72205-1

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NO. 72205-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN D. DILTZ,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ISSUES

The defendant was convicted of four felonies including First Degree Assault with a firearm allegation and Felony Eluding with an endangerment enhancement. The convictions were based on the defendant's flight from a pursuing police officer, first in a stolen truck and then on foot, during which the defendant shot at the officer at least four times. The State argued that it did not have to prove the defendant's motive and that his intent was to kill the pursuing officer and other officers.

Did the trial court abuse its discretion when it denied the defendant's motion for a new trial, finding the prosecutor's statements were based on the evidence, relevant to the issues, no more inflammatory that the defendant's actions and statement that he should have "went on fuckin' blasting" more officers rather than go to jail?

II. STATEMENT OF THE CASE

On June 27, 2014, a jury convicted the defendant of four felonies, including First Degree Assault with both a law enforcement victim and a firearm enhancement, Eluding a Pursuing Police Officer with an endangerment enhancement, Second Degree Unlawful Possession of a Firearm, and Possession of a Stolen

Motor Vehicle. CP 178-86. The jury acquitted him of Possession of a Stolen Firearm. Id. The defense motion for a new trial was denied when the court found the State's rebuttal remarks were not improper. The defendant now appeals that decision.

A. SUBSTANTIVE FACTS.

On April 29, 2013, at around 11:15 a.m., while responding to a "suspicious activity" call, Marysville Office Jeffrey Norris watched the defendant enter and drive away in a stolen black pickup truck. 4RP 16, 17, 18, 19, 20. When Officer Norris followed, he saw that the truck had neither a license plate nor a temporary tag. 4RP 21. He activated his emergency lights and the defendant began to pull over, running over a downed road sign. 4RP 23.

As Officer Norris approached the driver's side window, the defendant sped off. 4RP 24. The officer ran back to his patrol car and, lights and sirens activated, began a pursuit that lasted from Marysville into Everett. During the pursuit, the defendant drove well over the speed limit on both highway and residential streets, passed cars on the right and on the shoulder, ran stop lights and stop signs, caused other drivers to brake to avoid colliding with him, and nearly ran into a parked and occupied truck. 4RP 25-29; 142-43.

The pursuit ended in a neighborhood at 14th and Hoyt Avenue only when the truck's driveline fell off. RP 29. The defendant jumped out of the still-moving truck and fled on foot; the truck rolled into a parked car. 4RP 29-30.

Officer Norris started a foot pursuit, chasing the defendant south on the 1400 block of Hoyt yelling, "Stop. Police." 4RP 30, 45. The defendant did not look back until, not breaking his stride, he shot at Officer Norris at least three times. RP 32-33. Officer Norris did not remember the exact angle of the gun but knew "absolutely" that the defendant had shot at him, not at the ground. 4RP 32-33; 50, 52. If 90 degrees represented an arm parallel to the ground, the defendant's arm was between 75 and 90 degrees. 4RP 48, 50. Officer Norris radioed dispatch that he had been shot at. 4RP 34.

Several officers arrived and set up a perimeter at 15th and Hoyt. 4RP 39. The defendant continued to run, cutting through yards and eventually heading north back toward 14th. 4RP 39 and 65.

Marysville Officer Vinson, armed with a rifle, found the defendant and ordered him to stop. 4RP 67-68. The defendant, who no longer appeared armed, kept running. Id. Officer

Soderstrom saw the defendant and pointed his rifle him, telling him to stop; the defendant ran. 5RP 61. Snohomish County Deputy Haldeman, duty pistol drawn, saw the defendant and ordered him to the ground; the defendant ran. 4RP 117, 133. The defendant did not stop until an armed officer pointed a gun at him and threatened to shoot him if he did not comply. 4RP 94. Even then, the defendant first walked toward officers with his hands balled into fists before he lay on the ground. 4RP 170. He was no longer armed with a gun. 4RP 172.

Police found three bullet strike marks on the sidewalk between where the defendant and Officer Norris had been standing when the defendant shot. 4RP 77. They also found three casings in the same area. 4RP 77. A day later, they found a fourth casing in a nearby yard. 5RP 92.

