NO. 73720-1-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

KEVIN E. INGALLS,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Is the defendant entitled to a new trial on the basis of prosecutor error where the defendant did not object to any of the challenged arguments at trial, and none of the challenged arguments were improper?

2. Was it an abuse of discretion to refer jurors back to the original instructions in response to a jury inquiry when the instructions were not ambiguous and answering the question could have been a comment on the evidence?

II. STATEMENT OF THE CASE

On November 21, 2013 at about 1:45 p.m. Trooper Ramey was on patrol on I-5 in south Snohomish County when he was alerted by dispatch that a gold Ford Taurus had been seen proceeding southbound from Marysville driving erratically. He was informed the driver was "a possible DUI." The vehicle was reported to be taking up multiple lanes and possibly causing collisions. A short time later he received a second call concerning the vehicle at MP 196 by the Snohomish river bridge. Trooper Ramey notified that he was standing by to investigate at his location at 164th Avenue. 6/8/15 RP 42-43.

Trooper Ramey parked his car on an overpass at 164th where he had a view of the freeway. A short time later he observed a gold Taurus approaching in the left lane. The vehicle was driving slower than other cars. Trooper Ramey then entered the freeway to investigate. 6/8/15 RP 43.

The trooper was able to verify that the Taurus was the suspect vehicle by comparing the license plate with the registration information supplied by dispatch. The trooper observed the vehicle for about one mile before it cut in front of a truck, causing the driver of that other vehicle to hit his brakes. At that point Trooper Ramey pulled in behind the Taurus and activated his emergency lights to pull it over. The driver of the Taurus did not pull over, but continued on at 50-55 m.p.h. The trooper then activated his siren, but the driver still did not pull over. 6/8/15 RP 44-48.

As they approached 44th Avenue the driver of the Taurus changed lanes to the right. There was a wide shoulder that he could have pulled onto at that point, but he did not do so. The trooper then pulled next to the Taurus and observed that the defendant, Kevin Ingalls, was the driver and sole occupant of the vehicle. The trooper's lights and siren were still activated, but the defendant did not pull over. The trooper tried to get him to pull over

by pointing for him to pull over. The defendant did not pull over but began gesturing with his right hand, a response the trooper had never seen before. 6/8/15 RP 48-52, 100.

As they approached 220th Street the defendant accelerated to over 100 m.p.h. The defendant pulled over to the left hand HOV lane. Traffic had been light to medium, but as they approached 220th they encountered more traffic. The defendant moved over to the shoulder and passed the traffic travelling in the HOV lane. The trooper followed in the HOV lane. The traffic in that lane moved over as the defendant and the trooper approached. 6/8/15 RP 53-55.

At the Park and Ride near the Snohomish-King county line the defendant went across all lanes of traffic to the right hand shoulder, continuing to travel at about 100 m.p.h. Two DOT engineers were parked on the shoulder in a sedan. When the defendant was about one car length from their vehicle the defendant moved back into lane one, striking another car as he did so. The defendant continued to 175th Street where he exited the freeway. The intersection at the base of the off ramp is a blind intersection. The defendant did not slow down but instead ran the red light at the intersection, and continued back onto the freeway.

At that point the trooper terminated the pursuit because it was too dangerous to continue. 6/8/15 RP 55-5.

The defendant was charged with one count of attempting to elude a pursuing police officer. It was also alleged that the offense was aggravated by a threat of physical injury or harm to one or more persons other than the defendant or the pursuing police officer. 1 CP 131-132.

Trooper Ramey was the sole witness at trial. During the direct and re-direct examinations, he identified the defendant as the driver of the vehicle that he pursued. 6/8/15 RP 52, 100. He was also asked about the procedural steps he took to identify the defendant. Without objection the trooper testified that he ran the registration for the vehicle and obtained the information for the registered owner including driving status, photos and addresses. He looked at the photo and compared it to the person who had been driving. 6/8/15 RP 62-63.

