IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28369-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CHAD A. VAN DIEST,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. ─ Chad A. Van Diest appeals his convictions for residential burglary and luring. He contends error in (1) conducting a portion of the jury instruction conference in his absence, (2) allowing definitional instructions on potential crimes furthering his burglary conviction, (3) allowing prosecutor misconduct, (4) ineffective assistance of counsel, (5) permitting double jeopardy in allowing submission of alternative burglary charges to the jury, (6) entering convictions on insufficient evidence, and (7) an alleged judicial comment on the evidence. Mr. Van Diest, pro se, raises seven concerns in his statement of additional grounds for review (SAG). We affirm.

FACTS

On October 20, 2008, Mr. Van Diest, age 28, contacted M.H., age 15, as she was walking after school. She ignored him because she did not know or recognize him. Mr. Van Diest learned her name from another student and called to her. Mr. Van Diest said his name was Aaron, said he was 22 years old, and said he knew her brother. M.H. gave Mr. Van Diest her phone number. Mr. Van Diest was 28; his middle name was Aaron, but he goes by Chad; and although he knew M.H.'s brother, they were not on friendly terms. That evening, Mr. Van Diest called M.H. and asked her to sneak out of the house to meet him. He invited her to a party and suggested pitching a tent near her home. She declined. Mr. Van Diest called M.H. a couple more times that evening, but she did not answer.

The next morning as M.H. was returning from her grandparents' trailer, she saw Mr. Van Diest inside the enclosed patio to her back porch. Mr. Van Diest put a hand on M.H.'s shoulder, led her outside, and asked her to skip school and spend the day with him. Mr. Van Diest grabbed M.H. on her bottom, pulled her into him, and tried to kiss her. M.H. testified Mr. Van Diest mentioned during this time, he had wanted to see her the night before but her father would not go to sleep. When M.H. went inside, she noticed some things had been moved about. And, Mr. Van Diest told M.H. it had thrilled him to be inside her house. This alarmed M.H.; it "creeped" her out. Report of Proceedings (RP) at 126. It concerned her parents as well.

Tonya Luinstra, a school counselor, became aware of M.H.'s contacts with Mr. Van Diest and contacted the police. Deputy Sean Duke responded and twice

interviewed M.H. Deputy Duke then arrested Mr. Van Diest.

In October 2008, Mr. Van Diest was charged with one count of residential burglary with sexual motivation and assault in the fourth degree. Amended charges added burglary in the first degree with sexual motivation, two counts of luring, and one count of stalking. At trial, the fourth degree assault charge was dismissed at the outset.

In his opening statement, the prosecutor explained the first degree burglary with sexual motivation and residential burglary with sexual motivation charges were based on the same conduct; that the charges were "different legal ways of looking at what was done." RP at 87.

At trial, M.H. was asked if she had called Mr. Van Diest. She recalled trying to call Mr. Van Diest one time and that a woman answered. On cross-examination, M.H. reiterated that she did not recall placing any other calls, but offered that her friend may have called from her phone and had the call on speaker. The defense attempted to present evidence of phone records to suggest that M.H. had called Mr. Van Diest. The court found the records inadmissible, in part, because the witness, Detective Grant, was not a custodian of the records. The court ruled the records could not be properly authenticated because no evidence showed who made or received the calls.

On cross-examination, defense counsel asserted to M.H. that she had not mentioned Mr. Van Diest telling her it thrilled him to be in her house; then after looking at the police report, he admitted he was mistaken and apologized.

Without objection, Deputy Duke testified he was familiar with Mr. Van Diest, had

heard his name in town, had one contact with him, and Chad was not known as Aaron. Again without objection, Deputy Duke testified he showed M.H. a photograph of Mr. Van Diest to positively identify him.

Without objection, Marissa Parks testified she was familiar with Mr. Van Diest, and had she known "Aaron" was actually Chad Van Diest, she would have warned M.H. about seeing or talking with him. Solely objecting to relevancy, Mason Massey testified had he known M.H. had contact with Mr. Van Diest, he would have told her to stay away from Mr. Van Diest. Without objection, Anita H., M.H.'s mother, related Mr. Van Diest's conduct gave her "an eerie feeling." RP at 154.

