No. 43987-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON FITZGERALD,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 12-1-00443-2

BRIEF OF RESPONDENT

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2. Whether defense counsel was ineffective for failing to object to specific statements of the prosecutor.

3. Whether sidebars during the jury selection process violated Fitzgerald's constitutional right to an open trial.

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The State accepts Fitzgerald's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The statements which Fitzgerald claims were prosecutorial misconduct were proper in the context of the overall trial. Even if any statements were improper, there was no defense objection, and he does not establish that they were so flagrant and ill-intentioned as to be reversible error.

Fitzgerald challenges a number of statements made by the prosecutor during closing argument. At no time during the closing argument did Fitzgerald object, ask to strike, or seek a curative instruction.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85.

> As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id., at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence

does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A prosecutor is a quasi-judicial officer who must act impartially. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). It is the duty of the prosecutor to seek a verdict based on the evidence in the case rather than appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). It is misconduct for a prosecutor to appeal to the jurors' fear of criminals or invoke racial, ethnic, or religious prejudice as a reason for to convict. Belgarde, 110 Wn.2d at 504. Similarly prohibited are "inflammatory remarks, incitements to vengeance,

exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism." State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); *see also* State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995). While in closing argument the prosecutor has wide latitude to draw reasonable inferences from the evidence, a prosecutor may not suggest that evidence not presented provides additional grounds for convicting the defendant. Russell, 125 Wn.2d at 87(citing United States v. Garza, 608 F.2d 659 (5th Cir. 1979)).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a "substantial likelihood" that the jury was affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

a. Guilt by association.

Fitzgerald argues that the prosecutor improperly argued guilt by association when using the phrase "birds of a feather flock together." Appellant's Opening Brief at 10-11. He cites to a handful of cases from other states and federal courts disapproving that phrase, but he does not, in his argument, specify what he perceives the prosecutor was conveying by that expression. The State takes his claim to be that the prosecutor was urging the jury to convict Fitzgerald because he associated with known criminals. If so, that is not the way it appears from the record.

Fitzgerald was not seen at the location of the burglary by either of the victims. RP 129, 171.[1] The burglary was reported immediately after the victim watched the suspect vehicle drive away from his property. RP 116-17. Sgt. Dunn of the Thurston County Sheriff's Office received the call at 9:14 a.m. RP 35. Deputy Tom Cole spotted the vehicle a short time before he notified dispatch at 9:39 a.m. RP 187-88. It was located a short distance from the scene of the burglary and on one of only two routes out of the area where the victim residence was located. RP 185. Fitzgerald was in the vehicle. There was some discrepancy about where he was positioned inside the pickup, but there was no doubt that he was

[1] Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated September 19 and 20, 2012.

one of the three people removed from the pickup after it was stopped. RP 127, 193-94. The other two individuals in the vehicle were identified by the victim as the men he saw removing his property and fleeing the scene. RP 128-29.

Fitzgerald was charged as either a principal or an accomplice in all three of the charges. CP 17-18. The jury was instructed on accomplice liability. Instructions No. 8, 9, 17, 21; CP 25-29. In closing argument, the prosecutor was endeavoring to explain how accomplice liability works. Near the beginning of his argument, he said:

> [H]ere's the three individuals that you have, and I thought about this case and how do I convey to you as a jury how these people are connected.
>
> Well, I'm going to talk a little bit more about it, but I came up with the only thing I could really think of, which is kind of something my mom used to say when I was younger, birds of a feather flock together, and she usually meant that to mean choose your friends wisely, because the people you hang out with usually have common interests, and if those interests aren't good, you're going to be involved in those. So I want you to have that kind of mind set about these three individuals.

RP 304. There was no objection.