The prosecutor then asked if the person who had been driving matched the photo. The defense objected based on lack of foundation. In a hearing outside the presence of the jury the prosecutor clarified that he intended only to get into the procedural steps that the trooper took to identify the driver. He did not intend

to elicit the name of the registered owner of the vehicle. The court suggested a limiting instruction striking any inference from the evidence that the trooper received any information from the department of licensing specific to the defendant. The defense clarified that it was not seeking to exclude testimony regarding the procedural steps the trooper took, just the substance of what he learned. Based on that the court proposed an instruction clarifying that the trooper's procedural steps may be considered. The defense agreed to this modification. 6/8/15 RP 64-69, 71.

Thereafter the court instructed the jury:

> The testimony about the trooper's procedural steps shall stand. But to the extent that any testimony suggested that the trooper received or saw information from the department of licensing specific to this defendant, that testimony and information is stricken and the jury shall disregard.

6/8/15 RP 73.

During the course of deliberations the jury sent the court a note asking: "What specific part of Officer Ramey's testimony regarding his procedure are we allowed to consider?" 6/9/15 RP 145; CP 117. The defense proposed responding by again giving the limiting instruction previously given orally. 6/9/15 RP 148. The court was concerned that doing so could be construed as a

comment on the evidence. It noted that the instruction given during the evidentiary phase of trial was in response to the circumstances at the time, but that different circumstances faced the court at that point. In addition, neither the parties nor the court knew what the jurors were thinking when they sent out the question. The court ultimately instructed the jury "the court cannot comment upon the evidence, and you are to apply the instructions previously given, both oral and written." 6/9/15 RP 150-152; CP 117.

III. ARGUMENT

A. THE PROSECUTOR PROPERLY ARGUED FROM THE EVIDENCE ADMITTED AND DID NOT SHIFT THE BURDEN OF PROOF.

The defendant alleges that the prosecutor committed error in closing argument by arguing facts not in evidence, by shifting the burden of proof, and by commenting on his right to remain silent. [1]

[1] Although appellate courts have often used the term "prosecutorial misconduct," the Supreme Court has recognized that the term is "a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts, rather than mere trial error. See ABA Resolution 100B (Adopted Aug. 9-10, http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf; NDAA, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf. A number of appellate courts agree that "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App.), review denied,

Because the prosecutor properly limited his argument to the evidence admitted, and his argument that the evidence was unrefuted has been previously approved by reviewing courts, this argument should be rejected.

A defendant bears the burden to prove both that the prosecutor's statements were improper and that they prejudiced him. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Comments alleged to be improper are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the court's instructions. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). A prosecutor's remarks are not grounds for reversal even if they were improper if they were invited or provoked by the defense attorney and are in reply to his statements, unless the remarks are not pertinent, or are so prejudicial that a curative instruction would have been ineffective. Id. at 86.

Failure to object waives any claim of error unless the remark caused an "enduring and resulting" prejudice that could not have

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2009 Minn. LEXIS 196 (Minn. 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (2008).

been neutralized by a jury instruction. Russell, 125 Wn.2d at 86. Under this standard the defendant must show that (1) the prejudicial effect of the error on the jury could not have been cured by any instruction and (2) that the erroneous argument resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012).

1. The Prosecutor Referenced Only The Evidence That Had Been Admitted.

A prosecutor may not argue facts that have not been admitted into evidence. Russell, 125 Wn.2d at 88. The defendant identifies three comments made by the prosecutor which he alleges were improper for this reason. He alleges each of these comments referenced evidence the court struck; i.e. "that the trooper received or saw information from the department of licensing specific to this defendant..." 6/8/15 RP 73.

The first comment occurred at the end of the prosecutor's closing argument. The prosecutor was discussing the reason why the trooper's identification of the defendant was credible. He noted that at the time of the incident the trooper had a clear view of the defendant in his car. The defendant's odd behavior in the car was

memorable, making it easier for the trooper to recall the defendant. 6/9/15 RP 129-130.

