71632-8

71632-8

NO. 71632-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

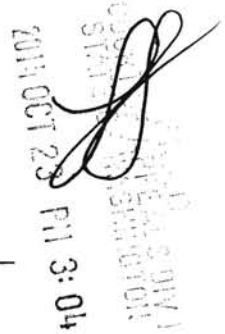
STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SANCOMB,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Washington State:

Statutes

Washington State:

Other Authorities

A. ISSUES

1. A jury instruction on a lesser included offense is not warranted unless the evidence supports an inference that only the lesser offense was committed. Sancomb was charged with second degree robbery. The victim testified that Sancomb, after stealing items from the hotel store, threatened her with death and brandished a five-inch knife. Sancomb did not testify, and his statement that was admitted at trial was silent on whether he had threatened the victim or brandished a knife. Did the trial court properly exercise its discretion in refusing to instruct the jury on the lesser included offense of third degree theft?

2. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that a curative instruction could not have neutralized the prejudice. At trial, the prosecutor asked the victim relevant questions as to her language abilities and work schedule. In closing argument, the prosecutor argued these facts and the evidence showing that Sancomb had threatened the victim and brandished a knife. Sancomb did not object to the questions or argument. The jury was correctly instructed on the law and that the lawyers' remarks were

not evidence. Has Sancomb failed to show that the alleged misconduct was so flagrant and ill-intentioned that it could not have been cured by an instruction from the court?

3. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result. The decision of whether and when to object is a strategic one. Defense counsel did not object to all but one of the prosecutor's statements and incorporated them into his own argument. No remark was so prejudicial that it affected the outcome of the trial. Has Sancomb failed to establish ineffective assistance of counsel?

4. The sentencing court did not include in Sancomb's offender score his 1996 Utah conviction, yet it appears in the appendix B to his judgment and sentence. The judgment and sentence also includes the deadly weapon enhancement, although the jury did not find the enhancement. Is remand necessary to correct these two scrivener's errors?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged William Sancomb with second degree robbery with a deadly weapon enhancement. CP 12-13. Judge Douglass North presided over the jury trial. CP 32. The jury found Sancomb guilty as charged, but did not find the enhancement. RP 236[1]; CP 51-52. The court sentenced Sancomb to 73 months of confinement. RP 277-86; CP 56-58.

2. SUBSTANTIVE FACTS.

On June 6, 2013, Prossie Lockett was working her usual overnight shift alone at the Silver Cloud Hotel. RP 80, 88. At approximately 11:00 or 11:30 p.m., Sancomb arrived at the hotel with a woman. RP 91-92. They disappeared for about thirty minutes, then left together. RP 92. Sancomb returned alone to the hotel. RP 93. He went straight to the store in the front of the hotel and grabbed candy, chips, and soda pop. RP 93-95. He grabbed so many items so quickly that he began dropping some. RP 95. He did not pay and walked past Lockett without saying a word. RP 94-96.

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[1] The verbatim report of proceedings consists of six consecutively paginated volumes. This brief refers to the record by page number only.

Lockett called after him, asking if he wanted to charge the items to his room or pay cash. RP 96. Sancomb told her that someone else would pay. RP 96. He continued walking away, dropping the stolen items as he went. RP 96-97. Lockett left the front desk and followed him. RP 97. She asked again who would pay. RP 97. As he neared the restroom, he pointed toward the men's restroom and said, "She's going to pay." RP 97. Lockett asked, "What's her name?" RP 127.

Sancomb quickened his stride and took larger steps. RP 97. He told Lockett, "Don't follow me, I have a knife." RP 116. He then turned back toward her and threatened, "Do you want to die because of candy?" RP 97, 99, 100. At first, Lockett did not take his threat seriously. RP 116. He then pulled a five-inch knife from under one arm and brandished the blade. RP 100. His eyes had widened and his tone was serious. RP 106. Lockett realized then that she was in danger. RP 106. Sancomb continued walking with long strides. RP 100-01, 107. Lockett called out that she would call the police. RP 101. Sancomb dropped more items and the knife as he exited the hotel. RP 107. Lockett picked up the knife and the dropped stolen items. RP 107-09. She then called police. RP 108-09.