Without objection, Tonya Luinstra compared her position and duties with other counselors with the same confidentiality accorded patients of providers in the community, except for abuse victims. During cross-examination, defense counsel remarked about her interview with both attorneys present, but did not, from Mr. Van Diest's view, contradict any of her testimony.

In closing argument, the deputy prosecutor argued Mr. Van Diest could not claim to have been a friend of M.H.'s brother, did not routinely use the name Aaron, and was 28 not 22 years old when first contacting M.H. Without objection, the prosecutor argued, Mr. Van Diest lied to M.H. and rhetorically asked "why?" RP at 260. The prosecutor noted "some might even term [Mr. Van Diest's] behavior as somewhat predatory." RP at 259. The prosecutor noted both M.H. and her parents were victims. Without objection, he asked, "if you had a daughter around 14 or 15 years old and you

had a 28 year old man who's lying about himself and pursuing your daughter in this fashion, wouldn't that alarm you?" RP at 271. Without objection, he noted the luring statute was intended to protect children from being taken into private places and its purpose would be thwarted if the "unknown" element could be negated by a simple, misleading, introduction.

While finalizing jury instructions, a brief hearing occurred outside Mr. Van Diest's presence. The judge explained some changes he had made to the jury instructions, but did not otherwise discuss them with counsel. Later, in Mr. Van Diest's presence, the jury instructions were fully discussed.

Upon reading the instructions to the jury, a juror asked the judge to define "unknown" as used in Instruction 20 (luring). RP at 258. The luring statute does not define the term. The court responded: "No, that's up to the jury." RP at 258.

The court instructed on the subordinate crimes of harassment, third degree child molestation, and stalking to support the State's theory of Mr. Van Diest having entered the home with intent to potentially commit those crimes. Mr. Van Diest successfully proposed the lesser offense of first degree criminal trespass, but it was not made specific to residential burglary.

In closing argument, the prosecutor allowed that the first degree burglary and the residential burglary charges stemmed from the same acts.

One luring count was dismissed at the close of the State's case. Mr. Van Diest was found guilty of criminal trespass in lieu of first degree burglary, residential burglary

with sexual motivation, and one count of luring. The criminal trespass charge was dismissed on the State's motion. Sentencing occurred on July 30, 2009; Mr. Van Diest was sentenced for the remaining charges. Mr. Van Diest unsuccessfully moved for relief from judgment. Mr. Van Diest appealed.

ANALYSIS

A. Misconduct Contentions

The issue is whether the trial court erred by allowing the prosecutor to express his personal opinion and argue facts not in evidence.

A defendant claiming prosecutorial misconduct must establish both an improper comment and the resulting prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments "calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper." *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). We consider the alleged comment in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *McKenzie*, 157 Wn.2d at 52. Comments may be deemed prejudicial solely if "there is a substantial likelihood misconduct affected the jury's verdict." *Id.* "In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences based on evidence in the record." *State v. Millante*, 80 Wn. App. 237, 251, 908 P.2d 374 (1995). Failure to object to an improper comment waives the error unless

the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction. *McKenzie*, 157 Wn.2d at 52.

First, when the prosecutor elicited evidence that Deputy Duke had a prior contact with Mr. Van Diest and had heard his name in town, he followed up by asking what name Mr. Van Diest uses; this was relevant to show Mr. Van Diest went by Chad not Aaron. Marissa Parks and Mason Massey testified they would have warned M.H. to stay away from Mr. Van Diest had they known Aaron was really Chad; this was relevant to establish a motive for Mr. Van Diest's use of the name "Aaron." That M.H. felt "eerie" was relevant to the victim's then existing mental condition under ER 803(a)(3). Anita H. gave similar supporting evidence. Ms. Luinstra's testimony about her confidentiality limitations was relevant to establish that statements to Ms. Luinstra by the victim in the course of counseling would be admissible pursuant to ER 803(1),(4), and to assist the jury in evaluating Ms. Luinstra's testimony.

