

67406-4

67406-4

NO. 67406-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

VANESSA RODRIGUEZ,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY SAINT CLAIR

---

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. The trial court did not err in allowing the impeachment of Rodriguez on cross examination with a prior statement to police when there was no evidence it was involuntary.

2. Even if Rodriguez's prior statement to police was not voluntary, any error was harmless.

3. None of the remarks by the prosecutor during closing were improper, but even if improper, Rodriguez fails to show they were flagrant and ill-intentioned or affected the verdict.

B. PROCEDURAL HISTORY

Rodriguez was charged in King County Superior Court with assault in the third degree. CP 1-5. Rodriguez was found guilty as charged by the jury. CP 36. Rodriguez received a standard range sentence and this timely appeal was filed. CP 47.

C. RELEVANT FACTS

In the late evening on October 20, 2010, Auburn Police responded to reports of a disturbance at the Meadows Apartment Complex in Auburn, Washington. RP 37. Upon arrival, police located Rodriguez and two of her family members outside at an

adjacent playground. RP 38-39. Upon speaking to Rodriguez's relatives it was learned that there may have been a physical fight between Rodriguez and her boyfriend, Anthony "Pee Wee" Archuleta, Sr. RP 173. Officers believed Rodriguez may have been the victim of an assault at the hands of Archuleta and began to investigate. RP 40-41, 43. When Rodriguez was asked what had happened between her and Archuleta, she became both verbally and physically aggressive towards the officers. Eventually Rodriguez had to be placed in restraints to prevent her from assaulting officers while they conducted their investigation. RP 44. With considerable effort on the part of the officers, Rodriguez was eventually handcuffed, told she was under arrest for obstruction, and placed into the back of one of the patrol vehicles. RP 45-47. As officers were attempting to place Rodriguez's feet inside the patrol car, she lashed out with her foot and struck one of the officers in the hand and face causing injuries. RP 109, 115-16. Rodriguez was booked into jail. RP 119.

At the start of the trial, the Court indicated it had reviewed the trial memorandum from both the State and Rodriguez, and that its understanding was that there were no CrR 3.5 issues. The State confirmed for the court that a pretrial CrR 3.5 hearing was

unnecessary because Rodriguez's statement would not be offered in its case in chief. RP 3. The State indicated the only way it envisioned needing a CrR 3.5 hearing would be if Rodriguez testified and then refused to acknowledge on cross-examination one spontaneous statement to detectives prior to being Mirandized: "It was self defense." The State indicated that only in that situation would they seek to offer testimony of Rodriguez's statement through Detective Jordan. RP 4. Rodriguez's attorney did not object or request a voluntariness hearing at any point prior to trial. Defense counsel confirmed verbally, when specifically asked by the court, that there were no CrR 3.5 issues. RP15.

Trial proceeded and the State did not offer Rodriguez's statement in its case in chief. Both police officers involved in the detention and arrest of Rodriguez testified, Officer Matt and Officer Postawa. Their testimony was consistent with one another and the physical evidence presented, including photos of Officer Matt, the victim, and his injuries. RP 30-159. There were no issues of identity. Both officers testified that Rodriguez was moderately intoxicated, but able to respond to questions and commands appropriately at the onset of the contact. RP 41-42, 101-02. Both testified that Rodriguez became extremely angry and aggressive

when they asked about Archuleta's involvement in the fight. RP 43, 103. Officer Postawa testified that Rodriguez attempted to kick him as he walked her back to the patrol car, but her kick did not connect. RP 46. Both testified regarding the struggle to get Rodriguez into the police vehicle after she was detained for obstruction. RP 45-49, 105-13. Officer Matt testified to the specifics of Rodriguez's kick to his face and the purposeful nature of the kick as opposed to a struggling or flailing movement. RP 110-12. Officer Postawa testified consistent with what he would have been able to see from his vantage point at the other side of the patrol car, and the blood and injuries he observed on Officer Matt immediately after the assault. RP 48-49. The State rested. RP 160.

Rodriguez took the stand. RP 171. Rodriguez testified that she had consumed alcohol during a family gathering celebrating her cousin's release from prison. RP 172. She testified that a fight ensued involving her then boyfriend, Anthony Archuleta. RP 177. Rodriguez described her level of intoxication at the time as "medium." RP 176. She described the police responding to the scene of the fight after Archuleta had left, and asking her about Archuleta. RP 180. Rodriguez testified that when they asked her about Archuleta she became upset and began "telling them off."

