

07562-1

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NO. 67562-1-I

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

STATE OF WASHINGTON, Respondent

v.

ALLEN KNOLL,

Appellant.

ON APPEAL FROM
THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR
SKAGIT COUNTY

STATE'S RESPONSE

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I. SUMMARY OF ARGUMENT

The appellant, Allen Knoll, was convicted of Unlawful Possession of a Firearm and Theft in the Second Degree.

Knoll claims he had a constitutional right to be present when the court received, and responded to, a question from the jury during deliberations. He further alleges prosecutorial misconduct in closing argument.

The State responds that the defendant has no constitutional right to be present during the formulation of and written response to a jury question and the prosecutor did not commit misconduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the defendant have a federal or state constitutional right to be present when the trial court receives, considers, and responds in writing to a jury question, in compliance with CrR 6.15?
(Assignment of Error 1.)
2. Did the prosecutor commit misconduct when he argued that the cooperating codefendants received lesser sentences for testifying pursuant to their plea agreements and when he referred to the defense theories as “red herrings”? (Assignment of Error 2.)

III. STATEMENT OF THE CASE

On March 1, 2011, Peggy Lee was in the parking lot of the Safeway store when a vehicle drove by, an arm came out the passenger side window, and stole her purse from her shopping cart. 1RP¹ 15-16, 19. She had about \$300 in her wallet, about \$1,500 in a zippered compartment of the purse, a credit card, and a gun in the purse. 1RP 20-21, 28.

The vehicle involved was stopped by law enforcement a brief distance away within a short period of time. 1RP 40. As the vehicle was fleeing, it was observed by a witness who saw three occupants in the car. 2RP 97. The vehicle was a 2-door Honda. 1RP 42, 46. The appellant, Allen Knoll, was in the front passenger seat of the vehicle. 1RP 40. On his person, he had some money, including a wad of bills that looked like he had just shoved them in his pocket. 1RP 40-41. The driver was Mark Gerrish and the back seat passenger was Connor Alamillo. 1RP 48-49.

Ms. Lee's wallet was found on the front passenger floorboard and her purse was on the rear floorboard behind the driver's seat. 1RP 50-51. The gun was in the purse. 1RP 51. Ms. Lee's cash was recovered. 2RP 8.

Gerrish and Alamillo testified for the State pursuant to plea agreements that they had. The plea bargains that they struck included

¹ 1RP refers to the Verbatim Report of Proceeding of July 18, 2011. 2RP refers to the

reduced charges and less time in exchange for their guilty pleas and agreements to testify. Alamillo testified that Knoll was the front seat passenger, that Gerrish was the driver, and that Alamillo was asleep during the actual purse snatching but that prior to the stop by law enforcement Knoll threw the purse into the back seat and said there was a gun in the purse. 2RP 47- 55. There was substantial cross examination regarding the credibility of Alamillo, his history with drug usage and drug convictions, and the plea deal that he struck. 2RP 55-68.

Gerrish testified that during the purse snatch, he was driving, Alamillo was in the back seat, and Knoll was in the front passenger seat and snatched the purse. 2RP 69-77. There was substantial cross examination regarding his credibility, his plea deal, and prior inconsistent statements that he made. 2RP 77-83, 85-86.

IV. ARGUMENT

1. Knoll's Federal and State Constitutional rights to be present were not violated.

Knoll claims that his federal constitutional right to be present and his state constitutional right to "appear and defend" were violated when the trial court responded to a jury question during deliberations, in writing,

after conferring with Knoll's counsel as well as counsel for the State, in accordance with CrR 6.15(f)(1)².

- a. The Sixth Amendment right to be present was not violated.

The federal right to be present deprives from the confrontation clause of the 6th amendment (U.S. Const.) and the due process clause of the 14th amendment (U.S. Const.). State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). "The core of the constitutional right to be present is the right to be present when evidence is being presented." In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, decision clarified sub nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994), citing United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Beyond that, a defendant has the right to be present at a proceeding where his presence has a reasonably substantial relation to the opportunity to defend against the charge. Irby, 170 Wn.2d at 881, citing Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled in part on other grounds sub nom. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The defendant does not have the right to be present when his "presence would be useless, or the benefit but a shadow." Id. "[T]he presence of a defendant is a

² CrR 6.15(f)(1) provides that upon receiving a written question from the jury, the court will notify the parties and provide an opportunity to comment. The court will respond to the jury in open court or in writing.

condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” Id.