Second, in closing argument, the prosecutor never called Mr. Van Diest a "liar," but he did use the words "lie," "lied," and "lies." RP at 260, 270. These arguments drew inferences from the evidence and did not express personal opinions. "Use of the word 'lie,' even though repeated, does not, by itself, establish prosecutorial misconduct." *Millante*, 80 Wn. App. at 251. A prosecutor may properly comment that a defendant lied where evidence supports the argument. *See McKenzie*, 157 Wn.2d at 59. Relying on the evidence, the prosecutor argued, "[S]ome might even term his

behavior as somewhat predatory." RP at 259. Again, this argument did not express a personal opinion. Although Mr. Van Diest complains the State referred to M.H. and her parents as victims, he cites no authority showing error. A prosecutor may argue the effects of a crime on the victims. *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006).

Finally, Mr. Van Diest argues the prosecutor improperly appealed to passion and prejudice when suggesting the luring statute was intended to protect children. The prosecutor's argument was consistent with the luring statute's purpose. *See State v. Dana*, 84 Wn. App. 166, 173, 926 P.2d 344 (1996) (discussing the purpose of the luring statute). The argument did not ask jurors to put themselves in the victim's position.

In sum, we are not persuaded prosecutorial misconduct occurred in presenting the evidence or in the closing argument.

B. Assistance of Counsel

The issue is whether Mr. Van Diest was denied effective assistance of counsel. He contends his attorney was ineffective by (1) failing to object to prosecutorial misconduct, (2) failing to secure admission of phone records, (3) mistakenly cross-examining a witness with the police reports and apologizing for his mistake, (4) failing to have another party present during witness interviews, and (5) failing to request a lesser-included instruction specific to the charge of residential burglary.

A defendant possesses the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.

Ed. 2d 674 (1984). Mr. Van Diest must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). If one prong fails, we need not address the other prong. *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). We presume counsel was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 889 P.2d 1251 (1995). The appellant must show no legitimate strategic or tactical reason exists for his trial counsel's actions. *Sutherby*, 165 Wn.2d at 883. Prejudice exists if by a reasonable probability the outcome would be different "but for counsel's unprofessional errors." *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

First, the allegations concerning prosecutorial misconduct have already been addressed and rejected. Thus, Mr. Van Diest did not have to object.

Second, the failure to secure admission of the phone records constituted neither deficient performance nor resulted in prejudice. The court rejected the proffered records because they were hearsay and did not show who made the calls. These are tenable grounds supporting the trial court's exercise of discretion. Further, M.H. testified she remembered placing one call, but did not rule out the possibility of other calls from her phone. Mr. Van Diest could not contradict that testimony with the proffered evidence. Moreover, the alleged phone calls occurred after the charged offenses. It follows that the outcome of the case would not have been different.

Next, regarding the mistaken use of the police reports and his counsel's

apology, lawyers can make mistakes without being constitutionally ineffective.

> A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974)). Though perhaps embarrassing to counsel, the mistake had no impact on the evidence. The mistake was neither constitutionally deficient representation nor prejudicial. Overall, the record shows Mr. Van Diest's counsel was well prepared and effective.

Next, regarding not having a third party present during one witness interview, Mr. Van Diest cites no authority showing his attorney deficiently performed. This does not show a failure to investigate or interview witnesses. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Nothing in this record shows Ms. Luinstra inaccurately testified. Thus, Mr. Van Diest fails to even suggest prejudice.

Finally, Mr. Van Diest argues his trial counsel was ineffective because he failed to request a lesser-included instruction (first degree criminal trespass) specific to residential burglary, not just for first degree burglary. Mr. Van Diest fails to recognize the difference between the three offenses. Criminal trespass requires that a person knowingly enters or remains unlawfully in a building. RCW 9A.52.070. Residential burglary requires that the person intended to commit a crime therein. RCW 9A.52.025. First degree burglary requires that the person intended to commit a crime therein and a

finding that the person is either armed with a deadly weapon or assaults another person. RCW 9A.52.020. The jury, therefore, could have acquitted on first degree burglary because they did not think that Mr. Van Diest assaulted M.H., although still thinking that he intended to commit a crime. Mr. Van Diest fails to prove a reasonable probability that, but for the lack of instruction, the result of the proceeding would have been different. Mr. Van Diest has not met the prejudice prong. Moreover, Mr. Van Diest failed to show that there was no legitimate strategic or tactical reason for his counsel not requesting a lesser-included instruction of criminal trespass on the residential burglary.

C. Jury Instruction Conference

The issue is whether the trial court erred in conducting a hearing regarding jury instructions without Mr. Van Diest's presence.