Officer Timothy Stout and his K-9 partner Jack tracked Sancomb to a nearby parking garage. RP 10, 16-18. Sancomb was inside eating a candy bar and drinking a Coke. RP 20. Stout told Sancomb that he was an officer and asked him to raise his hands. RP 18-19. Sancomb responded, "I'm eating." RP 19. Additional officers arrived and arrested Sancomb. RP 20-21. Lockett identified Sancomb at the scene. RP 144-45.

The knife was a steak knife with a blade of five to six inches. RP 46-49. No fingerprints could be lifted from the knife. RP 50, 53. The hotel did not have video surveillance. RP 54.

Officer Colin Cufley transported Sancomb to jail. RP 75. During the drive, Sancomb said that he did not think the incident was a robbery because he did not hurt anyone. RP 75. He said he did not push her and had just walked out the door. RP 75. Sancomb did not testify at his trial. RP 170.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF THIRD DEGREE THEFT.

Sancomb maintains that the trial court erred in refusing to instruct the jury on the lesser included offense of third degree theft.

However, neither Sancomb's statement nor any other evidence admitted at trial raised the inference that Sancomb committed only third degree theft. The trial court thus properly exercised its discretion in refusing to instruct the jury on this lesser crime.

A defendant may be tried only for the offenses charged. Wash. Const. art. I, § 22; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). As an exception to this rule, a defendant may be tried for an offense "the commission of which is necessarily included within that with which he or she is charged in the information." RCW 10.61.006. These are termed lesser included offenses. Peterson, 133 Wn.2d at 890.

A jury instruction on a lesser included offense is warranted when: 1) each of the elements of the lesser offense are necessary elements of the charged offense (the legal component), and 2) the evidence supports an inference that the lesser crime was committed (the factual component). State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

Third degree theft is a legal lesser included offense of second degree robbery. Robbery requires proof, *inter alia*, that the defendant took property with the intent to steal. RCW 9A.56.190;

See State v. Sublett, 176 Wn.2d 58, 88, 292 P.3d 715 (2012). Third degree theft also requires proof that a person committed theft of property. RCW 9A.56.050. The factual component is at issue here.

The purpose of the factual component "is to ensure that there is evidence to support the giving of the requested instruction." Fernandez-Medina, 141 Wn. 2d at 455. It requires a "more particularized showing than that required for other jury instructions." Id. "[T]he evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Id. (emphasis in original).

The trial court must consider all of the evidence presented, regardless of which party introduced it. Id. at 456. However, it requires more than that the jury might disbelieve the evidence pointing to guilt -- "[T]he evidence must affirmatively establish the defendant's theory of the case." Id. (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

The appellate court reviews the trial court's decision on whether the evidence meets the factual component for abuse of discretion. State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366

(2010). The evidence is viewed in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Here, the trial court properly determined that Sancomb had not met the factual component and, therefore, was not entitled to the lesser included offense instruction. Neither Sancomb's statement nor any other evidence presented at trial affirmatively established that Sancomb committed *only* third degree theft.

The prosecutor elicited Sancomb's statement from Officer Cufley:

> Q: On the way to the jail did Mr. Sancomb talk with you?
> A: He did.
> Q: Did he tell you that he didn't think this incident should be a robbery because he did not hurt anyone?
> A: He did, yes.
> Q: Did he also tell you that he just left the place and he didn't push her?
> A: Yes.
> Q: Did he also tell you that he just walked out the door?
> A: Yes.

RP 75.

Sancomb's statement established only his incorrect opinion that a robbery required an assault of some kind. Sancomb did not deny that he had threatened Lockett or brandished a knife. Even

with this statement, Sancomb was relying on the fact that the jury might not believe portions of Lockett's testimony. That is not sufficient to meet the factual component of the test.

A comparison to Fernandez-Medina is instructive. 141 Wn.2d at 449-52. In that case, it was error to deny the defendant's requested second degree assault instruction. Id. at 451. The defendant was charged with two counts of attempted murder, or, alternatively, first degree assault. Id. The evidence showed that Fernandez-Medina pointed a firearm at one victim's head; she heard a click as if the trigger had been pulled, but the gun did not fire. Id. Fernandez-Medina testified and denied committing the crimes. Id. However, an expert testified that a firearm may make a clicking sound, even when the trigger has not been pulled. Id. at 451-52. This raised the inference that the defendant had not pulled the trigger, and had committed only the lesser crime of second degree assault. Id. at 456.