The prosecutor went on to explain that it isn't necessary to prove which accomplice did any specific act. RP 305. The victim did not see any individual carrying any property, but a large amount

of his missing property was found in the suspects' vehicle. RP 318-19. Jason Fitzgerald was the only connection between the other two defendants and the victim. RP 107-08, 129-30, 319. The prosecutor discussed how Fitzgerald could have been in the pickup at the time it was stopped yet not have been part of the burglary, and concluded none of the possibilities made any sense. RP 321-22.

During his own closing argument, Fitzgerald's counsel discussed the "birds of a feather" analogy. He seems to have understood the prosecutor to be arguing that Fitzgerald was acting together with the other two, not that Fitzgerald was guilty solely because he associated with the others. RP 332, 337-38.

> Perhaps it's natural for the police and prosecutors to think that if somebody is together with a couple of bad birds, he must be a bad bird, too. That's natural. We expect the police to prevent crime. I don't think anybody would want the cops to stand there and wait for a crime to occur before they did anything about it. It's natural for the police to think this way. He was with him. *He must have been with them. He must have known what was going on. He must have helped.*

RP 338-39 (emphasis added).

Fitzgerald cites to cases from outside Washington which disapprove the prosecution's use of the "birds of a feather" analogy.

In United States v. Smith, 806 F.2d 971 (10th Cir. 1986), the court found error based on the fact that the government's case in chief relied on co-conspirators who had pled guilty and who testified at trial. The prosecutor did not use the "birds of a feather" analogy; those were the words of the court. Id. at 975. The prosecutor said, among other things, "you don't find swans in sewers," and that drug dealers "are his very type." Id. at 974. That is not the argument the prosecutor in Fitzgerald's case was making. He was arguing that because Fitzgerald was found with the other two offenders moments after the burglary was committed, in the vehicle containing large amounts of stolen property, and under the circumstances of the burglary his complicity could be inferred. Perhaps the "birds of a feather" language was not a good choice, but he was not attempting to convince the jury that merely because Fitzgerald hung out with criminal types he must be guilty of the crime. Here the codefendants did not testify, and the State was relying on circumstantial evidence to prove accomplice liability.

Fitzgerald further cites to United States v. Sturgis, 578 F.2d 1296 (9th Cir. 1978). In that opinion, the specific words of the prosecutor's argument are not included, but the court did "strongly condemn" the argument that "birds of a feather flock together." Id.

at 1299. However, the court found it to be harmless error because there was considerable evidence that the defendant had participated in both a robbery and the conspiracy to commit robbery, and the jury was properly instructed about attorney arguments. Id. at 1299-1300. In Fitzgerald's case, the jury was instructed that the arguments of the lawyers were not evidence, were only to explain the evidence, and it was to disregard any remarks not supported by the evidence or the instructions. Instruction No.1, CP 21-22. There was considerable evidence that he was not only present at the scene of the burglary, but it is a logical inference that he was at a minimum assisting in the theft of the property. If the very words "birds of a feather flock together" are error, then they were in this case harmless error.

An error is harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Fitzgerald cites to People v. Ong, 94 Ill. App. 3d 780, 419 N.E.2d 97 (1981), where the court disapproved any language that implies guilt by association. There the prosecutor uses phrases

such as "common drinking buddies," "peas in a pod," and "birds of a feather flock together." Id. at 790. Nevertheless, the court found that the remarks by themselves were not reversible error. The court reversed because these remarks were combined with an attempt to equate presence at the scene with accountability. Id.

Finally, Fitzgerald cites to State v. Harrington, 27 Ariz. App. 663, 558 P.2d 28 (1976). In that case, the prosecutor used the phrase "birds of a feather flock together" as an attack on the defendant's character and reputation. Id. at 666. The court said that under other circumstances, the remark might have been harmless error, but in that case there was substantial evidence of self defense and the court had admonished the prosecutor not to address that issue. Id. at 667. In Fitzgerald's case, the prosecutor was not attacking his character or reputation, but arguing that he would not have been where he was and with those people had he not been part of the crime.