Everett Police Detective Brenneman described the three strikes. The strikes showed a north to south trajectory, moving from where the defendant had been standing toward where Officer Norris had been standing. 5RP 91. The third strike was shallowest and was within 20" of Officer Norris. Id. at 95 and 148. Since the sidewalk sloped up, the bullets that caused the strikes would have skipped up. Id.

Detective Brenneman listened to some of the defendant's phone conversations and came to believe that the defendant had buried his gun in the Hoyt neighborhood. 5RP 151. On May 29, he and other officers found the gun shallowly buried in the yard of a house where Officer Norris had seen the defendant flee after the shooting. 5RP 152. (In a later recorded conversation, the defendant said he believed police had found the gun. 5RP 151.)

The buried gun was still cocked and ready to fire. 5RP 72. A 9mm hollow point bullet was in the chamber, 10 more in the magazine. 5RP 73-74. The gun could not be immediately fired because it was "out of battery." 5RP 156. "Out of battery" means that the gun had malfunctioned, become misaligned, or jammed. 5RP 157-58; 6RP 69. A person knowledgeable about guns can fix an out of battery gun in about five seconds. 5RP 157.

A forensic scientist examined the gun and the casings. The gun was a 9-milimeter Ruger P89 semiautomatic pistol, designed to fire with a single trigger pull. 6RP 109. The next round automatically loads. 6RP 110-11. The gun could have gone out of battery if it were stiff or if something, perhaps a hand, had gotten in the way of the slide to stop it from making its full motion. 6RP 115.

The four casings found at the scene matched the bullets in the gun; each had been fired from the Ruger. 6RP 125-27.

A defense expert testified that the bullet strikes showed that the defendant was firing north. 6RP 90. The series of strikes showed that the gun was rising as it was being shot. 6RP 85, 97-99. The witness discussed the angle at which the gun was held to make those strikes, using 90 degrees to represent the gun being held straight down (thus, 0 degrees for straight out and the opposite of the scale used by Officer Norris). The gun would have been held at between 60 and 40 degrees for the first, between 40-20 degrees for the second, and between 30 and 10 degrees for the one closest to Officer Norris. 6RP 97-99. 9mm hollow point bullets, such as those found in the defendant's gun, can cause great bodily harm. 6RP 99-100. Moreover, once a 9mm bullet, once fired, can travel more than a mile. Id.

Det. Brenneman testified about the mechanics of shooting. Two handed shooting is more accurate than single. 5RP 159. When a shooter is under stress, his first shot is usually the least accurate. Typically, where there is a series of shots by a person coming upon a target, the first shot tends to be the lowest. 5RP 159-60.

On May 22, the defendant made a phone call and talked about the shooting.

> I mean, I made bad choices. I should have just went out fuckin' blasting at 'em like I wanted to... then I wouldn't be here and fuckin' you know. I made a bad fuckin' decision. Bunch of 'em.

CP 359.

The jurors were instructed not to let "[their] emotions overcome [their] rational thought process[es]." CP 191, Instruction 1. Instruction 9 defined First Degree Assault, an assault committed with a firearm with intent to inflict great bodily harm." CP 199. Instruction 13 defined great bodily harm as an injury that "creates a probability of death..." CP 203.

Instruction 16 defined the lesser included crime of Second Degree Assault, an assault with a deadly weapon. CP 206.

In closing, the State discussed each of the crimes and enhancements and then focused on the defendant's intent when he shot at Officer Norris. The defendant had made a "made a decision... that it was more important that he get away than that Officer Norris lived." 7RP 5-6. He had fired four shots, one of which could have travelled a mile and a half past the officer, and used 9-mm hollow point bullets that create a probability of death.

7RP 5-6, 15-16. The defendant, to avoid jail, was willing to risk other lives and property. 7RP 20-21. "[W]hen Officer Norris didn't stop following him, he decided the best way to get away is to get rid of Officer Norris." 7RP 20.