She testified that the police officers then handcuffed her for obstruction and threw her against the trunk of the patrol car and then the ground. RP 180. When asked by her attorney, Rodriguez testified that she didn't remember trying to kick police prior to being placed in the patrol car. RP 180. Rodriguez then testified that they had her sit in the back of the patrol car with her legs out. RP 182. She testified that she recalled one of the officers trying to put her legs inside the patrol car after she refused to do it herself. RP 183. Rodriguez admitted to struggling with the officers as they tried to place her in the car, but denied trying to intentionally kick the police officer that she knew was at her feet. RP 186. She denied at any point intentionally kicking the police officer stating "I wouldn't do that. Why would I assault a police officer like that?" RP 187. On redirect, Rodriguez testified that detectives contacted her the next morning in the jail and informed Rodriguez they were investigating an assault on a police officer. Rodriguez testified she was confused because it was the first she had heard about any assault and that she had been under the impression she had been arrested for obstruction. RP 201.

The State requested a side-bar prior to impeaching Rodriguez with her prior claim of self-defense. RP 202. The defense objection was not on the grounds that the statement was involuntarily made, but that defense counsel did not believe her testimony had "opened the door" to the statement she had made to detectives. RP 205. After hearing argument, the trial court overruled Rodriguez's objection and determined that it was an appropriate area of cross examination. RP 206.

On re-cross, Rodriguez admitted she had told investigating detectives "I was just defending myself" when they told her they were investigating an assault on a police officer. RP 202. She then explained that she did not intentionally want to hurt the police officer and any injury was because of the struggle. RP 203.

Rodriguez requested a voluntary intoxication jury instruction. CP 42; RP 168. Defense counsel argued in closing that Rodriguez could not have formed the necessary intent for assault due to her level of intoxication. RP 252-53.

D. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN ALLOWING THE IMPEACHMENT OF RODRIGUEZ ON CROSS EXAMINATION WITH A PRIOR STATEMENT TO POLICE WHEN THERE WAS NO EVIDENCE IT WAS INVOLUNTARY.

Rodriguez argues for the first time on appeal that the trial court erred by admitting her statements to police without holding a CrR 3.5 hearing to determine whether they were voluntary. However, Rodriguez did not object to the lack of a hearing, and she testified on direct about her exchange with police, opening the door to the topic on cross-examination. RP 201. When there is no objection to the court's failure to hold a CrR 3.5 hearing, a defendant has the burden of proving this failure is a manifest error affecting a constitutional right, enabling her to raise it for the first time on appeal. RAP 2.5(a)(3); State v. Williams, 137 Wn.2d 746, 748, 975 P.2d 963 (1999). For an error to be "manifest," a defendant must show actual prejudice. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The purpose of CrR 3.5(a) is to prevent the admission of defendant's involuntary incriminating statements. Williams, 137 Wn.2d at 751, 975 P.2d 963. Where a defendant does not allege his statements were involuntary, there is

no manifest error, and reversal is not required unless the record shows involuntariness. Id. at 754.

Here, the record does not show Rodriguez's statements were involuntary, in fact, the record is devoid of any of the circumstances surrounding the statement other than the fact that it was made to detectives the next morning while she was in custody. This is because Rodriguez made no claim of involuntariness at the time of trial. Rodriguez was also given ample opportunity to explain the statement, which was used as impeachment during the second round of cross examination by the State.

Rodriguez improperly cites, as supporting evidence of involuntariness, the recitation of facts from the State's trial memorandum. CP 55. None of these facts were elicited during the trial. Should the court be inclined to consider the recitation of facts from the State's trial brief, however, the court should consider all of the facts laid forth in the brief in making a determination of voluntariness of Rodriguez's statement:

The next morning, Detectives Michael Jordan and Michelle Vojir went to the jail to speak with the defendant. When the defendant was brought out to the booking area Detective Jordan introduced himself to the defendant and told her they had booked her for assaulting a police officer. Jordan asked the defendant if she wished to speak with them about the

incident and in response the defendant stated that she was only defending herself and agreed to speak with them and agreed to have the conversation tape recorded. The defendant was taken to an interview room where Detective Jordan began going through the defendant's Miranda rights with her on audio tape. The defendant then invoked her rights, Detective Jordan terminated the recording and the defendant was returned to her cell.