Fitzgerald further argues that it was misconduct for the prosecutor to display a PowerPoint[2] slide depicting individual photographs of Fitzgerald and the other two offenders with the words "birds of a feather flock together" beneath them. Appellant's

[2] PowerPoint is a registered trademark of the Microsoft Company.

Opening Brief at 10-11, CP 67.[3] He relies on In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), for his argument that this slide introduced unadmitted evidence. It is important, then, to examine exactly what the Glasmann court found improper about the State's argument and what it did not disapprove. It started with the presumption that Glasmann had waived any error unless there was misconduct so "flagrant and ill intentioned that an instruction would not have cured the prejudice." Glasmann, 175 Wn.2d at 704.

It is error to show to the jury evidence not admitted at trial and is reversible error if there is reason to believe the defendant was prejudiced. Id. In closing argument, the prosecutor in Glasmann used a PowerPoint slide presentation in which he incorporated video from security cameras, audio recordings, photographs of the victim's injuries, and Glasmann's booking photograph, which had been admitted into evidence. Id. at 700. The photograph showed "extensive facial bruising." Id. at 700. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at 715, J. Chambers concurring.

[3] Fitzgerald mentions in passing that the men all had their hands behind their backs, apparently in handcuffs. Appellant's Opening Brief at 11. That isn't particularly obvious from the photographs, but defense counsel brought it to their attention in cross examination of Deputy Cole. RP 209.

Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?", one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?", and three showed the word "GUILTY" superimposed across it, an additional "GUILTY" on each successive slide. Id. at 701-02.

One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Another showed the victim's injuries with two captions: "What was happening right before the defendant drove over Angel . . . ", and ". . . you were beating the crap out of me!" Id.

The Glasmann court found that the photograph, with the additional captions, constituted the prosecutor's individual opinion that the defendant was guilty, Id. at 706-07, although it is not clear from the court's opinion why it is an individual opinion as opposed to the opinion of the State, which the prosecutor represented. The court found this to be misconduct. It discussed at some length the "prejudicial imagery" which is considered to be of such an impact that an instruction cannot overcome it. Id. The court concluded

that the "multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed," combined with his closing argument, created such prejudice that a curative instruction would have been pointless. Id. at 708. The prosecutor argued that the evidence overwhelmingly supported the charges filed, but also told the jury that to reach a verdict it must decide "Did the defendant tell the truth when he testified?" and that they had a duty to compare the testimony of the State's witnesses to that of the defendant. Id. at 710.

Glasmann was challenging only the degree of the offenses for which he was being tried, not his culpability. "Because Glasmann defended by asserting he was guilty only of lesser offenses, and nuanced distinctions often separate degrees of a crime, there is an especially serious danger that the nature and scope of the misconduct here may have affected the jury." Id. at 680. In its summary of the holding, the court said:

> The prosecutor's presentation of a slide show including alterations of Glasmann's booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. *Considering the entire record and circumstances of this case*, there is a substantial likelihood that this misconduct affected the jury

> verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.
>
> It is substantially likely that the jury's verdict were (sic) affected by the prosecutor's improper declarations that the defendant was "GUILTY, GUILTY, GUILTY!", *together with* the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over the defendant's bloodied face in a jail booking photograph.

Glassman, 175 Wn.2d at 714, emphasis added.

> When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that the jurors could acquit Glasmann only if they believed him represent the type or pronounced and persistent misconduct that *cumulatively* causes prejudice demanding that a defendant be granted a new trial.

Id. at 710, emphasis added.

The court in Glasmann did not reject the use of computer-generated visual aids during argument. "Certainly, lawyers may and should use technology to advance advocacy and judges should permit and even encourage new techniques. But we must all remember that the only purpose of visual aids of any kind is to

enhance and assist the jury's understanding of the evidence." Glasmann, 175 Wn.2d at 715, J. Chambers concurring.

