct when she misstated the law on residential burglary.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To establish residential burglary, the State must prove beyond a reasonable doubt that Mr. Churape-Martinez entered or remained in the residence with the intent to commit a crime therein. Mr. Churape-Martinez was aware that Ms. Bradley – the only occupant – had recently used drugs, and she did not answer the door when he knocked. Where Ms. Bradley testified that Mr. Churape-Martinez entered the home in order to ensure her safety and the State failed to present evidence of intent to commit a crime therein, was the evidence insufficient to support a conviction for residential burglary?

2. To establish malicious mischief, the State must prove beyond a reasonable doubt that Mr. Churape-Martinez acted with malice when he damaged the property. Where Mr. Churape-Martinez damaged the door in order to get into the home to ensure Ms. Bradley's safety and where the State failed to provide any evidence as to how the items inside the home were broken, was the evidence insufficient to support a conviction for malicious mischief?

3. Both the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee defendants in criminal cases the right to be informed of the nature of the charges against them. It is a well-settled rule that a defendant cannot be convicted of an uncharged offense. The State charged Mr. Churape-Martinez with malicious mischief based upon damage done to a door and mirror belonging to Mr. Morison, but presented evidence at trial of a damaged desk fan and evidence that the mirror actually belonged to Ms. Bradley's sister, Mikkiah. Where the to-convict instruction failed to identify either the owner or the item damaged, did the instructions allow Mr. Churape-Martinez to be convicted of an uncharged offense?

4. It is prosecutorial misconduct to misstate the applicable law. Mr. Churape-Martinez's sole defense to the residential burglary charge was that the State failed to prove he intended to commit a crime inside the

residence. In response, the prosecutor erroneously urged the jury to convict Mr. Churape-Martinez based upon damage to the exterior door and the offense of criminal trespass. Did the prosecutor commit flagrant and ill-intentioned misconduct in misstating the law on what may serve as a predicate crime for residential burglary?

D. STATEMENT OF THE CASE

1. Underlying events.

Oscar Churape-Martinez did not like that his girlfriend, Maisey Bradley, used drugs. RP 170. In September 2018, Ms. Bradley went to the home where her sister lived with Jacob Morrison after fighting with Mr. Churape-Martinez over her substance use. RP 150-51, 170. Ms. Bradley was coming off of drugs and was sick, and fell asleep when she arrived. RP 170-71, 177. Mr. Churape-Martinez knew that Ms. Bradley was at her sister's house and went to find her. RP 171. After she did not answer the door, he became afraid and forced the lock, causing damage to the door handle and door frame. RP 161, 171.

Ms. Bradley woke up when Mr. Churape-Martinez entered the bedroom. RP 171-72. Mr. Churape-Martinez felt that this home was not a good place Ms. Bradley to spend time and wanted her to leave with him. RP 172. The two began to fight, and a mirror and fan were damaged in the altercation. RP 173-74. Although Ms. Bradley did not initially want to

leave with Mr. Churape-Martinez, she eventually walked to his car and the two left together. RP 177.

Once in the car, Mr. Martinez began to drive erratically, speeding and narrowly missing an oncoming vehicle. RP 179-81. Ms. Bradley told him she wanted to get out of the car, and asked him to slow down and to take her to her mother's house. RP 177-79. Meanwhile, law enforcement observed the vehicle and attempted to pull Mr. Churape-Martinez over. RP 182. He continued to drive, however, and police lost sight of the car when Mr. Churape-Martinez pulled into a residential driveway. RP 182-83, 287. Ms. Bradley asked the home owner to borrow a phone so she could call her mother to pick them up. RP 183. Instead, her mother called the police, who arrived a short time later and arrested Mr. Churape-Martinez. RP 185, 185, 276, 288-89.

The State charged Mr. Churape-Martinez with residential burglary, unlawful imprisonment, attempting to elude a pursuing police vehicle, and third-degree malicious mischief. CP 4-6. The information specified that, for the malicious mischief charge, the property damaged was a mirror and a door/doorframe, both belonging to Mr. Morrison. CP 5-6.

2. Trial proceedings.

Mr. Churape-Martinez exercised his right not to testify at trial. *See, generally*, RP. Thus, the only evidence regarding the circumstances of his

entry and the subsequent events inside the residence came from Ms. Bradley. According to Ms. Bradley, Mr. Churape-Martinez came in to the house because he was afraid when no one responded to his knocking. RP 171. Ms. Bradley implied that Mr. Churape-Martinez broke the mirror during their subsequent argument, but did not describe how the mirror was broken or give any further details regarding the argument. *See* RP 172-74.