By comparison, Sancomb has no evidence to point to that raises the inference that he committed *only* theft. His statement is entirely consistent with the State's theory of the case; that he stole the candy, threatened Lockett, and brandished a knife. As the trial court found, even with his statement, Sancomb was relying on the

jury disbelieving Lockett's testimony. RP 167-68. That is not sufficient.

Sancomb asserts that the trial court erred because it did not consider Sancomb's statement as it was not made under oath. While the trial court did comment on this fact, the court clarified that that was not the sole basis for its decision. RP 169. Rather, the trial court found Sancomb's statement insufficient to meet the affirmative proof required based on Fowler, 114 Wn.2d at 67; State v. Brown, 127 Wn.2d 749, 755-56, 903 P.2d 459 (1995); and State v. Speece[2], 115 Wn.2d 360, 362-63, 798 P.2d 294 (1994). RP 160-61, 167-68. The court summarized its view of the defense argument:

> Basically, what you are asking the jury to do is simply to disbelieve some of Ms. Lockett's testimony. Now, they can certainly do that if there is evidence to the contrary and there is a choice for them to make. But at this point I wouldn't give the lesser included. Obviously you can confer with Mr. Sancomb on whether he wants to testify. And obviously, if he testifies and provides a basis for a lesser included, then I'd give it.

RP 167. The court later clarified again, ". . .[Y]ou are not lacking in the fact that there's a theft in the third degree. . .legally that's a

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[2] The verbatim report of proceedings states that the trial court referred to the case of "State v. Spence." RP 160-61. However, the context and discussion in the record indicate that the trial court was referring to State v. Speece. RP 161.

lesser included. The question is whether there is affirmative evidence suggesting that that's all there is as opposed to a robbery." RP 169-70.

The trial court's analysis properly centered on whether Sancomb had met the affirmative proof required and properly concluded that he had not met that standard. Sancomb's statement did not raise the reasonable inference that he had committed only theft. The trial court did not abuse its discretion in denying the lesser included instruction.

2. SANCOMB CANNOT SHOW THAT HE WAS PREJUDICED BY THE PROSECUTOR'S QUESTIONS TO THE VICTIM, CLOSING ARGUMENT, OR BY HIS COUNSEL'S STRATEGIC DECISIONS NOT TO OBJECT.

Sancomb contends that several of the prosecutor's questions to the victim and three portions of the closing argument constituted misconduct and warrant reversal. In the alternative, he asserts that his counsel was ineffective for not objecting to all but one of the remarks. Both claims fail. The questions and argument were not improper. Moreover, a curative instruction could have neutralized any prejudice.

a. The Prosecutor's Questions Of The Victim And Closing Argument Did Not Constitute Prosecutorial Misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of establishing that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the prejudice." Emery, 174 Wn.2d at 760-61. This requires a defendant to show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id. The reviewing court's focus is on whether the resulting prejudice could have been cured. Id. at 762.

The supreme court has recognized that "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. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original)

(quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That court has noted, "[T]here is great potential for abuse when a party does not object because '[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.'" State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (quoting State v. Sullivan, 69 Wn. App. 167, 173, 847 P.2d 953 (1993)).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). On review, the prosecutor's remarks are viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); accord State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

However, deliberate appeals to the jury's passion and prejudice are prohibited. Russell, 125 Wn.2d at 89. For example, it was improper for the prosecutor to play upon the jury's fears of the defendant's future dangerousness by arguing, "If you have a reasonable doubt that he killed these women, let him go. . .There is

no shortage of naieve [sic], trusting, foolish young people in the cities of this country. . ." Id. Even so, reversal is required only where the statements were so inflammatory that no instruction could have cured the prejudice. Id.

i. The prosecutor's questions to Lockett regarding her background, work schedule, and language abilities were relevant and the closing argument incorporating this testimony was not improper.

Sancomb's first claim is that the prosecutor's questions about Lockett's background and later argument including these facts were improper. However, Lockett's background, work schedule, and language abilities were relevant to her credibility, specifically her ability to perceive and accurately testify. See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 1.02 (3d ed. 2008), (in evaluating the credibility of a witness the jury may consider the ability of the witness to observe accurately).

Lockett was the only witness to the crime. RP 220. She was working her usual overnight shift at the Silver Cloud Hotel when Sancomb robbed her. RP 42, 80, 92. The prosecutor asked Lockett about her night job at the Silver Cloud Hotel as well as her

daytime jobs as a caregiver. RP 78. Sancomb's counsel asked similar questions and incorporated her answers into his closing argument. RP 111-12, 216. He argued:

> [I]t's not a bad thing to work full-time and to work three jobs and work your butt off, but the downside to that is she's tired. The mind plays tricks on you. You are looking down an empty hallway in the middle of the night in the dark with glasses on and you can barely see yourself. The mind plays tricks on you.