Glasmann does not stand for the proposition that any time a caption is added to a photo that was admitted into evidence it becomes altered evidence. " . . . *here* the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence." Id. at 706, emphasis added. In Fitzgerald's case, the photographs of the three offenders had been admitted as exhibits. The caption below the three pictures in the slide, CP 67, does not even touch the photographs, and thus they cannot be "altered" by the caption. Nor did the Glassman court say that *every* instance of a caption is going to amount to altered evidence. It was dealing with the facts before it, and each case will present different facts. The "birds of a feather" caption referred to the fact that the three men had been together when the crime was committed, a fact not in dispute. The argument that they were together committing a crime is not improper because it was based upon the evidence. Fitzgerald mischaracterizes the State's argument when he maintains that the purpose was to paint Fitzgerald with the same brush as the others, hoping to divert attention from the fact that no witnesses saw him at the scene of

the burglary. The argument actually was that if Fitzgerald was with the two identified burglars in the suspect vehicle, which contained stolen property, a short distance from the scene of the crime and a short time afterward, it was evidence that he was part of the crime, i.e., flocking together.

The challenged argument, including the slide, was not improper. Certainly it was not so flagrant and ill-intentioned that a curative instruction would have been useless. Fitzgerald could have objected and asked the court to instruct the jury to disregard. A jury is presumed to follow instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

b. Argument of the traumatized child victim.

Count two of the third amended information, the information on which he was tried, charged Fitzgerald with attempted residential burglary and included an allegation that the victim of the burglary was present at the time of the crime. CP 17, RCW 9.94A.535(3)(u). The testimony was that Levi Thompson, Amanda Easterday, and Easterday's six-year-old son were in the residence when the child ran into the adults' bedroom yelling that a man with a crowbar was at his bedroom window. RP 99-100, 110-11. In answer to a question from the prosecutor, Thompson explained that

the incident has a lasting impact on the child—he no longer liked to go to bed and asked to sleep in the adults' bedroom. RP 118. There was no objection. When the prosecutor asked a similar question of Easterday, Fitzgerald objected, a sidebar was held, and the court sustained the objection. RP 169. At a time when the jury was not present, the court made a record of the sidebar, indicating that the prosecutor had understood the impact on the victim was relevant to the aggravating circumstance; the defense maintained the statute only required that people be present, not necessarily upset. RP 226. During closing argument, the prosecutor made one reference to the child. "As you heard, [the boy][4] has been traumatized by these events."

A prosecutor is entitled to refer to evidence that has been admitted. The testimony of Thompson was not objected to. No other testimony on the subject was admitted. There was one sentence in the closing argument that can scarcely be characterized as "urging" the jury to convict based on the trauma to the child. Even if the evidence was irrelevant, the likelihood of the jury being prejudiced is, considering the totality of the circumstances, nonexistent. At worst, it was harmless error.

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[4] Because he is a minor, the State is not using the child's name.

c. Diminishing the burden of proof.

Fitzgerald claims that the prosecutor's closing argument trivialized the State's burden of proof. He cites to cases which disapproved things that this prosecutor did not do, such as use a "fill in the blank" argument. Appellant's Opening Brief at 15. He

The State does not dispute that it is improper argument to misstate the law or to minimize the burden of proof. However, Fitzgerald again mischaracterizes the prosecutor's arguments when he claims that the prosecutor did both. He quotes the following remarks:

> The evidence that has been presented to you shows that these three individuals each acting as an accomplice to one another committed these offenses. If someone had come up to you and told you, you know, my house just got burglarized, the cops were there within ten minutes, they pulled over the truck with three guys in it and all of the stolen property, wouldn't you almost automatically say, yeah, all three of those guys, yeah, they must have burgled your house, because that makes sense.

RP 322, Appellant's Opening Brief at 16. In rebuttal argument, the prosecutor said:

> It makes no sense, because what Mr. Hack has asked you to do and what Mr. Fitzgerald hopes you do is leave your common sense out here and don't take it back there, because, as I said to you right at the close of my first talk with you, if someone walked into a coffee shop and said, hey, I want to tell you this story,

> this, this, and this happened, I mean what would you logically conclude.