Due process includes the right to be present at all critical stages of a criminal proceeding. *State v. Wilson*, 141 Wn. App. 597, 603, 171 P.3d 501 (2007). Although the core of this right is the right to be present whenever evidence is presented, the right extends to any situation in which the defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* (quoting *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)). Due process does not, however, require the defendant's presence "when presence would be useless, or the benefit but a shadow." *Id.* at 604. In *State v. Bremer*, 98 Wn. App. 832,

835, 991 P.2d 118 (2000), the court stated that "jury instructions involve resolution of legal issues, not factual issues." Therefore, the court held the defendant's presence was not required when jury instructions were discussed. *Id.*

Our case is like *Bremer*. Here, the court convened to indicate changes to jury instructions on legal points without input from counsel, then it adjourned. Mr. Van Diest's due process rights were not violated by his absence from the hearing.

D. Comment on Evidence

The issue is whether the court erred in making an impermissible comment on the evidence when responding to the jury question about the definition of "unknown."

Under article IV, section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The purpose of prohibiting judicial comments on the evidence is to prevent the jury from being influenced by the trial judge's opinion of the evidence submitted." *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986). A statement by the court will only constitute a comment on the evidence if its attitude toward the merits of the case or its evaluation of a disputed issue is inferable from the statement. *Lane*, 125 Wn.2d at 838 (citing *Hansen*, 46 Wn. App. at 300).

Here, the trial court's statement was not a comment on the evidence. Rather, it was a refusal to comment. A juror asked the judge to define the term "unknown" and the judge declined to answer, saying it was up to the jury. RP at 258. Accordingly,

because the trial court's statement was not a comment on the evidence, we do not reach the issue of harmless error under *State v. Levy*, 156 Wn.2d 709, 724, 132 P.3d 1076 (2006).

E. Instructing on Uncharged Crimes

The issue is whether the court erred in instructing the jury on uncharged crimes. Mr. Van Diest contends the court improperly instructed the jury on the uncharged crimes. He argues the instructions were misleading to the jury and prejudicial.

Giving a proposed instruction is within the discretion of the trial court and is reviewed for an abuse of discretion. *In re Det. of Pouncy*, 144 Wn. App. 609, 620, 184 P.3d 651 (2008), *aff'd,* 168 Wn.2d 382, 229 P.3d 678 (2010). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *Id.* at 620-21. An instruction is proper if evidence supports the theory upon which the instruction is based. *State v. Allen*, 116 Wn. App. 454, 465, 66 P.3d 653 (2003).

Here, the State charged Mr. Van Diest with residential burglary. To prove residential burglary, the State had to show Mr. Van Diest entered M.H.'s residence with the intent to commit a crime. The evidence presented permitted the State to argue several possible intended crimes. The trial court properly gave the challenged instructions to define those possible crimes. This allowed the State to argue its case theory.

F. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Van Diest's residential burglary and luring convictions. Mr. Van Diest contends he had an implied license to enter the porch so he did not enter unlawfully. Further, he contends no evidence shows he entered M.H.'s bedroom or was not known to M.H.

We review an evidence sufficiency challenge in the light most favorable to the State to determine if any rational trier of fact could have found the crime elements beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001).

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). Mr. Van Diest challenges the element of unlawful entry. Viewing the inferences for the State, Mr. Van Diest entered the porch of M.H.'s home. The porch was a fully enclosed part of the residence. Friends knocked to gain access. Circumstantial evidence showed Mr. Van Diest entered M.H.'s bedroom. M.H. testified her backpack was on the floor, not where she had left it, and that Mr. Van Diest had admitted to being in her room. Given this evidence, a rational

trier of fact could have found Mr. Van Diest unlawfully entered the home of M.H.'s family.

In order to commit the crime of luring, the person must be unknown to the minor. RCW 9A.40.090. The element of "unknown" as used in the statute is undefined. Mr. Van Diest argues that he was known to M.H. because she had given him her phone number. Webster's New Collegiate Dictionary 1271 (1981) defines "unknown," in part, as "one that is not known or not well-known, *esp* : a person who is little known." Black's Law Dictionary 785 (5th ed. 1979) defines "known" as "familiar; perceived; recognized; understood." Mr. Van Diest approached M.H. on October 20 and introduced himself. M.H. gave him her phone number and the incident at issue occurred the next morning, before the two had spoken on the phone. In addition, Mr. Van Diest provided M.H. with a false identity when he introduced himself. A rational trier of fact could reasonably conclude, therefore, that Mr. Van Diest was unknown to M.H. on the morning in question.