Ms. Bradley believed Mr. Churape-Martinez's intention was only to help her. RP 175. Ms. Bradley was explicit that Mr. Churape-Martinez never forced her to leave and she didn't believe he would have forced her to leave. RP 173. Although she testified that she "probably" felt slightly threatened, Mr. Churape-Martinez did not verbally threaten her with consequences if she did not come with him. RP 174-75. Mr. Churape-Martinez vaguely mentioned that he had a gun, but Ms. Bradley testified it was obvious that he was lying and she did not believe he actually possessed a firearm. RP 175-76. He did not physically force her out of the home, and the two walked outside together and got into his car. RP 177-78.

The State additionally called the homeowner, Mr. Morrison, and Ms. Bradley's sister, Mikkiah,[1] to testify regarding the damaged property.

[1] Mikkiah Bradley is referred to herein as "Mikkiah" to avoid confusion.

Mikkiah and Mr. Morrison left the home after Ms. Bradley fell asleep, and the doorknob and lock were broken when they returned. RP 136. The bedroom was also in disarray, with a broken mirror and fan. RP 203. Mr. Morrison stated that he received the mirror for free and that it did not have a value, although it would likely cost $30-$40 new. RP 156. By comparison, Mikkiah testified that the mirror was hers and was brand new. RP 141. The State also questioned Mr. Morrison about the broken desk fan, which he estimated was valued at approximately $30. RP 156.

Mr. Churape-Martinez's entire defense to the residential burglary charge was that the State failed to prove he intended to commit a crime when he entered the residence. *See* RP 330-31. In closing, defense counsel conceded that, because Mr. Morrison did not give Mr. Churape-Martinez permission to enter the home, the State met its burden to establish the element of unlawful entry. RP 330. The prosecution responded by arguing that Mr. Churape-Martinez's intent to break the door and the act of criminal trespass could both satisfy the second element of intent. RP 335. The jury instructions did not specify the predicate offense. CP 33.

Although the information charging malicious mischief included only the mirror and door as the damaged property, the prosecutor argued that the jury should find Mr. Churape-Martinez guilty based on damage caused to the fan, in addition to the other items. RP 325. The court later

instructed the jury that, to convict Mr. Churape-Martinez of the crime of malicious mischief, the jury need only find that Mr. Churape-Martinez "knowingly and maliciously caused physical damage to the property of another." CP 38. The jury instructions did not list the specific property or property owner. CP 38.

The jury found Mr. Churape-Martinez guilty on all counts. CP 48-51. Mr. Churape-Martinez timely appeals his conviction and sentence.

E. ARGUMENT

1. The State failed to establish that Mr. Churape-Martinez intended to commit a crime inside the residence.

The evidence was insufficient to establish residential burglary as the only proof as to Mr. Churape-Martinez's intent throughout the incident was that he desired to ensure Ms. Bradley's safety. Due process demands the State prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Requiring the State to bear the burden of proving guilt beyond a reasonable doubt is "indispensable" in protecting a defendant's presumption of innocence. *Winship*, 397 U.S. at 363-64. Whether the State has met its burden is a question of law and is reviewed

de novo. *Rich*, 184 Wn.2d at 903 (citing *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014)).

The question on review is whether "any rational trial of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "A 'modicum' of evidence does not meet this standard." *Rich*, 194 Wn.2d at 903 (quoting *Jackson*, 443 U.S. at 319). Although the evidence is viewed in the light most favorable to the prosecution, "[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To support a conviction for residential burglary, the State was required to prove beyond a reasonable doubt that (1) Mr. Churape-Martinez entered or remained inside the residence unlawfully, and (2) he did so with the intent to commit a crime against person or property therein. RCW 9A.52.025(1). "Intent" exists only where a person "acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). Here, Mr. Churape-Martinez did not enter with the intent to commit a crime. To the contrary, the ***only*** testimony regarding Mr. Churape-Martinez's intent upon entry came from Ms. Bradley, who

was clear that he went into the home because he was afraid for her safety. Specifically, Mr. Churape-Martinez was aware that Ms. Bradley was using drugs and that she was inside the residence. RP 170-71, 177. When she didn't answer despite his repeated knocking, he "freaked out" and entered the residence to get her. RP 171. According to Ms. Bradley, "I think he just wanted to protect me, honestly." RP 175.