RP 347, Appellant's Opening Brief at 16.

Fitzgerald attempts to analogize this argument to that disapproved in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). In that case, the court found improper the prosecutor's argument that the jury had to have a reason to return a not guilty verdict, interpreting that to imply that the jury must find the defendant guilty unless it came up with a reason not to. Id. at 431. The court further found improper the argument that the certainty required to convict—beyond a reasonable doubt—was the same certainty people use to make everyday decisions. Id. There were also arguments that focused on the degree of certainty required to act, rather than hesitate to act. Id. at 432. Ultimately, however, because Anderson had not objected to these remarks, the court concluded that they were not so flagrant and ill intentioned that a curative instruction would have been useless, and the convictions were affirmed. Id. at 432. Division II of the Court of Appeals, reviewing similar arguments in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), did find them to be prejudicial and reversible error. Id. at 685-86.

The remarks of the prosecutor in Fitzgerald's case are not remotely like the arguments in Johnson and Anderson. The challenged argument here was not a trivialization of the burden of proof. It was a discussion of the fact that common sense is the same inside and outside of the courtroom. A jury is not required to believe incredible evidence or theories merely because they are presented in a courtroom as opposed to a coffee shop. The prosecutor was talking about credibility and common sense, not decision making by the jurors. There is nothing unconstitutional about common sense. State v. Dixon, 78 Wn.2d 796, 798, 479 P.2d 931 (1971).

Fitzgerald did not object to these arguments. They were not objectionable.

d. Roadblocks to reality.

Fitzgerald claims that the prosecutor improperly impugned his attorney during closing argument, making reference to a description of defense counsel as putting up road blocks to the jury's exercise of common sense. Appellant's Opening Brief at 19. The remarks complained of occurred during rebuttal, and in context, were as follows:

> I just want to spend a couple of minutes going over the key concepts that we discussed earlier, because I don't think Mr. Hack's explanation of a lot of those things rings true, according to the jury instructions that you have from the judge.
>
> You have to consider a case in its whole meaning, consider every aspect, every piece of evidence together. You can't look at, okay, well, let's look at this, and let's look at this, and let's look at this in isolation. You have to say, let's look at it altogether. Let's look at the whole picture.
>
> When you look at that picture, you can see for miles. You can see everything that's on the horizon, everything that's coming at you, but if someone puts something in front of you and said, no, just focus at this, look to the left, look to the right, you can't see everything. They put up these road blocks, because they don't want you to see what is there. They don't want you to see what you can see when you use your common sense.

RP 341-42. The prosecutor's PowerPoint presentation included a slide depicting several road signs with the words "common sense" superimposed on them, beneath the phrase "look at the facts proven and circumstances of the whole case." CP 96. The record does not reflect whether that slide was shown to the jury, but for purposes of this argument the State will assume that it was.

During the defense closing argument, counsel argued that reasonable doubt came from several specific pieces of evidence, for example, the evidence of the crowbar and pry marks on the

bedroom window, RP 327-330, the value of the stolen property, RP 331-32, the dispute over who was driving the pickup, RP 334-37, how many people were involved, 337-38. He accused the State of twisting the evidence to its benefit. RP 337. The prosecutor was responding to those arguments. and, as argued above, a prosecutor has great latitude in responding to defense argument.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). In Thorgerson, however, even though the prosecutor used language such as "bogus," "sleight of hand," the court did not find it reversible error because it was unlikely to have affected the verdict. Id. at 452. In State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), where the prosecutor said, among other things, that defense counsel's argument was a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what they are doing," the court found no reversible error because there was no prejudice. Id. at 29-30.