The defendant “does not have the right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least where those matters do not require a resolution of disputed facts.” Lord, 123 Wn.2d at 306, citing United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857, 93 S.Ct. 140, 34 L.Ed.2d 102 (1972) and People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992).

The right to be present does not extend to proceedings involving the wording of jury instructions, an in-chambers conference in response to a jury question submitted during deliberations, or the written response of the trial court to a jury question submitted during deliberations. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998); State v. Jasper, 158 Wn.App. 518, 541, 245 P.3d 228 (2010), aff’d, ___ Wn.2d ___, 271 P.3d 876 (March, 2012); State v. Sublett, 156 Wn.App. 160, 231 P.3d 231 (2010); State v. Bremer, 98 Wn.App. 832, 835, 991 P.2d 118 (2000).

The specific issue raised by Knoll has already been decided by this Court in Sublett³, supra, and Jasper, supra. Here, the trial court responded to the jury's question in accordance with CrR 6.15. According to the foregoing authorities, Knoll had no constitutional right to be present for the discussion about the response to be given, or the giving of the written response to the jury.

b. The Section 22, Article 1, right to appear and defend was not violated.

Knoll argues for an independent analysis of the State constitutional right to appear and defend. This state constitutional right, along with many others, is guaranteed by Article I, Section 22, of the Washington State Constitution.

When an appellant is alleging greater protections under the state constitution than under a similar provision of the federal constitution, the appellant must engage in a Gunwall⁴ analysis. State v. Ladson, 138 Wn.2d 343, 347-348, 979 P.2d 833 (1999). The Court should analyze the state constitutional provision independently only if the party adequately briefs the Gunwall factors. Malyon v. Pierce County, 131 Wn.2d 779, 791,

³ Review has been accepted by the Supreme Court on an issue different from this. The appellate court's finding that that State Constitutional right to appear and defend was not offended by the defendant's absence is not being reviewed. State v. Sublett, 170 Wn.2d 1016 (2010); see Petition for Review filed by Michael Sublett in No. 84856-4 (whether defendant's federal and state constitutional rights to a public and open trial were violated by an in-chambers hearing regarding the response to a jury question).

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

935 P.2d 1272 (1997); State v. Palomo, 113 Wn.2d 789, 783 P.2d 575 (1989), cert. denied, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990). “Once this court has conducted a Gunwall-type analysis and has determined that a provision of the state constitution independently applies to a specific legal issue, in subsequent cases it is unnecessary to repeat the Gunwall-type analysis of the same legal issue.” Ladson, 138 Wn.2d at 348 (citations omitted).

The state supreme court has conducted a Gunwall analysis in comparing the sixth amendment right to be present with the state constitutional right to appear and defend in the context of whether the prosecutor can question a testifying defendant regarding his opportunity to tailor his testimony to the evidence presented. State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011). The Court was clear, however, that the Gunwall analysis is context specific. Martin, 171 Wn.2d at 528 (“It is incumbent on us, therefore, to make that determination based on the factors set forth in Gunwall and in the context of a case where it is alleged that the prosecutor’s questioning of the defendant violated his constitutional rights to appear and defend, to testify, and to meet witnesses face to face.”).

The state supreme court has also conducted a Gunwall analysis regarding the federal right to be present and the state right to appear and

defend in the context of the defendant's right to represent himself on appeal. State v. Rafray, 167 Wn.2d 644, 222 P.3d 86 (2009).

However, no appellate court has ever conducted a Gunwall analysis in the context of whether the right to appear and defend offers broader protection such that the defendant has a right to be present where the court considers and responds to a jury question during deliberation. In the absence of briefing on the issue, this Court cannot enter into such an analysis.

Knoll, citing State v. Irby, *supra*, asserts that the State constitutional right to "appear and defend" "is more broadly protected by the Washington Constitution than its federal constitutional counterpart." Br. App. at 4. The Irby Court, however, did not actually so hold. What the Irby Court did hold was that Irby's federal constitutional right was violated. The Court then did briefly examine Irby's state constitutional claim separately "because this court has previously interpreted the right to 'appear and defend' independently of federal due process jurisprudence." Irby, 170 Wn.2d at 885. The Court did not hold, however, that the state constitutional claim is more broad; it did note, in a footnote, that "[t]he right under the state constitution to 'appear and defend' is, arguably, broader than the federal due process right to be present." Irby, 170 Wn.2d at 885 n. 6 (emphasis added).