Nor was there evidence that he remained in the residence with the intent to commit a crime. Neither the information nor the jury instructions specified the predicate crime Mr. Churape-Martinez allegedly intended to commit. CP 4, 33. Based upon the remaining charges and the prosecutor's statements at trial, the two offenses Mr. Churape-Martinez arguably could have formed an intent to commit within the residence were malicious mischief or unlawful imprisonment.

Again, the only evidence as to how the mirror was broken came from Ms. Bradley's testimony. Ms. Bradley stated that she and Mr. Churape-Martinez argued in the bedroom, but did not recall how long the argument lasted and did not give any details. *See* RP 173-74. She implied that Mr. Churape-Martinez broke the mirror but did not testify as to the circumstances. RP 173. Without any evidence regarding how the property was damaged, a rational juror could not find beyond a reasonable doubt

that he intended to commit the crime of malicious mischief versus accidentally causing property damage.

The evidence was similarly insufficient to establish Mr. Churape-Martinez formed an intent to commit unlawful imprisonment ***inside*** the residence. Unlawful imprisonment requires a person to "knowingly restrain[] another person." RCW 9A.40.040. The restraint must substantially interfere with the other person's liberty and must be done "without consent" or "by physical force, intimidation, or deception." RCW 9A.40.010; CP 29-30. Moreover, "[t]he offense is committed only if the person acts knowingly in all these regards." CP 29.

In this case, Mr. Churape-Martinez's did not restrain Ms. Bradley or substantially interfere with her liberty inside the home. Rather, the evidence shows that Ms. Bradley left the house with Mr. Churape-Martinez of her own free will. Although the two initially argued about whether she would leave, Ms. Bradley testified that "honestly, deep down, I wanted to go with him." RP 172-73. Ms. Bradley was explicit that "[h]e never forced me out the door" and she did not believe he would have forced her out of the home. RP 173. When asked if she felt threatened to go with him, she answered "I don't know. … I probably felt a little threatened. Just a little bit." RP 174. However, Mr. Churape-Martinez did not say anything bad would happen to her if she did not go with him. RP

174-75. He mentioned a gun, but she "knew that he didn't have a gun" and could "totally tell he [was] lying." RP 175-76.

Ultimately, Ms. Bradley testified that she walked out of the home with Mr. Churape-Martinez, got into the car of her own accord, and that the two drove away together. *See* RP 177-78. It was only later, when she felt that Mr. Churape-Martinez was driving erratically, that she was unable to leave the vehicle. RP 178-79. Even after the car stopped, Ms. Bradley apparently did not want to leave Mr. Churape-Martinez behind, calling her mother to pick them both up. RP 183.

Because he neither intended to commit nor actually committed unlawful imprisonment inside the home, it cannot serve as a predicate offense for the residential burglary. The State failed to meet its high burden of proof, and the burglary conviction cannot stand as matter of law. This Court should reverse and dismiss with prejudice. *See State v. Devitt*, 152 Wn. App. 907, 913, 218 P.3d 647 (2009).

2. The State's failed to prove Mr. Churape-Martinez acted with malice in damaging Mr. Morrison's property.

The evidence at trial was similarly insufficient to establish that Mr. Churape-Martinez maliciously caused damage to Mr. Morrison's door and mirror. The *mens rea* for malicious mischief is exacting – in order to establish malicious mischief, the State was required to prove that Mr.

Churape-Martinez "knowingly and maliciously cause[d] physical damage to the property of another." RCW 9A.48.090(1)(a). "Malice" is defined as "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12); CP 39. The jury was additionally instructed that "[m]alice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another." CP 39; RCW 9A.04.110(12).

a. Mr. Churape-Martinez only damaged the door in an effort to get in and ensure his girlfriend's safety.

The State failed to present any evidence that Mr. Churape-Martinez acted with "an evil intent, wish, or design to vex, annoy, or injury anyone" when he forced the door open. Rather, it was uncontroverted that Mr. Churape-Martinez broke the doorknob only after he became afraid for Ms. Bradley's safety. RP 170-71. The first thing he said upon seeing that Ms. Bradley was, thankfully, only sleeping was that the house was a "bad place to be" and they should leave, presumably because being at the house was related to Ms. Bradley's substance use. RP 172.

City of Bellevue v. Kinsman is instructive. 34 Wn. App. 786, 664 P.2d 1253 (1983). The defendant in *Kinsman* left her three-year old son with her brother and his fiancé so she could go out for a few hours. 34 Wn. App. at 787. When she returned to her brother's home after 2:00 a.m., the

house was dark and locked. *Id*. Kinsman, who had consumed some alcohol during the evening, knocked and then pounded on the door, eventually opening it. *Id*. at 787-88. She then confronted her brother's fiancé and hit her in the face. *Id*. at 788.