In Fitzgerald's case, the challenged argument does not even rise to this level. The prosecutor disagreed with many of the

arguments defense counsel made, and it is not improper for the State to respond to them. It is a stretch to consider the language quoted above with a personal attack on defense counsel or his function in the trial. It is entirely proper argument to ask the jury to consider all of the evidence, not individual pieces in isolation. Using a visual aid for that point is likewise not improper. It is alarming to think that jurors, to whom we entrust the responsibility to determine guilt or innocence, are so easily swayed by such an innocuous remark that it would prejudice them against the defendant.

This argument was simply not improper. Even if it had been, there was no objection, and, like in Warren and Thorgerson, it was not so objectionable that it could not have been cured by an instruction to the jury.

e. Cumulative error.

Fitzgerald claims that his convictions should be reversed because the various alleged errors were cumulatively prejudicial. The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a

defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

As argued in the preceding sections, the claimed errors were not, in fact errors, and he has not shown any prejudice. He argues that the verdict was likely to have been affected because the evidence was circumstantial. It is not clear how that follows. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Even assuming any of the statements challenged were error, which the State does not concede, the cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Lindsay, 171 Wn. App. 808, 838, 288 P.3d 641 (2012).

2. Counsel was not ineffective for failing to object to the prosecutor's argument.

Fitzgerald argues that his trial counsel was ineffective for failing to object to testimony about the effect of the attempted burglary on the child and for comments made during closing. Appellant's Opening Brief at 23-24. The State's response is that

Fitzgerald has exaggerated the evidence and overstated the prosecutor's remarks. The performance of his attorney was not ineffective.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct.

2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." Stenson, 132 Wn.2d at 705. As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (1993), *citing to* Strickland 466 U.S. at 689. While it is easy in retrospect to find fault with tactics

and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a

reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Considering the totality of the record, and the standards set forth above, it cannot be said that Fitzgerald's trial counsel was ineffective. Defense counsel conducted a vigorous defense. He objected to some things and not others, indicating either a tactical choice or an opinion that those others were not objectionable. It is not necessarily good practice to object when those objections will likely not be sustained.

3. There was no violation of Fitzgerald's right to a public trial.

At the start of the trial, the court announced that challenges for cause to prospective jurors would be at sidebar and the exercise of preemptory challenges would be at the clerk's desk. RP 6-7. Following questioning of the jury venire, the court called counsel to

a sidebar. Following the sidebar, the selected jurors were seated. Voir Dire RP 71. On appeal, Fitzgerald claims that this procedure violated his right to a public trial.[5] Appellant's Opening Brief at 25-29. He does not argue that any of the three sidebars held during the evidentiary portion of his trial were similar violations. RP 145, 169, 267.

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is subject to de novo review on direct appeal. State v. Easterling, 157 Wn.2d 167,173-74, 137 P.3d 825 (2006) The right to a public trial is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 10 of the Washington Constitution. Id., at 174. The remedy for a violation of the right to a public trial is reversal and remand for a new trial. State v. Wise, 148 Wn. App. 425, 433, 200 P.3d 266 (2009) *affirmed,* 176 Wn.2d 1, 288 P.3d 1113 (2012). The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the

[5] This issue is pending review in the Supreme Court in State v. William Smith, case no. 85809-8, set for oral argument in the fall term, 2013.

analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an undercover police officer was testifying and he feared public testimony would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
>
> 4. The court must weigh the competing interests of the proponent of the closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," State v. Lormor, 172 Wn.2d 85, 92, 257 P.3d 624 (2011) citing to Bone-Club, 128 Wn.2d at 257, or when jurors are questioned in chambers. Lormor, 172 Wn.2d at 92, citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

The right to a public trial exists to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004),

The right to a public trial is violated when jury selection is conducted in chambers rather than in an open courtroom without consideration of the Bone-Club factors. *See, e.g.,* Strode, 167 Wn.2d at 227 (Alexander, C.J. plurality opinion); 167 Wn.2d at 235-36 (Fairhurst, J., concurring). Fitzgerald contends that a sidebar is the equivalent of an in-chambers conference or other closed-courtroom proceeding. Appellant's Opening Brief at 28. The State disagrees.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To decide whether a particular process must be open to the general public, the Sublett court adopted the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis. Fitzgerald does not suggest any reason under the experience and logic test for considering side bars to be a courtroom closure, and he does not raise the same claim regarding side bars conducted during the evidentiary portion of the trial. Further, a record was kept of the challenges and made part of the court file, available to the public. Supp. CP. ____