The defendant challenges the argument that followed:

> And he told you that after he terminated the pursuit, he looked at a photo, called the troopers down in Seattle to try and find him. But they were unable to assist as they were doing other things.

6/9/15 RP 129-130.

He also points to the prosecutor's rebuttal closing argument wherein the prosecutor argued:

> Also, I challenge you to remember what the testimony actually was about gathering of evidence, about what the trooper did. Remember what he did on the side of the road at 175th, what he testified to. Prior to calling up other troopers in King County to try to talk to the defendant, he was there looking at things. And that he's certain the defendant's the one.

6/9/15 RP 142.

The defendant argues these arguments violated the court's order striking evidence that the trooper identified the defendant from a photo, and was thus error. The first challenged argument came at the close of the prosecutor's initial remarks. Looking at a photo was one of the procedural steps that the trooper performed after the pursuit was ended. He did not argue that the trooper identified the defendant from the photo. Nor did he argue there was an inference that the trooper identified the defendant from a photo

obtained from records maintained by the department of licensing. Taken in the context of the other remarks, looking at a photo was just one of the procedural steps that the trooper performed after the pursuit ended. Since there was evidence that the trooper looked at a photo, and the argument was confined to the court's limitation placed on that evidence, the prosecutor's argument was not error.

The argument in rebuttal was likewise limited to the procedural steps the trooper employed after the pursuit. In addition they were a pertinent reply to defense counsel's arguments challenging the trooper's identification of the defendant. Defense counsel challenged the trooper's identification by arguing that the trooper did not know certain physical characteristics of the driver of the eluding vehicle. 6/9/15 RP 136-137. Counsel then attacked the trooper's follow up investigation to identify the driver, arguing that the trooper failed to determine who the registered owner of the vehicle was or obtain a search warrant for the defendant's home. 6/9/15 RP 138-139. The prosecutor's argument was a pertinent response, confined to the limited evidence admitted regarding the procedural steps the trooper took to investigate the identification of the driver. Thus, even if this court should find the argument

improper, because it was invited by defense counsel and was a pertinent response, it is not grounds for reversal.

The defendant also argues the prosecutor erred when he argued the trooper was "the person who had the opportunity to observe him identified him twice. He says yes." 6/9/15 RP 130. The prosecutor did not argue that the trooper identified the defendant from a Department of Licensing photo. The trooper did identify the defendant twice in open court. 6/8/15 RP 52, 100. "He says yes" clearly referred to those two in court identifications. The prosecutor properly confined his argument to the evidence introduced in the trooper's testimony.

Finally, the defendant did not object to any of these arguments. If any of these arguments were improper, an instruction striking the argument and reminding jurors to consider only the evidence before it would have cured any prejudice. Russell, 125 Wn.2d at 88. The defendant has therefore waived any claim of error resulting from those three arguments.

2. The Prosecutor Did Not Shift the Burden Of Proof or Comment on the Defendant's Right to Remain Silent.

A prosecutor's argument may not shift the burden of proof to the defendant. State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d

43 (2011). Thus it is improper to argue that the defense did not present witnesses or explain the factual basis of the charge, or argue that the jury should find the defendant guilty simply because he did not present evidence to support his theory of the case. State v. Jackson, 150 Wn. App. 877, 885, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009).

Nor may the prosecutor comment on the defendant's right to remain silent. State v. Ramirez, 49 Wn. App. 332, 339, 742 P.2d 726 (1987). The test to determine whether the defendant's right to remain silent has been violated is whether the nature of the prosecutor's comment was such that the jury would "naturally and necessarily accept it as a comment on the defendant's failure to testify." Id. at 336.