RP 216. Lockett's jobs and work schedule were clearly relevant. The prosecutor's questions and argument including these facts were not improper.

Similarly, Lockett's English language ability was relevant to her credibility. She was not a native English speaker. RP 136. She had emigrated from Uganda ten years previously and learned British-style English in the fifth grade. RP 78, 136. At trial, Lockett used slightly different words to describe Sancomb's actions and threat than in her previous statements. RP 122-25.

Defense counsel focused his cross examination of Lockett and his closing argument on these inconsistencies. RP 117, 122-25, 127, 130. He impeached her. RP 116-31. He asked questions focused on whether she had said that Sancomb turned his head or his entire body to face her when he brandished the

knife. RP 120-24. At times, Lockett appeared confused by his questioning.[3] RP 120-24. He argued in closing argument that Lockett was not credible due to these inconsistencies. RP 204-05, 214-15, 223-24.

By contrast, the prosecutor argued that these slight inconsistencies were because English was not Lockett's native language and she had learned British-style English in Uganda. RP 196. These were relevant facts for the jury to understand her testimony. As such, it was not improper for the prosecutor to ask these questions or to incorporate her answers into his closing argument.

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[3] For example, during cross-examination of Lockett this exchange occurred:

Sancomb's Counsel:	Okay. I am simply talking about your interaction with him in that hallway.
Lockett:	Okay.
Sancomb's Counsel:	From this point forward until I say that we are talking about something else.
Lockett:	Okay.
Sancomb's Counsel:	Okay? So let me back up. So when you are down that hallway and after you say, where is she –
Lockett:	Uh-huh.
Sancomb's Counsel:	Okay?
Lockett:	Yes.
Sancomb's Counsel:	He ends up turning; is that correct?
Lockett:	No, he did not.
Sancomb's Counsel:	He did not turn?
Lockett:	Yes, if we are talking about the hallway.
Sancomb's Counsel:	Yeah. I am simply talking about the hallway.

RP 121.

ii. The prosecutor appropriately argued the serious facts of the case and did not make an improper emotional appeal to the jury.

Second, Sancomb contends that the prosecutor made an improper emotional appeal to the jury and an improper "golden rule" argument.[4] This claim also fails. The context of the arguments shows the prosecutor appropriately argued the serious facts of the case, including that Sancomb had threatened the victim's life.

Preliminarily, the supreme court has noted that in criminal cases, "golden rule" arguments are likely best viewed as improper appeals to the jury's passion or prejudice. Borboa, 157 Wn.2d at 125 n.5. Regardless, whether viewed as an alleged "golden rule" argument or as an appeal to the jury's passion or prejudice, the arguments were not improper in context.

In this case, the central issue was Sancomb's threat in order to retain the property he had stolen. RP 191, 197, 200, 203, 206-07, 218, 222-23. To prove that Sancomb committed second degree robbery, the State had to show that, *inter alia*, Sancomb took personal property by threatened use of immediate force, violence, or fear of injury. 11 Wash. Prac., Pattern Jury Instr. Crim.

[4] A "golden rule" argument improperly urges the jurors to place themselves in the shoes of one of the parties. State v. Borboa, 157 Wn.2d 108, 125 n.4, 135 P.3d 469 (2006).

WPIC 37.04 (3d ed. 2008); RCW 9A.56.190. Sancomb's counsel argued that the State had overcharged Sancomb by charging robbery rather than theft. RP 206-07, 218.

The prosecutor began his closing argument by focusing on Lockett and the threat that Sancomb had made to her. RP 190. The prosecutor then argued:

> Now, you may be asking yourself, what's the big deal, this is all over just some candy and some cherry Coke and some bags of chips. But you have to remember Ms. Lockett, and what it would feel like to have your life threatened, to have someone threaten you over a bag of candy, to have someone ask you if you are willing to die over candy.
>
> You see, that's the reason why we are here today. That's the reason why Mr. Sancomb is here today is *because of that threat*, the threat that he made to Prossie.

RP 190-91 (emphasis added). While it may have been inartfully worded, it is clear from the context that the prosecutor was urging the jurors to consider the evidence of the threat.