Defense conceded that the defendant was guilty of Unlawful Possession of a Firearm, Possession of a Stolen Vehicle, and Attempting to Elude. 7RP 24-26. Defense argued that the defendant was guilty of Second Degree Assault, not First Degree, because he "...did not try or intend to hit Officer Norris with a bullet... His arm was down, the gun was pointed down." 7RP 21. Defense argued that had the defendant wished to hurt Officer Norris, he would have kept shooting. 7RP 28, 31. The defendant shot only to get away, not to injure anyone. 7RP 39.

In rebuttal, the State addressed both motive and intent. The defendant's intent was to cause whatever harm it took to get away from the police. 7RP 44. During the high-speed eluding, the defendant had already driven recklessly and endangered lives of others. 7RP 45. He stopped only when his truck broke down and then he "bailed." Id. When he abandoned the truck, the defendant did not leave the gun in the truck it but rather armed himself with the gun and a clip holding hollow-point bullets. Id. Those things

showed the defendant intended to inflict great bodily harm on anyone who tried to stop him. 7RP 46.

The direction of the four bullets, not just one warning shot, showed that the defendant's intent was to hit Officer Norris. 7RP 47. The defendant did not decide to stop shooting; he stopped only when the gun went out of battery. Id. at 49

The defendant's own words showed his intent. "I should have just went out fuckin' blasting at 'em like I wanted to." Id. That statement and the defendant's actions showed that the defendant intended generally to kill as many cops as he needed and specifically to kill Officer Norris. 7 RP 49-50.

> [T]he one issue you have to decide... what was his intent. Not what was his motivation behind it, was he trying to flee, was he trying to become a notorious cop killer. What was his intent when he shot at Officer Norris?

7RP 50.

Neither side objected during closing arguments.

The jury returned with guilty verdicts on all counts and all enhancements except for Possession of a Stolen Vehicle. CP 178-86.

On July 11, after considering briefing from both sides and argument, the court denied a defense motion for a new trial based

on claimed prosecutorial misconduct in the State's rebuttal argument. 8RP 1-13. The court ruled that there was no misconduct and entered written findings. 8RP 12-13, CP 1-4.

The court found that the State's argument about the defendant wanting to kill cops, specifically Officer Norris, was not misconduct. The State was required to prove that the defendant intended to cause great bodily harm, which includes a probability of death. CP 1. The State's argument came directly from the evidence. Id. The defendant said his intent was to go out "fuckin' blasting at 'em" referred to the shooting. CP 2. The defendant fired at Officer Norris at least three to four times. Id. Thus, the State's reference to the defendant as someone who "wanted to kill as many cops, specifically Officer Norris, on that day as he could" was a reasonable inference from the evidence, relevant to the issue of intent. Id.

Nor was the State's "notorious cop killer" statement misconduct. The State did not say the defendant was a notorious cop killer but rather that it had no burden to prove the defendant's motive, whether it was just that he wanted to get away or that he wanted to become notorious. Id.

Neither statement was more inflammatory than the evidence. CP 2. Neither was flagrant or ill-intentioned. Id. The statements were based on reasonable inferences drawn from admitted evidence, were not improper, and were not a basis for a mistrial. CP 4.

This appeal follows.

III. ARGUMENT

A. BECAUSE THE PROSECUTOR ARGUED REASONABLE INFERENCES BASED ON THE EVIDENCE, NOT EMOTIONAL APPEALS, NO PROSECUTORIAL MISCONDUCT OCCURRED, THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A NEW TRIAL AND THE CONVICTION SHOULD BE AFFIRMED.

Prosecuting attorneys are quasi-judicial officers whose duty is to ensure that defendants receive fair trials. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor commits misconduct when he asks the jury to convict based not on the evidence but on emotions. State v. Fuller, 169 Wn. App. 797, 821, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006 (2013).[1]

[1] "'Prosecutorial misconduct' is a term of art but is really 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, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public's confidence in the criminal justice system, 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" for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf

Before a conviction is reversed, a defendant must show a substantial likelihood that the improper statements affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); 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. Russell, 125 Wn.2d at 85. When there was no objection, the defendant must show that the statements were so flagrant and ill-intentioned that they caused an enduring prejudice that could not have been cured by a curative instruction. Id.