In Irby, both his federal and state constitutional rights were violated because “a defendant’s presence at jury selection ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend’ because ‘it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.’” Irby, 170 Wn.2d at 883. It was for this same reason, i.e. that the defendant has some power to decide who will be on the jury, that “his substantial rights may be affected” such that his absence from that stage of trial violates the right to “appear and defend.” Irby, 170 Wn.2d at 885.

Here, however, in the context of the defendant’s presence for the written answering of a jury question, a purely legal issue, there is simply no purpose to the defendant’s presence. Knoll’s presence would not have made a difference.

This Court has never found Article 1, Section 22, to afford greater protections than the Sixth Amendment right to be present under the circumstances herein. Indeed, in cases where the defendant has claimed both federal and state constitutional violations based on his not being present for discussions regarding resolution of jury questions, the Court has found that the state and federal protections were coextensive and that neither provision was violated. See State v. Sublett, supra; State v. Jasper, supra.

The defendant does not have a state constitutional right to be present for the consideration of and response to jury questions.

- c. The giving of the written response to the jury did not constitute judge/jury communication that required the presence of the defendant.

Knoll appears to make an argument that because the trial court is to have no communication with the jury in the absence of the defendant, that the written response to the jury constitutes such an impermissible communication. Knoll argues that the constitutional right to be present accrues whenever the trial court communicates with the jury. Knoll relies on State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983), in support of this proposition.

Caliguri involved the trial court's having an FBI agent replay some tapes in evidence at the jury's request. It is unclear from the opinion whether counsel for either party were notified, however the defendant was not notified and was not present. During the playing of the tapes, the judge and FBI agent were present with the jury. Caliguri, 99 Wn.2d at 505. Caliguri, in finding error (albeit harmless error), relied on the 1914 decision of State v. Shutzler, 82 Wn. 365, 144 P. 284 (1914).

In Shutzler, the court had called the jury into the courtroom to give them additional instructions. The court did not advise counsel and

conducted the hearing on a legal holiday. Under these circumstances, the communication was unconstitutional. Shutzler, 82 Wn. at 367.

In State v. Smith, 85 Wn.2d 840, 845, 540 P.2d 424 (1975), the jury asked to hear a tape that had been admitted into evidence. The trial court played the tape in the presence of the judge, jury, bailiff, court reporter and clerk. Although counsel were advised of the proceeding, neither they, nor the defendant, were permitted to be present. The appellant court, noting that they do not “commend the trial court’s procedure of excluding counsel and appellant” found that “[t]he error, if any, was harmless.” Smith, 85 Wn.2d 852-853.

Those cases in which the court has found error in the trial court’s communication with the jury have involved the trial court’s actual physical presence in front of the jury. There has been no case where the court’s written communication with the jury pursuant to CrR 6.15 was found to be error.

Here, the judge did not physically go before the jury but provided a written response, agreed upon by counsel, and in accordance with CrR 6.15. This procedure was not constitutionally erroneous.

d. Any error was harmless.

Even if the defendant did have a constitutional right to be present, any error was harmless.

The defendant must demonstrate how his presence was necessary to secure his due process rights; prejudice will not be presumed. Lord, 123 Wn.2d at 307; State v. Wilson, 141 Wn.App. 597, 605, 171 P.3d 501 (2007). See also State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960) (“[I]mproper communication with the jury will not warrant a new trial, unless the defendant has been prejudiced thereby.”), cert. denied, 366 U.S. 934, 81 S.Ct.1658, 6 L.Ed.2d 846 (1961).

Knoll has offered no facts to substantiate a due process violation. Knoll’s counsel was able to participate in the conference regarding the response to provide to the jury. The judge told the jury no more than to refer to the jury instructions already provided.