This Court reversed her conviction for malicious mischief based upon an erroneous jury instruction, noting that there was "scant evidence that Kinsman had an evil intent, wish, or design to vex, annoy, or injure anyone." *Id*. at 790. Instead, she could just as likely have been "impelled by fear or concern for her son's safety." *Id*.

The same factors are true in Mr. Churape-Martinez's case. Although an argument later ensued, it is clear that – at the time the door was damaged – Mr. Churape-Martinez was acting out of concern for Ms. Bradley and not malice.

b. The State did not present any evidence as to how the mirror was broken.

For the reasons argued in Section E(1), the State failed to establish that Mr. Churape-Martinez committed malicious mischief by breaking the mirror.[2] There was no testimony regarding the exact circumstances

[2] Only Mr. Morrison's door and mirror were identified in the information and can serve as the basis for a conviction. CP 5-6. As argued in Section E(3), to the extent that the State presented evidence of the broken fan and the to-convict instruction did not identify the specific property damaged, Mr. Churape-Martinez was potentially convicted of an uncharged crime.

surrounding the property damage except that it occurred during an argument. There was certainly no evidence of animus supporting the permissible inference that damage to Mr. Morrison's rightful property evidenced malicious intent towards Mr. Morrison. Under these facts alone, a juror could not conclude beyond a reasonable doubt that Mr. Churape-Martinez even intended to break the mirror, much less did so for the specific purpose of vexing, annoying, or injuring another person. The State's failure to prove the requisite *mens rea*, requires reversal and dismissal.

3. The jury instructions allowed Mr. Churape-Martinez to be convicted of a crime for which he was never charged in violation of his rights under the Sixth Amendment and article I, section 22 of the Washington Constitution.

In failing to identify the specific property damaged or property owner, the to-convict instruction for malicious mischief allowed Mr. Churape-Martinez to be convicted of an uncharged crime. Both the Sixth Amendment and article I, section 22 of the Washington Constitution guarantee defendants in criminal proceedings the right to be informed of the nature of the charges against them. U.S. Const. amend. VI; Const. art. I, § 22. "It is a well-settled rule in this state that a party cannot be convicted for an offense with which he was not charged." *State v. Garcia*, 65 Wn. App. 681, 686, 829 P.2d 241 (1992); *see also Von Atkinson v.*

Smith, 575 F.2d 819 (10th Cir. 1978) ("It is axiomatic that due process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified"). Thus, where the charging document alleges only one crime, it is constitutional error to instruct the jury on a different, uncharged crime. *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

As a corollary to this rule, Washington courts have consistently held that once the charging document identifies specific conduct or a specific victim as a basis of a charge – even if not an essential element of the offense – jury instructions cannot be worded in a way that would allow for conviction based upon other, uncharged conduct. For example, in *State v. Jain*, the State charged the defendant with money laundering, listing two specific properties in connection with the charge. 151 Wn. App. 117, 121-23, 210 P.3d 1061 (2009). At trial, the State presented evidence of money laundering involving five properties and the jury instructions failed to identify any specific property. *Id.* at 123. This Court reversed, finding that "the jury . . . could have returned a guilty verdict by finding that Jain committed acts [as to properties] not charged in the information." *Id.* at 124.

Similarly, in *State v. Brown*, the defendant's convictions were reversed after the jury instructions failed to identify the specific

coconspirators elected in the information. 45 Wn. App. 571, 575-76, 726 P.2d 60 (1986). While the identities of the coconspirators were not an essential element of the offense, once the State specifically named individuals in the charging document, jury instructions could not allow convictions based upon conspiracy with additional or differing coconspirators. *Id.* at 577; *see also State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010) (same); *State v. Morales*, 174 Wn. App. 370, 383-84, 298 P.3d 791 (2013) (jury improperly allowed to convict defendant of uncharged alternative where information listed single victim of harassment but to-convict instruction identified two possible victims).

In this case, the information alleged Mr. Charupe-Martinez committed malicious mischief by causing physical damage to a "door and/or frame and/or mirror belonging to Jacob Morrison." CP 5-6. The charging document makes no reference to a fan or property belonging to Mikkiah. CP 5-6.