Prosecutorial misconduct may be addressed in a motion for new trial. CrR 7.5(a); McKenzie, 157 Wn.2d at 52. The trial court applies the same standard as an appellate court and the defendant bears the same burden. Id. The propriety of the State's comments should not be looked at in isolation but rather in the context of the

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(last visited Sept. 24, 2014); American Bar Association Resolution 100B (Adopted 8/9-10/10), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Sept. 24, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

entire argument, the issues in the case, the evidence addressed, and the jury's instructions. Id.

The standard of review of the denial of a motion for new trial is abuse of discretion. Id. An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. Id. at 51-52. The standard is deferential because the trial court, having heard the evidence and arguments, is in the best position to evaluate whether a new trial should be granted. Id. State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

1. The Arguments Were Proper Because They Were Based On The Evidence, Issues, And Instructions.

The trial court correctly found that the State's arguments were proper. The arguments were reasonable inferences based on the evidence, relevant on the main issue in the case, the defendant's intent when he shot at Officer Norris.

The evidence showed that the defendant chose to become involved in a car chase. He drove recklessly from Marysville to Everett, through residential neighborhoods, in a stolen truck endangering the lives and property of others as he sped through the City streets, well over the speed limit, almost hitting an

occupied truck, and eventually running into a parked car. He ignored Officer Norris's lights and siren.

The evidence showed that the defendant chose not to abandon the pursuit; he stopped only because the truck's drivetrain fell off. He then jumped out of a still-moving truck which rolled into a parked vehicle.

The evidence showed that the defendant chose to arm himself with a semiautomatic Ruger loaded with at least 14 rounds of 9mm hollow-point bullets. Hollow point bullets can be lethal and are designed to create maximum injury.

The evidence showed that the defendant chose to shoot at Officer Norris. The defendant pointed the Ruger at Officer Norris and shot at least four times. His first shot was low, his second higher, his third higher still, and the fourth so high it never hit the sidewalk. Each shot was aimed north to where the pursuing officer stood and was capable of causing great bodily harm.

The evidence showed that the defendant chose to keep shooting until the Ruger went "out of battery", that is, jammed. The defendant kept running and buried the now-useless gun in a nearby back yard. Even then, the defendant, surrendered only when a gun was pointed at him and he was told to lie down or be shot.

If the defendant's actions alone did not prove his intent, his words did:

> I mean, I made bad choices. I should have just went out fuckin' blasting at 'em like I wanted to... then I wouldn't be here and fuckin' you know. I made a bad fuckin' decision.

The State made no arguments that were not based on that evidence. No one disputed that the defendant was the driver or the shooter. No one disputed that the out of battery Ruger was the weapon or the hollow point bullets the ammunition.

The defendant's reliance on State v. Russell, is misplaced. 152 Wn.2d 24. Russell was convicted of murdering three young women. In closing argument, the State suggested that if the jury "let him go", Russell would go to California and find more young women to kill. Russell did not object but later moved for a mistrial based on the State's deliberate appeal to jury's fears.

The Supreme Court found that the State's remark was egregious. Id. at 89. However, it was doubtful that the statements created such a sense of revulsion that reversal was required. Id.

The argument in the present case is nothing like that in Russell. Here, the State made no argument based on future dangerousness. Instead, the State asked the jury to convict only

based on what the defendant had done and what he said he had intended to do. That is not prejudicial and is not misconduct.

2. The Arguments Were Not An Appeal To The Jury's Emotions.

The facts of the present case were egregious. Referring to the egregious or heinous nature of a crime is not misconduct. State v. Pierce, 169 Wn. App. 533, 552-53, 280 P.3d 1158, review denied, 175 Wn.2d 2025 (2012). In Pierce, the State made three improper arguments: it asked the jurors to imagine the crimes happening to themselves, it embellished its description of the murders with facts not in evidence, and it made arguments about the defendant's train of thought that were not supported by any evidence. Those statements, taken together, created a substantial likelihood of affecting the verdict because they were highly inflammatory and invited the jurors to imagine themselves being murdered in their own homes. Id. at 556.