The appellant asserts that if he had been involved he may have been “able to guide his attorney in her requests for a new instruction or an alternative remedy.” Br. of App. at 8. The appellant does not indicate what other response or remedy would have been permissible other than the one that was given. As with Mr. Wilson in State v. Wilson, supra, “this hypothetical possibility does not rise to the level of a showing that his presence bore a reasonably substantial relation to the fullness of his opportunity to defend himself, or that a fair and just hearing was thwarted by his absence.” Wilson, 141 Wn. App. at 605. See also United States v. Kenrick, 221 F.3d 19, 33 (1st Cir.) cert. denied, 531 U.S. 961, 121 S.Ct.

387, 148 L.Ed.2d 299 (2000) (“[m]ere speculation and bare allegations” are insufficient to make out a due process violation).

Even where the trial court fails to consult with the parties’ attorneys in violation of CrR 6.15, if the response is “negative in nature and conveys no affirmative information,” any error will be harmless because there is no prejudice when the trial court communicates “no information to the jury that was in any manner harmful to the [defendant].” Jasper, 158 Wn. App. at 541, citing State v. Russell, 25 Wn. App. 933, 611 P.2d 1320 (1980); State v. Safford, 24 Wn.App. 783, 794, 604 P.2d 980 (1979) (“Since the trial court’s response to the jury, “Read the instructions,” was negative in character and conveyed no affirmative information, no prejudice resulted and it was not reversible error.”), rev. denied, 93 Wn.2d 1026 (1980); State v. Johnson, supra.

In Jasper, the defendant argued that he was prejudiced because he would have requested that the trial court instruct the jury about an available statutory defense. The Court pointed out that that defense was not available and it would have been erroneous to give it. Therefore, the defendant failed to show any prejudice from the trial court’s error in “not informing the parties of the jury’s inquiry and by not proving Jasper’s counsel with an opportunity to participate in developing an appropriate response.” Jasper, at 543.

Here, the trial court fully complied with CrR 6.15(f)(1). It also provided a response that conveyed no affirmative information. Knoll has failed to demonstrate that his “presence bore a reasonably substantial relation to the fullness of his opportunity to defend himself, or that a fair and just hearing was thwarted by his absence.” He proffers only “mere speculation and bare allegations.” Know has failed to demonstrate any prejudice.

2. The prosecutor did not engage in misconduct during closing argument.

Knoll alleges prosecutorial misconduct, claiming that the prosecutor improperly commented on Knoll’s failure to testify and that he denigrated the defense counsel and argued his personal opinion.

The appellant bears the burden of establishing that the prosecutor’s conduct was improper and prejudicial. State v. French, 101 Wn.App. 380, 86, 4 P.3d 857 (2000), citing State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996); State v. Dixon, 150 Wn.App. 46, 53, 207 P.3d 459 (2009). “We review a prosecutor's comments during closing argument in the context of the total argument, ‘the issues in the case, the evidence addressed in the argument, and the jury instructions.’” Dixon, 150 Wn.App. at 53, quoting from State v. Dhaliwal, 150 Wn.2d 559, 578, 79

P.3d 432 (2003) and citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

A defendant's failure to object to an improper remark constitutes a waiver of that error and the Court will not review it unless it was "so flagrant and ill-intentioned" that it created prejudice incurable by an instruction. Dixon, 150 Wn.App. at 54; French, 101 Wn.App. at 387.

If the prosecutor does commit misconduct in his closing argument, that is not necessarily grounds for reversal. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Fiallo-Lopez, 78 Wn.App. 717, 729, 899 P.2d 1294 (1995), citing State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988)(quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)). "Misconduct is not considered prejudicial unless there is a substantial likelihood that it affected the jury's verdict." French, 101 Wn.App. at 390. Where the evidence of guilt is sufficient to convince the Court that the improper argument did not affect the result below, the error is harmless beyond a reasonable doubt. Fiallo-Lopez, 78 Wn.App. at 729.

- a. The prosecutor did not comment on the defendant's failure to testify.

A statement which does not directly comment on the defendant's silence nonetheless violates the defendant's right to remain silent if it is "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" French, 101 Wn.App. at 389, quoting from Fiallo-Lopez, 78 Wn.App. at 728 (quoting State v. Ramirez, 49 Wn.App. 332, 336, 742 P.2d 726 (1987)).