The remainder of the prosecutor's closing argument focused on the elements of the crime, evidence admitted at trial, and Lockett's credibility. RP 194-03. In rebuttal, the prosecutor came back to Sancomb's threat to Lockett. He explained:

> I don't know if you've ever been threatened, but you can all imagine that that threat is something that

> sticks with you; it's something that stays with you. That threat is a violation of your dignity as a person. *And there was no doubt in Ms. Lockett's mind that a threat was made to her.*

RP 230 (emphasis added). The last sentence clarified that the prosecutor was responding to Sancomb's counsel's argument that Lockett was simply mistaken about Sancomb threatening her with a knife. RP 204-06, 216-17. The prosecutor was not asking the jurors to place themselves in Lockett's shoes, but instead arguing that a threat would not be something that Lockett was simply mistaken about it.

At the end of rebuttal, the prosecutor returned to the serious threat that Sancomb had made to Lockett's life and argued "there was candy and things stolen, but there was something else stolen, it's a small part of Ms. Lockett's human being." RP 232. The prosecutor then concluded by stating that Sancomb was guilty of second degree robbery. RP 232.

The overall arguments were appropriate in the context of a case where Sancomb was charged with a violent crime against a person. See RCW 9.94A.030(54)(a)(xi). The evidence supported the arguments because Sancomb had threatened Lockett's life with a five-inch knife. RP 49, 100, 116. The

prosecutor was not required to describe the facts in a dry, clinical manner. See State v. Pirtle, 127 Wn.2d 628, 689, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996) (arguments that evoke an emotional response are appropriate if restricted to the crime's circumstances). The argument was not improper.

Sancomb relies on State v. Pierce. 169 Wn. App. 533, 552-56, 280 P.3d 1158 (2012). Pierce is distinguishable. In Pierce, the prosecutor made three egregiously improper arguments in closing: (1) a first person narrative of the defendant's thoughts leading up to the crimes, (2) a description of the murder that was not based on evidence, and (3) the imagined thoughts of the victims on the day they were murdered. 169 Wn. App. at 553. The argument was highly inflammatory and included repeated appeals to the jurors' sympathies, such as that the victim pleaded for mercy for himself and his wife. Id. at 555. As such, reversal was required.

By contrast, here, the prosecutor made a relatively brief argument that centered on the evidence of the threat Sancomb made to Lockett. The two portions of the closing argument that Sancomb relies on constitute one paragraph at the beginning of the closing argument and one paragraph near the end of the rebuttal

argument out of a total of eighteen pages of the transcript. RP 190-03, 227-32. The argument was not improper.

iii. The prosecutor's statement in rebuttal made in response to defense counsel's argument did not unfairly prejudice Sancomb.

Lastly, Sancomb contends that the prosecutor urged the jury to convict based on what might happen in other cases. This claim also fails. In rebuttal, the prosecutor responded to defense counsel's argument that the State had not proved its case because it had only Lockett's testimony.[5] RP 209, 215-17, 220. The prosecutor started to argue, "Defense -- if you believe the defense's theory of the case, it makes it extremely difficult for all those cases where a person is alone in their attack and there's a --." RP 231. Sancomb's counsel objected before the prosecutor could even finish his sentence. RP 231. The court instructed the prosecutor to confine his argument to the facts of the case. RP 231. The prosecutor did so. RP 231-32.

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[5] For example, Sancomb's counsel argued in closing:

> The other problem with the State's case is eyewitness testimony...a lot of innocent people [sic] become convicted based on unreliable testimony and later found not guilty. When we have someone like Ms. Lockett, who gives inconsistent statement with reasonable explanations about how she could be mistaken, it is clear that that testimony, her eyewitness account is somewhat unreliable.

RP 220.

Arguments made in response to a defense attorney's argument are generally not so prejudicial as to deny a defendant a fair trial. See Weber, 159 Wn.2d at 255, 277-78 (prosecutor responded to defense's argument of the lack of witnesses by comparing the case to child molestation cases where there are often no witnesses).

Here, the prosecutor's less than one sentence argument was made in direct response to defense counsel's argument. The jury was correctly instructed to base their decision on the evidence and that the lawyers' remarks were not evidence. RP 178-81; CP 33-35. In the entire context of the trial and argument, this very brief statement did not prejudice Sancomb.

b. Sancomb Has Not Shown That These Remarks Were So Flagrant And Ill-Intentioned That An Instruction Could Not Have Cured Any Prejudice.