Nothing of the sort occurred in the present case. The State never asked the jury to place themselves in the victim's place. The State never embellished how the shooting occurred. The State never argued facts not in evidence.

Instead, the State highlighted the defendant's own statement of his intent: to "blast" anyone who tried to stop him. The defendant fled in a stolen car in a way that endangered others, he armed himself with a gun and hollow point bullets, he fled on foot, he shot at Officer Norris, he continued shooting until his gun jammed, and said he "should have just went out fuckin' blasting at 'em like [he] wanted to." The State's argument that the defendant's choice was "to kill as many cops, specifically Officer Norris, on that day as he could," merely interpreted the defendant's actions in light of the defendant's own words.

The defendant has cited cases from other jurisdiction that are similarly unhelpful. See People v. Brooks, 214 Ill. App. 3d 531, 573 NE.2d 1306 (1991) (improper to refer to recent officer killings, a fact not in evidence); Campbell v. State, 579 So.2d 720 (1996) (denial of mistrial proper in trial for murder of non-officers where prosecutor stated that defense expert had testified for murder cases involving cop-killers); Williams v. State, 172 Ga. App. 682, 324 SE.2d 544, 544-45 (1984) (improper to discuss other incidents of police shootings not in evidence).

None of those is on point. However, State v. Berube, 171 Wn. App. 103, 286 P.3d 402 (2012) is helpful. At Berube's murder

trial, the prosecutor argued that the defendant's mother must have been sad when she learned her son he had been running from the law. The court found the statement was not misconduct. Id. at 119. The State had not used inflammatory language or brought in unadmitted evidence. It was not unreasonable to suggest that a mother who loved her son, as Berube's mother had testified, would be sad to see his situation. Id.

The same is true here. The State used no inflammatory language but rather made reasonable inferences from the evidence admitted, and argued that the defendant wanted to blast whomever tried to stop him, as he himself had said. The statements were not improper and could not have improperly affected the verdict.

In State v. Fuller, 169 Wn. App. 797, 282 P.3d 126, review denied, 176 Wn.2d 1006 (2013), the court reversed a conviction but found no misconduct in one of the State's arguments. The State had argued that Fuller hated foreigners (like the Somali victim), had slashed his victim's throat, had stabbed him in the chest, had almost severed his fingers, and had left him to die. Id. at 139. Despite its emotional nature, the argument was not improper because it was based on the evidence and reasonable inferences from the evidence. Id. at 140.

The present case is similar. Although the argument pointed out heinous and emotional facts, the facts were taken from the evidence admitted.

The State differentiated motive from intent. Whether the defendant was trying to flee or become notorious was not something the jury needed to consider. In its oral ruling, the court noted that the State had not accused the defendant of being a notorious killer.

> It's quite the contrary...saying that's not what we have to prove, the evidence doesn't necessarily show that, and it does not have to show that. .. I do not find this to be an improper statement. 8RP 12.

The trial court, in the best position to assess the statement in context, found it not at all troubling.

Even if the State's argument did evoke an emotional response, the jurors were instructed not to let their emotions overcome their rational thought processes. Juries are presumed to follow instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The State's arguments in the present case were not inflammatory, certainly not to the extent that they overcame the jury instructions.

3. The Trial Court Did Not Abuse Its Discretion Because Its Decision Was Reasonable.

The denial of a motion for new trial based on prosecutorial misconduct is within the trial court's discretion and will not be disturbed absent an abuse of discretion. McKenzie, 157 Wn.2d at 52. An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. Id. The standard is deferential because the trial court, having heard the evidence and arguments, is in the best position to evaluate whether a new trial should be granted. Id. State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

The trial court in the present case found no prosecutorial misconduct because State's arguments were reasonable inferences from the evidence presented, relevant to the defendant's intent, based on the evidence, relevant to the issues, and not more inflammatory than the evidence. The defendant has not shown that this was an abuse of discretion. The convictions should be affirmed.

IV. CONCLUSION

Based on the foregoing, the defendant's convictions should be affirmed.

Respectfully submitted on February 19, 2015.

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