G. Double Jeopardy

The next issue is whether Mr. Van Diest's convictions violate double jeopardy principles. Mr. Van Diest contends his residential burglary conviction should be dismissed because the jury returned the verdict on the criminal trespass charge first and both charges were based on the same conduct.

We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76,

226 P.3d 773 (2010).

"Both our federal and state constitutions protect persons from being twice put in jeopardy for the same offense." *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461, (2010); U.S. Const. amend. V; Const. art. I, § 9. This includes, "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

Alternative guilty findings for the same offense do not offend double jeopardy if the court does not reduce the defendant's lesser crime to judgment of conviction. *State v. Womac*, 160 Wn.2d 643, 659-60, 160 P.3d 40 (2007) (distinguishing *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)).

Here, Mr. Van Diest was found guilty of criminal trespass and residential burglary based on the same conduct. Upon the State's motion, the court dismissed the criminal trespass charge. Without any authority, Mr. Van Diest argues because the verdict on criminal trespass occurred first, the residential burglary charge must be dismissed. Notably, "[w]hen two convictions violate double jeopardy principles, the proper remedy is to vacate the lesser conviction." *State v. League*, 167 Wn.2d 671, 672, 223 P.3d 493 (2009). Under these circumstances, no double jeopardy principle has been violated.

H. SAG

Mr. Van Diest raises several concerns in his SAG. Some have been adequately

briefed by counsel. *See* RAP 10.10(a) (purpose of SAG is to permit appellant "to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel."). We address the remaining issues.

First, Mr. Van Diest contends a conspiracy existed between the State and M.H.'s friends and family to charge and convict him of crimes. He notes the high school sent out sex offender brochures to student's parents. Next, he points to the letters submitted by M.H.'s father and neighbor at sentencing to suggest the community wanted to get rid of him. Mr. Van Diest claims the victim was manipulated by the prosecutor and a deputy sheriff. Mr. Van Diest appears to argue the community set him up to interact with M.H. This proposition is urged as a bare allegation, without supporting evidence. Given all, Mr. Van Diest fails to persuade us of his conspiracy theory.

Second, Mr. Van Diest contends "anytime there is an accusation of sexual molestation against a child in the state of Washington, a forensic interview is an absolute" under *Devereaux v. Perez*, 218 F.3d 1045, 1053 (9th Cir. 2000). SAG at 15. But *Devereaux* actually holds "there is no constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol." *Id.* On review, the Ninth Circuit repeated the holding almost word for word. *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001). Accordingly, Mr. Van Diest's argument fails.

Third, Mr. Van Diest contends his arrest was unlawful. He argues Deputy Duke, as a mere patrol officer, was unqualified to issue an affidavit of probable cause. He cites no authority for this position. He claims Deputy Duke misrepresented material facts in his affidavit because he used slightly different language than M.H.'s testimony. Illustratively: "victim felt uncomfortable" instead of "victim stated 'I did not want to hang out with him.'" SAG at 25, App. 9, at 1-4; App. 9, at 1, 2. This language discrepancy does not show any misrepresentation of material facts, so we do not reach his related argument that no probable cause existed for his arrest.

Finally, we reject Mr. Van Diest's argument that his arrest was unlawful because his *Miranda* rights were violated in questioning from Deputy Duke. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A CrR 3.5 hearing found Deputy Duke did have probable cause to arrest regardless of Mr. Van Diest's statements, and that statements made to Deputy Duke after requesting an attorney were inadmissible.

Fourth, Mr. Van Diest contends in Jury Instruction 29 that the court misstates the law of child molestation in the third degree as well as the definition of sexual contact. He highlights the use of the phrase "the person" instead of "a person" and "years of age" instead of "years old." "The court need not include specific language in a jury instruction, so long as the instructions as a whole correctly state the law." *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000). While the instruction does not quote the statute word for word, it does not misstate the law. Therefore, this argument fails.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.