IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KRISTEN A. KENNEDY, Appellant.	No. 38795-6-II UNPUBLISHED OPINION

Bridgewater, J. — Kristen A. Kennedy appeals her conviction for second degree burglary, arguing that the trial judge commented on the evidence in violation of her rights under the Washington State Constitution.[1] Kennedy also filed a Statement of Additional Grounds (SAG) under RAP 10.10. Concluding that the trial judge's comment on the evidence did not prejudice her and that Kennedy cannot raise her SAG issues in this appeal, we affirm.[2]

In October 2008, Robert Estes and James Pool allowed Kennedy to stay in their attic free of charge. Estes had known Kennedy for 10 years and sometimes helped her when she was "down." I VRP at 22. On the morning of October 5, 2008, following an argument with Kennedy, Pool awoke to the sound of someone smashing the electric meter on the outside of the home. Seconds later, he went outside to find the electric meter destroyed and observed Kennedy walking down the street at a fast pace. A cinder block lay near the electric meter. Kennedy did not respond to Pool yelling at her as she walked away. Kennedy had attempted to destroy the

[1] Kennedy was also convicted of first degree arson and theft of a firearm. She does not challenge those convictions.

[2] A commissioner of this court initially considered Kennedy's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

electric meter after an earlier argument with Estes.

When Pool went back inside the house, he smelled propane. The smell originated with an open propane valve on the tank of a three-burner camp stove used for cooking in the home. Pool and Estes then discovered the attic engulfed in flames and smoke. In the month prior, only Kennedy had been in the attic. A fire department investigation concluded that someone likely lit the fire intentionally, igniting a set of boxes, books, paper, and clothing in the attic. After the fire, Estes noticed that his fanny pack containing a .45 caliber pistol was missing. The fanny pack had been in the home the previous night.

That same morning, approximately four to five blocks from Estes and Pool's home, the owner of Friendly Auto Sales, Leonard Simpson, Sr., discovered the glass on the entry door to the business shattered. Once inside the entry door, a person could enter the office. The door to an office that Simpson normally kept locked was ajar. Several sets of car keys that had hung from a peg board inside the office were missing. Several cars on the lot had keys in them, and someone had moved one car on the lot and left the keys in it.

That afternoon, police located Kennedy and placed her under arrest. Inside her jacket pocket they located keys belonging to Friendly Auto Sales. The next day, Simpson's son found Estes' pistol underneath a motor home on the Friendly Auto Sales lot.

The State charged Kennedy with one count each of first degree arson, second degree burglary, and theft of a firearm. As part of its to-convict instruction for second degree burglary, the trial court instructed the jury that one of the elements of the crime was that "on or about October 5, 2008, [Kennedy] entered or remained unlawfully in a building, a building at Friendly Auto in Aberdeen, WA." CP at 45. The jury found Kennedy guilty as charged and she appeals.

Kennedy argues that the part of the to-convict instruction quoted above was a judicial comment on the evidence, in that it commented that Friendly Auto Sales was a building as a matter of law.[3] Wash. Const. art. IV, § 16 prohibits judges from conveying to the jury their personal attitudes regarding the merits of the case or instructing a jury that matters of fact have been established as a matter of law. *State v. Becker,* 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (citing *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); *State v. Primrose*, 32 Wn. App. 1, 3, 645 P.2d 714 (1982)). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A] judicial comment in a jury instruction is presumed to be prejudicial and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 725; *see also State v. Lane,* 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995); *State v. Lampshire,* 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

In *Levy*, the State alleged that the defendant entered Kenya White's apartment. *Levy*, 156 Wn.2d at 714-15. The court's instructions to the jury on that charge included an element stating, "[O]n or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, *to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA*." *Levy*, 156 Wn.2d at 716. The defendant never challenged whether the apartment constituted a building. *Levy*, 156 Wn.2d at 726. Our Supreme Court affirmed the

[3] Kennedy did not raise this objection at trial. Because she raises a constitutional challenge, she may raise it for the first time on appeal. *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

defendant's conviction, concluding that while the instruction improperly suggested to the jury that the apartment was a building as a matter of law, the error was not prejudicial. *Levy*, 156 Wn.2d at 721, 727.

In contrast, in *Becker*, the State alleged that the defendants sold cocaine to an undercover police officer within 1,000 feet of a commercial office building, a portion of which housed the Youth Education Program (YEP), a general equivalency degree program for students unable to complete a traditional high school curriculum. *Becker*, 132 Wn.2d at 57-58. The defendants argued that YEP did not constitute a school within the meaning of the sentencing enhancement statute. *Becker*, 132 Wn.2d at 59. The jury found the defendants guilty by special verdict that stated the offense occurred "within 1000 feet of the perimeter of school grounds, *to-wit: Youth Employment Education Program School*." *Becker*, 132 Wn.2d at 60 (emphasis added). Our Supreme Court vacated the sentence enhancements, concluding that referring to YEP as the "Youth Employment Education Program School," which had never been its name, constituted an impermissible comment on the evidence that relieved the State of its burden to prove all elements of a sentence enhancement. *Becker*, 132 Wn.2d at 65-66.

The instruction in Kennedy's case is more like the instruction in *Levy* than the instruction in *Becker*. The trial court commented on the evidence when it provided the jury with an instruction stating, "[O]n or about October 5, 2008, [Kennedy] entered or remained unlawfully in a building, a building at Friendly Auto in Aberdeen, WA." CP at 45. The instruction suggested to the jury that Friendly Auto Sales was a building as a matter of law. But Kennedy never challenged the issue of whether the office at Friendly Auto Sales was a building. The State presented evidence that the office had a door that was normally kept locked but was found ajar.

It also presented evidence that Kennedy had taken car keys kept in that office. The judicial comment on the evidence was not prejudicial to Kennedy and therefore is not reversible error.

Kennedy argues in her SAG that (1) her counsel failed to listen to her, (2) she was denied medication, and (3) no one attempted to explain to the court that her behavioral irregularities were caused by her lack of medication. Because Kennedy's additional grounds rely on facts outside the record, a personal restraint petition is the appropriate procedure to seek review. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We cannot consider them in her direct appeal.

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.

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.