Fitzgerald cites to a footnote in State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), *review granted*, 176 Wn.2d 1031, 299 P.3d 20 (2013). In Slert, four members of the jury venire were excused during an in-chambers meeting. In a split opinion, the court held that to be a violation of the right to a public trial. The footnote to which Fitzgerald cites, and which is dicta, reasoned that even if the jurors had been excused at a side bar it would still have involved a discussion of case-specific reasons and thus should have been held on the record. As noted, this is dicta, since a side bar was not at issue in that case and any discussion about one was unnecessary to decide the case.

There was no violation of Fitzgerald's right to a public trial.

4. There was no violation of Fitzgerald's right to be present at a critical stage of his trial.

Fitzgerald maintains that his right to be present at all critical stages of his trial was violated by the challenges conducted at side bar. Appellant's Opening Brief at 29-33. In fact, he was present.[6]

A defendant has the fundamental right to be present at all critical stages of trial, including voir dire and the empanelling of a jury. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). In Irby, the defendant was on trial for murder. Prospective jurors filled out a questionnaire the day before voir dire was to begin. Several members of the venire indicated on their questionnaires that the predicted length of the trial would constitute a hardship for them, or that a member of their families had been murdered. That same day, the judge exchanged e-mails with counsel about agreeing to excuse those jurors so they would not have to appear for voir dire. The defendant had no opportunity to participate in that exchange of messages. Counsel stipulated to the dismissal of seven of the venire for cause without Irby every having seen them. The Supreme Court found this a constitutional violation because the

[6] The record does not specifically reflect that Fitzgerald was not at the side bar, but typically defendants do not accompany their attorneys to bench conferences and the State assumes that he remained at the counsel table.

jurors were being individually evaluated without any input from Irby. Irby, 170 Wn.2d at 882-83.

Fitzgerald argues that his case is like Irby in "all relevant respects." Appellant's Opening Brief at 31. In fact, there is no resemblance between the two cases. Fitzgerald was present during all of the jury questioning. No jurors were privately questioned, even in open court. He had full access to his attorney at all times, and had the opportunity to consult with counsel and give his input into the selection of the jury. The fact that he sat at counsel table while his attorney made the actual challenges does not deny him his right to be present. His attorney represented him and was acting on his behalf. It strains the notion of "presence" to conclude that he was not present. Irby, however, was in custody at the time the potential jurors were excused, and had no opportunity to consult with counsel. Irby, 170 Wn.2d at 878.

Fitzgerald cites to several cases standing for the proposition that jury selection is a critical part of the trial. The State does not dispute that. He was present. He offers no argument, nor does the record indicate, that he was in any way prevented from hearing and observing all of the questioning of the venire or that he was

prevented from discussing challenges with his attorney. There was no violation of his right to be present.

Even if there were, a violation of a criminal defendant's right to be present is subject to harmless error analysis. *See* United States v. Marks, 530 F.3d 799 (9th Cir. 2008); Rice v. Wood, 77 F.3d 1138 (9th Cir. 1996). An error will be deemed harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." Rice, 77 F.3d at 1144 (internal quotation marks omitted). Fitzgerald has not shown any prejudice.

D. CONCLUSION.

Because there was no prosecutorial misconduct, no ineffective assistance of counsel, and no violation of Fitzgerald's right to a public trial or right to be present at a critical stage of the trial, the State respectfully asks this court to affirm all of his convictions.

Respectfully submitted this 27th day of June, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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--AND--

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of June, 2013, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

June 27, 2013 - 1:15 PM

Transmittal Letter

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