Here, the comment, in context, would not cause a jury to naturally and necessarily equate this with Knoll's failure to testify. Knoll's defense was based almost entirely on the two cooperating co-defendants not being credible. The defense vigorously cross-examined the codefendants regarding the plea bargains they obtained in exchange for their testimony. Therefore, the prosecutor, in addition to arguing all of the other evidence in the case, spent some time in discussing the credibility of the cooperating codefendants. The prosecutor pointed out that the circumstantial evidence and common sense supported the testimony of Gerrish and Alamillo, 2RP 126-127, he addressed the inconsistent statements of Gerrish as well as pointed out consistencies between Gerrish and Alamillo's statement, 2RP 127-128, 130-131, he addressed the plea bargains that Gerrish and Alamillo received, 2RP 129-130, and then the

prosecutor, in context of addressing the plea bargain and its effect on the credibility of these witnesses, acknowledged that Gerrish and Alamillo received shorter jail terms as a result of the plea bargains. 2RP 131. The implication was not, as Knoll now argues, that if Knoll had testified he might have avoided a lengthy term in jail, rather, the prosecutor was clearly arguing that Gerrish and Alamillo received shorter jail terms than they would have had they not entered into their plea bargains. The statement has nothing to do with Knoll, implicitly or explicitly. There was testimony before the jury explaining the plea bargains that were reached in exchange for testimony and the “prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” Fiallo-Lopez, 78 Wn.App. at 728, citing State v. Hoffman, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991).

Furthermore, the prosecutor clearly explained to the jury that the State had the burden of proof, 2RP 124-125, 134, and he never implied that Knoll was required to provide evidence or that any inferences should be made from his failure to testify.

There was no misconduct with respect to the prosecutor referencing the plea bargains with the codefendants which resulted in less time for them.

- b. The prosecutor's comments did not denigrate the defense attorney and did not constitute an expression of personal opinion.

Knoll argues that when the prosecutor called the defense theories “red herrings”, he improperly denigrated her. He further argues that the prosecutor used his position to vouch for the credibility of his witnesses and the strength of his case in his use of the term “red herring”.

While a prosecutor may not disparage defense counsel, he may comment disparagingly on a defense argument. See State v. Brown, supra. Arguments that suggest that the defense counsel is trying to trick the jury are generally improper because they tend to impugn counsel's character. See State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

“[A] prosecutor may not properly express an independent, personal opinion as to the defendant's guilt”. State v. Martin, 157 Wn.2d 44, 53, 134 P.2d 221 (2006). However, “he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact. . . In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.” Martin, 157 Wn.2d at 53, quoting State v. Armstrong, 37 Wn. 51, 54-55, 79 P. 490 (1905) (emphasis added in Martin). The challenged comments must be reviewed in context. Id.

“Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” Martin, 157 Wn.2d at 54, quoting State v. Papadopoulos, 34 Wn.App. 397, 400, 662 P.2d 59 (emphasis added in Martin), rev. denied, 100 Wn.2d 1003 (1983).

Here, taken in context, the prosecutor’s comments did not denigrate defense counsel nor did they express a personal opinion.

c. The prosecutor’s comments did not prejudice Knoll.

Moreover, Knoll cannot demonstrate prejudice. The comments complained of were brief. In its entirety, the prosecutor’s argument focused on the merits of the State’s case based on all of the evidence and there was never any comment impugning counsel, herself. Under these circumstances, a proper limiting instruction could have neutralized any potential prejudice resulting from the complained of statements.

The jury instructions clearly explained that the State “has the burden of proving each element of the crime beyond a reasonable doubt” and the defendant “has no burden to prove a reasonable doubt exists.” In addition, the court instructed the jury that the attorneys’ remarks were not evidence and that they must disregard any remark, statement, or argument that was not supported by the law or the evidence.

In light of these instructions, the evidence in the case, and considering that the jury acquitted on one of the counts, there is no substantial likelihood the remarks affected the verdict.

Knoll has not demonstrated prosecutorial misconduct or prejudice.

V. CONCLUSION

For the foregoing reasons, the convictions should be affirmed.

DATED this 7 day of May, 2012.

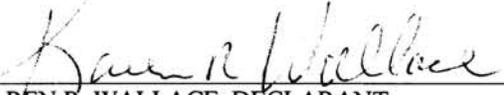
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ROSEMARY H. KAHOLOKULA, #25026
Chief Criminal Deputy Prosecutor
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: San Taser, WAP, 1511 Thurston, Suite 24, Seattle, WA 98101
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 7th day of May 2012.


KAREN R. WALLACE, DECLARANT