CP 55. Based on all of the facts contained, it is clear that the statement regarding acting in self defense made by Rodriguez, assuming arguendo that the statement was custodial<sup>1</sup>, was not in response to police interrogation and was both spontaneous and voluntary. Detectives asked if she was willing to speak with them. Rodriguez, without prompting, blurted out this self-defense claim.

CP 55. Subsequently she did agree to speak with them and agreed to give a taped statement. After being transported to an interview room and advised of her rights, Rodriguez told officers she no longer wanted to give a statement. Detectives terminated the interview without asking any questions and returned Rodriguez to her cell. CP 55.

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<sup>1</sup> See Howes v. Field, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012) (holding that no categorical rule has been clearly established that questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison).

Rodriguez relies in part on State v. Alexander, 55 Wn. App. 102, 776 P.2d 984 (1989), for the proposition that failing to hold a CrR 3.5 hearing prior to the admission of an inculpatory statement is reversible error. However, the present case is distinguishable from Alexander. In Alexander, the court admitted the defendant's statement without allowing the defendant an opportunity to testify or present other evidence in a separate CrR 3.5 hearing. In Alexander, the defendant's statements were offered in the State's case in chief. In contrast to Alexander, no statements made by Rodriguez were offered as evidence in the State's case in chief. It was not until Rodriguez chose to testify in redirect about the morning after her arrest and her conversation with the two detectives that the State impeached her about her claim of self-defense. RP 201.

More on point is State v. Kidd, 36 Wn. App. 503, 674 P.2d 674 (1983). In Kidd, the court found that the failure to hold a CrR 3.5 hearing did not render a statement by the defendant inadmissible when a review of the record did not raise any issues concerning its voluntariness. The defendant in that case was charged with arson and the State called a witness who testified to statements made by the defendant during a prior arrest. The

defendant objected to the testimony on the basis that it was irrelevant and prejudicial, but did not request a hearing on voluntariness. On appeal, Kidd argued that failure to hold a CrR 3.5 hearing was grounds for reversal. The court found that nothing on the record disclosed that Kidd made the statements under duress, coercion or inducement despite being made prior to advisement of Miranda rights and affirmed the conviction. It cited State v. Harris, 14 Wn. App. 414, 422, 542 P.2d 122 (1975), and State v. Eldred, 76 Wn.2d 443, 448, 457 P.2d 540 (1969).

The present case is more in line with Kidd, in that Rodriguez did not object to the use of the prior statement on the grounds of involuntariness, but rather on the grounds that Rodriguez's redirect testimony had not opened the door to that line of questioning. Rodriguez was not prejudiced by the impeachment with her prior statement. She had already waived her Fifth Amendment privilege and testified when the statements were offered for impeachment. The record suggests no issue of voluntariness, and the failure to hold a CrR 3.5 hearing does not render an otherwise admissible statement inadmissible. State v. Harris, *supra*; State v. Toliver, 6 Wn. App. 531, 494 P.2d 514 (1972); State v. Baker, 68 Wn.2d 517, 413 P.2d 965 (1966).

A statement that is inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), may, if it is voluntary, be used for impeachment purposes to attack the credibility of defendant's trial testimony. State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). See also Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). Because the statement in issue was voluntary, the use of the statement as impeachment without a CrR 3.5 hearing was not manifest constitutional error.

2. EVEN IF RODRIGUEZ'S PRIOR STATEMENT TO POLICE WAS NOT CLEARLY VOLUNTARY, ANY ERROR WAS HARMLESS.

Rodriguez raised the defense of voluntary intoxication in this case. RP 208. Rodriguez's cross examination of the two State's witnesses, closing, and testimony all focused on her level of intoxication as it pertained to the purposefulness of the kick to the victim officer's face. Rodriguez's own testimony undermined her voluntary intoxication claim. She admitted that her level of intoxication was "medium." She testified that she knew what she

was doing, was capable of following the police officer's instructions, but chose not to. RP 198-99.

Further, given the inconsistencies in the defendant's direct testimony, the inconsistencies in her testimony on cross examination, and admissions she made during both direct and cross examination, impeachment with her prior claim of self defense had no appreciable effect. Rodriguez had ample opportunity to explain the context of her statement to detectives in front of the jury.