The defendant argues that the prosecutor impermissibly shifted the burden of proof and commented on his right to remain silent when he argued the case was about "whether the defendant did it. And the unrefuted testimony is, yes, of course he did." 6/9/15 RP 130. An argument that the evidence is "unrefuted" does not necessarily shift the burden of proof or comment on the defendant's silence. State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009), State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442

(1978), review denied, 91 Wn.2d 1013 (1979). A prosecutor may state that certain evidence is undenied without reference to who could have denied it. State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995), cert denied, 516 U.S. 1121 (1996), Ramirez, 49 Wn. App. at 336, Morris, 150 Wn. App. at 931.

The argument that the "unrefuted testimony" was that the defendant was guilty of eluding is the same as the argument that the evidence is undenied. The prosecutor did not suggest who could have refuted the trooper's testimony. He made no specific mention that the defendant had not produced witnesses to refute the trooper's identification of him as the driver of the suspect vehicle. Nor did he argue that the defendant had failed to testify and explain why he was not the driver. For that reason the argument neither shifted the burden of proof nor did it comment on the defendant's right to remain silent.

Even if improper the defendant has not demonstrated that the passing reference was prejudicial. The court had instructed the jury that "[t]he defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." 1 CP 123. Jurors are presumed to follow the court's instructions. In a similar circumstance the court

found no prejudice to the defendant arising from a prosecutor's argument that the evidence was undisputed. State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

Moreover the defendant did not object to the remark. Counsel's failure to object suggests the remark was not critically prejudicial in the context of the entire trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 617 (1990), cert denied, 498 U.S. 1046 (1991). Instead counsel made the tactical decision to argue that the prosecutor "did not mean that Mr. Ingalls had any burden of proof in this case." 6/9/15 RP 131. Under these circumstances, if the prosecutor's brief remark that the testimony was unrefuted was error, the defendant has not shown that the court's instruction did not cure any potential prejudice to him. An alleged error arising from the "unrefuted" remark has been waived.

Finally, the defendant argues that the cumulative effect of the prosecutor's errors violated his right to a fair trial. A defendant may be entitled to a new trial on the basis of cumulative errors which standing alone are not sufficient, but when combined deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed none of the arguments identified were erroneous. Even if the court finds the arguments improper, the

defendant has waived a claim of error because jury instructions that were either given or could have been given could neutralize any prejudice to the defendant.

The defendant argues this court should reverse, citing State v. Reed, 102 Wn.2d 140, 146-147, 684 P.2d 699 (1984), and State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076, review denied, 131 Wn.2d 1018 (1997). Each of these cases differs from the present case in that in each case the prosecutor directly commented on the defendant's failure to produce evidence or to testify. This court specifically rejected the argument in Fleming that the argument that the State's evidence was "undisputed" was improper. Fleming, 83 Wn. App. at 217, n. 3. For these reasons as well the court should reject the defendant's argument that cumulative error in the prosecutor's arguments entitles him to a new trial.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RESPONDING TO A JURY QUESTION.

The defendant argues that the court erred when it responded to an inquiry from the jurors by referring jurors back to the written and oral instructions previously given. He claims the jurors' question demonstrated that they were confused. He argues that

the court should have given the jurors the same limiting instruction it gave mid-trial as he had requested.

Generally a court has no duty to provide a jury with additional instructions after they have begun deliberating. State v. Langdon, 42 Wn. App. 715, 718, 713 P.2d 120, review denied, 105 Wn.2d 1013 (1986). Whether to answer a jury question is a matter within the court's discretion. Id. A court abuses its discretion when no reasonable person would take the view adopted by the trial court. Greiff, 141 Wn.2d at 921.

Where the original jury instructions are not ambiguous the court does not abuse its discretion by responding to a jury question by referring the jury back to the original instructions. State v. Sublett, 156 Wn. App. 160, 184, 231 P.3d 231 (2010), affirmed, 176 Wn.2d 58 (2012). However if the jury question identifies a legitimate ambiguity in the original instructions the court must clarify that ambiguity. United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005).