However, the State presented evidence relating to uncharged victims and uncharged items. Mr. Morrison testified he received the mirror for free and it had no value, although would likely cost $30-$40 new. RP 156. Meanwhile, Mikkiah testified that the broken mirror belonged to her, and that it was "brand new." RP 136-37, 141.

The prosecutor also emphasized the damage to a fan, beginning in her opening argument. RP 117. She then elicited testimony from Mr. Morrison that both a mirror and a fan were broken, the type of fan, verified that it belonged to Mr. Morrison, and asked Mr. Morrison to estimate the specific value of the fan, which he estimated as $30. RP 156. The prosecutor raised the issue yet again in closing, arguing that Mr. Churape-Martinez was guilty of malicious mischief because, in addition to other property, "he broke the fan." RP 325. Defense counsel compounded the error, arguing that there was little doubt as to the malicious mischief charge because Mr. Churape-Martinez "broke[] the mirror and the fan." RP 328.

The to-convict instruction required the State to prove only that Mr. Churape-Martinez knowingly and maliciously caused physical damage "to the property of another[.]" CP 38. In so doing, the instruction allowed Mr. Churape-Martinez to be convicted of a damaging the mirror, even if the jury believed it belonged to Mikkiah, and of damaging Mr. Morrison's fan, crimes for which Mr. Churape-Martinez was never charged.

The instructional error was undoubtedly prejudicial. "When the jury is instructed on an uncharged crime, a new trial is appropriate when it is possible that the defendant was mistakenly convicted of an uncharged crime." *Kirwin*, 166 Wn. App. at 669. Here, given the

extenuating circumstances, it is certainly possible if not probable that the jury believed Mr. Churape-Martinez did not act with malice in breaking the doorknob.

Instead, any malicious intent would have been formed when trying to convince Ms. Bradley to leave the residence and related solely to the mirror and fan. Given the arguments and evidence at trial, it is almost certain that the jury conclusion regarding malicious mischief included damage to the fan. The jury was also able to find Mr. Churape-Martinez guilty of malicious mischief regardless of who it believed owned the mirror. It is certainly ***possible*** that the jury believed Mikkiah was the true owner of the mirror and that Mr. Churape-Martinez was guilty of malicious mischief based upon damage to uncharged property and/or an uncharged victim. Accordingly, this Court should reverse and remand for a new trial. *Jain*, 151 Wn. App. at 124.

4. The prosecutor committed misconduct when she informed the jury that unlawful entry and exterior property damage could serve as the predicate crimes for residential burglary.

The prosecutor repeatedly misstated the law, urging the jury to find Mr. Churape-Martinez guilty of residential burglary based upon an intent to commit criminal trespass and for property damage occurring before he entered the residence. It is likely the jury relied on this misstatement of the law in convicting Mr. Churape-Martinez, requiring reversal by this Court.

a. The prosecutor misstated the law on residential burglary.

Prosecutors represent the people "in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Thus, a prosecutor commits misconduct by misstating or misrepresenting the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) ("A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury."). Where a prosecutor urges the jury to convict based upon an incorrect understanding of the law, the reviewing court cannot be certain that the jury's verdict rests on a legally valid theory. *State v. Allen*, 127 Wn. App. 125, 137, 116 P.3d 849 (2005).

Residential burglary requires that the person who enters a home unlawfully must also intend to commit a crime "therein." RCW 9A.52.025(1). Absent this intent, unlawful entry amounts only to criminal trespass. RCW 9A.52.070(1) (first degree criminal trespass is committed where a person "knowingly enters or remains unlawfully in a building."). Crimes committed outside the residence cannot serve as the predicate crime for a residential burglary. *See Devitt*, 152 Wn. App. at 913.

The Washington Supreme Court has resolved any doubt that criminal trespass and damage to property to gain unlawful entry cannot serve as predicate crimes for residential burglary. *State v. Garcia*, 179

Wn.2d 828, 318 P.3d 266 (2014). In *Garcia*, the prosecutor argued that the defendant committed second-degree burglary by throwing a brick through the door of a gas station, with the act of breaking the door serving as the predicate crime for the burglary. *Id.* at 849. The Court squarely rejected this interpretation, finding that, under the plain language of the statute, "a conviction required that [Garcia] not only trespass, but also intended to commit a crime *inside* the burglarized building." *Id.* (emphasis in original) (citing *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) and RCW 9A.52.070)).

The prosecutor in Mr. Churape-Martinez's case engaged in this exact misconduct, misrepresenting the law as to an essential element of the crime in order to obtain a guilty verdict.