Even if this Court were to conclude that these three portions of the prosecutor's closing argument or his questions were improper, Sancomb did not object to any other than the prosecutor's statement regarding other cases. RP 230-31. Sancomb cannot demonstrate that the questions or arguments

were so flagrant and ill-intentioned that an instruction could not have cured any prejudice.

Indeed, Sancomb's counsel incorporated portions of the prosecutor's arguments into his own argument. For example, he first read part of the first jury instruction that the jurors may not let their emotions overcome their rational thought process. RP 221; CP 35. He then argued:

> So I caution you, because you saw a lot of the State, you know, for direct examination of Ms. Lockett, talking about personal life. And you see in their closing argument, again they opened with it. And they want you to feel something for Ms. Lockett and base your judgment based on what she had gone through. But you need to remember, you are not here for Ms. Lockett. You are here as a juror to decide the fate of Mr. Sancomb.

RP 221. Defense counsel's incorporation of the prosecutor's argument weakens Sancomb's claim that it prejudiced him. See Russell, 125 Wn.2d at 89.

The trial court also instructed the jury that the lawyers' remarks were not evidence, that they were to disregard any remark not supported by the evidence, and that they were to base their verdict solely on the evidence and the law, not on sympathy or prejudice. RP 178-81; CP 33-35. The instructions included that the State had the burden to prove the crime beyond a reasonable

doubt. RP 182, 184-85; CP 37, 42. Jurors are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Any prejudice from these statements did not have a substantial likelihood of affecting the trial.

c. Sancomb's Counsel Was Effective.

Sancomb asserts that if this Court finds that the prosecutor's remarks were improper, but could have been cured by an instruction, then his counsel was ineffective for failing to object. This claim also fails. Sancomb's counsel was effective.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687, 108 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The first prong of the test "requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

The second prong of the test requires a showing that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. Id. If one prong has not been met, a reviewing court need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

Here, Sancomb's counsel did not object because the majority of the arguments were not improper. Moreover, as stated above, counsel incorporated into his own argument the overall argument that the prosecutor was simply making an emotional appeal. This was an effective and legitimate strategy. See State v. Rafay, 168 Wn. App. 734, 833, 285 P.3d 83 (2012) (counsel not ineffective for not objecting to closing argument because the decision to object is tactical); see also Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013) (counsel's decision not to object was a reasonable strategic decision).

Sancomb cannot show that he was prejudiced by any of counsel's alleged errors. There was no prejudice because the majority of the prosecutor's statements were not improper and an objection was not necessary. Sancomb's counsel ably represented

him throughout trial and his decisions not to object were legitimate trial strategy.

3. REMAND IS NECESSARY TO CORRECT TWO SCRIVENER'S ERRORS IN THE JUDGMENT AND SENTENCE.

Sancomb also seeks remand to correct the deadly weapon finding on the judgment and sentence and one of the convictions listed on the appendix B. The State agrees that remand is appropriate to fix these errors.

The jury did not find the deadly weapon enhancement, CP 52. Yet, the deadly weapon finding appears in the judgment and sentence. CP 56. Remand is appropriate to correct this error.

The sentencing court did not include in Sancomb's offender score his 1996 Utah conviction for theft by receiving stolen property/possession of a stolen vehicle, cause no. 961500872, because it did not find the crime comparable.[6] RP 249-51; CP 83-85, 104-10. However, the conviction appears on the criminal history, appendix B to the judgment and sentence. CP 61.

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[6] The title of this conviction is theft by taking, but it was also referred to in the State's briefing and in the record as possession of a stolen vehicle. RP 249; CP 83-85.

The record and the State's memorandums on comparability clarify that this was an error. RP 259-60; CP 66-67, 86-87, 118-26.

The conviction that should have been reflected on the appendix B was a 1990 Georgia theft by taking conviction, cause no. 1E1989CR139N. RP 259; CP 67, 86-87, 118-26. While remand is appropriate to correct this scrivener's error, the offender score was correctly calculated as a 9. RP 259. Therefore, resentencing is not necessary.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Sancomb's conviction and remand to correct the two scrivener's errors in the judgment and sentence.

DATED this 27th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. William Aldrich Sancomb, Cause No. 71632-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 23rd day of October, 2014.

Name:
Done in Seattle, Washington