Even assuming error, reversal is still not required if the error is harmless. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). Assuming the error is constitutional, the State bears the burden of showing that the error is harmless beyond a reasonable doubt. Id.; citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431 (1986) (citations omitted)). An error is harmless when there is no reasonable probability that the outcome would have been different had the error not occurred. Powell, 126 Wn.2d at 267, 893 P.2d 615 (citations omitted).

Rodriguez was convicted by her own testimony in this case. Despite her attorney arguing a voluntary intoxication defense, both her direct testimony and her admissions during cross examination

gave the jury little choice but to disregard that claim. Even if there was error below, it was clearly harmless given all of the evidence in this case.

Rodriguez testified on direct examination that she had consumed two 24-ounce cans of Four Lokos and some Mickey's, all beverages with a high alcohol content. RP 174. She described her intoxication level as "medium." RP 176. She indicated at several junctures during her testimony that she did not remember parts of the night, for example when she lost her shirt or what the two arresting officers looked like. RP 178. She also testified that she did not remember trying to kick either officer prior to being placed in the patrol car. RP 180. Rodriguez testified that she continued a barrage of verbal aggression towards the officers throughout the incident and that she purposefully did not comply with their requests to put her feet inside the patrol vehicle. RP 182-85. She also testified that she knew one of the officers was at her feet, she kicked her feet, and that it was possible she did kick the officer. RP 186. Rodriguez admitted to purposefully kicking at the roof and windows of the patrol car. RP 187.

On cross examination, Rodriguez testified that despite memory gaps from that night, she could remember the struggle with

the officers in great detail. RP 191. She testified that her intoxication level during the incident went up and down and she only remembered "bits and pieces." RP 192. Rodriguez admitted that she knew one of the police officers was at her feet during the struggle, that he was trying to put her feet in the car, and knowing all of that she was making a "bicycle" motion with her feet. RP 195. She admitted she was capable of following the officers' instructions but unwilling to do so, and that she was not so intoxicated as to be unable to place her legs inside the patrol car if she had wanted to. RP 198-99.

Given the internal inconsistencies in Rodriguez's testimony: her admission that she had gaps in her memory yet recounted the struggle in great detail; her admission that her intoxication level was only "medium," despite her attorney asserting a voluntary intoxication defense; her admission that she was angry at the officers; and her admission that she kicked her feet knowing an officer was standing there; it cannot be said that the admission of her prior statement claiming self-defense had a reasonable probability of changing the outcome. Rodriguez's own testimony defeated any voluntary intoxication claim attempted by her attorney and her credibility was questionable, to say the least, far prior to

any mention of her claim of self defense during the second round of her cross examination.

3. NONE OF THE REMARKS BY THE PROSECUTOR DURING CLOSING WERE IMPROPER, BUT EVEN IF IMPROPER, RODRIGUEZ FAILS TO SHOW THEY WERE FLAGRANT AND ILL-INTENTIONED OR AFFECTED THE VERDICT.

Prosecutorial misconduct is grounds for reversal if the conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The defendant bears the burden of establishing the impropriety of the statements. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A prosecutor's conduct is evaluated by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Monday, 171 Wn.2d at 675. A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Monday, 171 Wn.2d at 675. When addressed for the first time on appeal, reversal is only required if the conduct is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. State

v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008). Prejudice is only established when there is a substantial likelihood the prosecutor's comments affected the verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Rodriguez did not object to either of the two arguments she challenges on appeal, nor did Rodriguez request curative instructions for the jury. Therefore, the burden is on Rodriguez to establish that any misconduct present was so flagrant and ill-intentioned that it could not have been neutralized by a curative instruction. Rodriguez fails to establish that either of the arguments made by the prosecutor in this case rise to this level.

- a. The Prosecutor's Argument Was Based On WPIC 1.02, Common Sense, And Reasonable Inference. It Was Not An Improper Argument Based On Facts Not In Evidence.

The first remark made by the prosecutor that is challenged on appeal essentially argues that the State's witness, both police officers, were credible because they had nothing to gain from lying:

But regardless of whether the defendant is found guilty or not guilty, it's not going to change [Officer Matt's] life in any appreciable degree, nor Officer Potawa's. Still going to be at Auburn Police, still going to do their normal patrol, and it's not going to have

any real bearing on their lives. The defendant on the other hand, that's a different story for very obvious reasons. She's facing a criminal charge. So that will affect her life. She does have an interest in being found not guilty in this case, and that's another thing you need to consider when assessing witness credibility, who's got a dog in the fight?