The prosecutor's misconduct began during her initial closing argument:

> So, on No. 11, the one we're going to talk about is No. 2: Entering or remaining with the intent to commit a crime against a person or property therein. Breaking in that door is not an element of the crime. But that's what he did. ***That act of destroying the door is, in it -- itself, a crime against property. So if you find that he broke that door down to get in, that would be a crime against property therein.***

RP 321-22 (emphasis added). Defense counsel subsequently conceded that Mr. Churape-Martinez was guilty of criminal trespass inasmuch as the State established unlawful entry. RP 330. However, counsel argued that

Mr. Charupe-Martinez entered the home with the purpose of waking Mr. Bradley up so she could leave with him. RP 330-31.

The prosecutor seized on the concession of unlawful entry in rebuttal, arguing nothing more was necessary:

> Now, as far as residential burglary goes, intent is defined for you. … they don't have to intend to commit a crime. They have to intend to commit an act that happens to be a crime. ***So when he entered that home unlawfully, when he crossed that threshold, when he committed trespass going in there, he committed residential burglary.***
>
> ***It doesn't matter that he committed more crimes later that he may not have preconceived as he crossed the threshold. It's not complicated. He broke the door down; that's a crime.*** And then he committed a variety of crimes when he's in inside. ***So all he's got to intend is crossing that threshold. Breaking that door, he's got to intend that.***
>
> ….
>
> ***Residential burglary was committed the moment he walked up on that door and crossed that threshold.***

RP 335-36 (emphasis added). In repeatedly urging the jury to use either criminal trespass or damage to the exterior door as predicate crimes for residentially burglary, the prosecutor offered not one, but two, legally erroneous bases to convict Mr. Churape-Martinez.

b. The misconduct was prejudicial.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct impacted the jury. *Monday*,

171 Wn.2d at 675. Even where defense counsel fails to object, reversal is warranted where the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" which could not be cured by a jury instruction. *Id.* Where a prosecutor's misstatement of law is contrary to published precedent, it is deemed flagrant and ill-intentioned. *See State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

In this case, the prosecutor's argument was contrary to both the plain language of the statute and to our Supreme Court's holding in *State v. Garcia*. Moreover, there is a substantial likelihood that the misconduct affected the verdict. Evidence and testimony regarding Mr. Churape-Martinez's intent while inside the apartment was bare bones at best. The only direct evidence came from Ms. Bradley, who testified that he was there to protect her. The circumstances surrounding the broken mirror and fan were utterly unclear.

By comparison, Mr. Morrison and Mikkiah testified extensively about the door and doorknob, including when it was purchased, installed, and the tool likely used to break it. *See*, *e.g.*, RP 145-49, 152-55. Given the obvious damage to the door and unlawful entry, the prosecutor's misstatement of the law focused the jury on finding Mr. Churape-Martinez guilty on the bases improperly advanced by the State.

Unlike *Garcia*, which involved a single criminal act by the defendant and a single erroneous legal theory advanced by the prosecution, a limiting instruction could not have cured the prejudice in Mr. Churape-Martinez's case. *See Garcia*, 179 Wn.2d at 849 n. 1. An attempt to cure the harm caused by the prosecutor's misstatement of law would require the court to break down both of the prosecutor's erroneous arguments, address the possible criminal acts, and discuss the distinction between intent formed when entering the residence versus intent formed once inside the residence.

Finally, Mr. Churape's convictions for malicious mischief and unlawful imprisonment do not equate to a finding that he intended to commit those crimes inside the home. Due to the paucity of the evidence of what occurred inside the home, it is likely the jury found Mr. Churape-Martinez guilty of malicious mischief based upon damage to the door and door frame. Additionally, given Ms. Bradley's testimony as to how the two left the home together, it is highly likely the unlawful imprisonment conviction was based solely upon events inside the vehicle.

Due to the prosecutor's misconduct, the jury was operating under multiple misunderstandings of the law when it found Mr. Churape-Martinez guilty. This Court should reverse Mr. Churape-Martinez's

conviction for residential burglary and remand for a new trial. *Allen*, 182 Wn.2d at 382.

F. CONCLUSION

This Court should reverse and dismiss Mr. Churape-Martinez's convictions for residential burglary and malicious mischief as unsupported by the evidence. Alternatively, this Court should reverse the convictions and remand for a new trial, as the jury instructions allowed him to be convicted of an uncharged crime of malicious mischief, and the prosecutor engaged in prejudicial misconduct by misstating the law on residential burglary.

DATED this 8th day of November, 2019.

Respectfully submitted,

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