A jury question itself does not raise the inference that the jury was confused, or that any confusion was not clarified before the jury reached its verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). Rather courts have looked at whether the jurors'

question points out a real ambiguity in the original instructions to determine whether a clarifying instruction was necessary.

In Young a trial court erred when it did not clarify a term used in the original jury instructions when asked to do so by the jury. The term was a technical legal term that was not otherwise explained in the instructions. The definition of the term was critical to the jury's determination of whether to accept the defense theory of the case. State v. Young, 48 Wn. App. 406, 417, 739 P.2d 1170 (1987).

In Southwell a jury question revealed that the court's original instructions were ambiguous as to whether the jury had to be unanimous as to the affirmative defense if it was otherwise unanimous regarding guilt. Because unanimity as to both was required, and the original instructions did not make that clear, failure to clarify that point left open the possibility that the defendant had been convicted by a less than unanimous jury. Southwell, 432 F.3d at 1055. In that circumstance it was error to simply refer jurors back to the original instructions. Id. at 1052, 1055.

Unlike the instructions at issue in Young or Southard the question posed by the jurors in this case did not relate to an ambiguous and otherwise undefined legal concept. Rather it dealt

with the consideration of the evidence that had been admitted. The question posed by jurors asked the court to identify specific evidence that had been testified to. The previous instruction on that point was clear – the jury could consider all of the procedures the trooper performed, but could not infer that the defendant had been identified from department of licensing records. Simply restating the instruction as the defendant claims the court should have done would not have answered the juror's question.

The trial court was rightly concerned that any further instruction would be a comment on the evidence. 6/9/15 RP 150. The jury had already been instructed that the court was not permitted to make a comment on the evidence. The jury was further instructed to disregard any instruction that appeared to be such comment. CP 121. An additional instruction identifying specific testimony could lead to further confusion in light of this instruction.

The defendant argues that it was not likely that the jurors remembered the court's oral instruction, and for that reason the court should have given it again. To support this claim he asserts that neither the deputy prosecutor nor the trial judge recalled exactly what questions had been answered and when they were

answered in relation to the defendant's objection.[2] Since the judge and deputy prosecutor had a memory lapse, he argues that the jury could not have reasonably remembered the instruction given by the court. He further argues that the question demonstrated the jury's confusion.

A similar argument was rejected in Ng. The court observed that "the individual or collective thought process leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." Ng, 110 Wn.2d at 43. The jury's question did not lead to the inference that entire jury was confused, or that any confusion was not clarified before final verdict. Id. Likewise the jury question posed here does not create an inference that any member of the jury remained confused about what it could consider in its deliberations.

Under the circumstances the court did not abuse its discretion when it responded to the jury question by referring jurors

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[2] The defendant states the trial judge mistakenly stated testimony concerning photo identification was not yet before the jury, although he claims that it in fact was. BOA 16 n. 4. The trial judge accurately summarized the testimony. 6/8/15 RP 62, 70. No evidence was directly introduced that the trooper identified the defendant from a DOL photo. However a reasonable inference could have been drawn from evidence the trooper looked at a DOL photo of the registered owner of the vehicle. The court struck that reasonable inference. Although the prosecutor momentarily forgot the question that had been objected to he did remember the question a short time later. 6/8/15 RP 61, 69.

back to the original instructions. The instructions were not ambiguous, and identifying any specific procedure the trooper testified to could be considered a comment on the evidence. Moreover, the court did not err by refusing to adopt the defendant's proposed response because it would not have answered the jurors' question.

IV. CONCLUSION

For the foregoing reasons the judgment and sentence should be affirmed.

Respectfully submitted on June 10, 2016.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent, v. KEVIN E. INGALLS, Appellant.	No. 73720-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of June, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Jan Trasen, Washington Appellate Project, jan@washapp.org; and wapofficemail@washapp.org.

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

Dated this 10th day of June, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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