RP 236-37. The prosecutor is permitted a reasonable latitude in arguing inferences from the evidence, including references to a witness's credibility. State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985). This statement was one of many arguments made by the prosecutor regarding specific ways to assess witness credibility as enumerated in the court's first instruction to the jury. RP 234; CP 29.

Rodriguez contends that this comment was an improper argument that was based on facts not in evidence and cites United States v. Witherspoon, 410 F.3d 1142, 1146 (9<sup>th</sup> Cir. 2005) for this proposition. In Witherspoon, the court reversed convictions for being a felon in possession of a firearm based on compounded prosecutorial misconduct during closing. The statement that was made by the prosecutor in that case that Rodriguez suggests is analogous to the present case is:

These are officers that risk losin' their jobs, risk losin' their pension, risk losin' their livelihood. And, on top of

that if they come in here and lie, I guess they're riskin' bein' prosecuted for perjury.

Witherspoon, at 1146.

This statement by the prosecutor in Witherspoon was one of a multitude of statements that the court found to be improper. The court in Witherspoon ultimately reversed the defendant's conviction finding that all of the prosecutor's statements in conjunction with one another amounted to the prosecutor suggesting he knew things that the jury did not, and vouching for the State's witnesses. That is not the case here.

This case is not analogous to Witherspoon. Although there was nothing specifically elicited during the officers' testimony in this case regarding any effect the trial outcome would have on their lives, it was a proper argument to make regarding credibility. RP 241. It is not improper to point out that Rodriguez had a larger stake in the outcome of the trial in assessing the witness' credibility. It is not outside the realm of reasonable inference from the evidence, nor is it improper vouching. This argument was grounded by, and in reference to, WPIC 1.02, one of the jury instructions provided to the jury in this case by the court without objection by Rodriguez. CP 28.

WPIC 1.02 outlines a number of things the jury may consider when assessing witness credibility, including any interest a witness may have in the outcome of the case. The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727. Even if this comment was marginally improper, it was grounded in WPIC 1.02 and the record does not establish that this comment was flagrant or ill-intentioned and that no curative instruction would have neutralized any prejudice.

b. The Prosecutor Made No Arguments That Shifted The Burden Or Misstated The Law.

The second remark made by the prosecutor during closing argument that Rodriguez challenged on appeal, does little more than highlight the fact that the jury had a credibility assessment to make regarding Rodriguez's testimony and the testimony of the two police officers. Appellant cites State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), for the proposition that this argument improperly instructed the jury that they would have to believe the officers were lying in order to acquit Rodriguez. A plain reading of the prosecutor's closing argument is fatal to this claim:

[Y]our job is to make that credibility assessment and decide whether the defendant's story should be believed, or whether these two officers that have no dog in the fight, whose lives aren't going to be affected appreciably by the outcome of this case, would get up on the stand and lie to you.

RP 241-42.

The above statement can in no way be construed to be an argument that misstates the law or shifts the burden of proof as the statement in State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (the prosecutor stated that in order to acquit, the jury would have to find that the complaining witness has either lied or was confused).

Instead, just as in State v. Lewis, 156 Wn. App. 230, 241-42, 233 P.3d 891 (2010), the prosecutor in this case told the jury their job was to make credibility assessments of all of the witnesses. The Court in Lewis found that asking questions of the jury regarding credibility did not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof, thereby distinguishing the case from the facts of Fleming. Lewis, 156 Wn. App. at 241. In Lewis, the prosecutor stated:

Do you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story? Do you believe that Mr. Crocker

took a swing or do you believe that the defendant beat him up to take the money and the wallet?"

Id. The Lewis court found that in making these arguments and posing these questions to the jury during closing, the prosecutor did not misrepresent the role of the jury, the burden of proof, or the law. It held that the prosecutor's closing argument was neither misconduct nor flagrant and ill-intentioned. The argument made by the prosecutor in the present case is equivalent to the argument made by the prosecutor in Lewis, and was not improper.

E. CONCLUSION

For the forgoing reasons, the State requests this Court affirm Rodriguez's conviction for assault in the third degree.

DATED this 2<sup>nd</sup> day of July, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lindsay Calkins, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VANESSA RODRIGUEZ, Cause No. 67406-4-I, in the Court of Appeals, Division One, 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.

Mary Heinzen  
Mary Heinzen/Paralegal

July 31, 2012  
Done in Kent, WA

2012 JUL -5 AM 9:57  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON