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NO. 67617-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LONNIE CARTER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

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**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

TUYEN T. LAM  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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STATE OF WASHINGTON  
[Signature]

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**A. ISSUE PRESENTED**

Whether Lonnie Carter has failed to show that the prosecutor committed misconduct in closing argument.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Lonnie Carter, was charged by amended information with one count of felony harassment based on a threat to kill. CP 57. The victim, Michael Harding, was a King County Department of Corrections Jail Officer. 4RP 5<sup>1</sup>.

**2. SUBSTANTIVE FACTS**

On October 27, 2008, Michael Harding was working as a corrections officer at the King County Regional Justice Center in Kent, Washington. 4RP 5, 9, 15. Harding had been a corrections officer for thirteen years. 4RP 5. The appellant, Lonnie Carter, was housed in the "Noreast" section of the jail. 4RP 16-17. Noreast is an administrative segregation unit that is designed to allow inmates to come out one at a time during their time out of their cells so they

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<sup>1</sup> The Verbatim Report of Proceedings consists of six volumes and will be referred to as follows: 1RP (4/25/11); 2RP (7/11/11); 3RP (7/12/11); 4RP (7/13/11); 5RP (7/14/11); and 6RP (7/29/11).

do not have to come in contact with other inmates. 4RP 8-9. Harding was scheduled to work alone in the Noreast unit from 6:20a.m. to 2:30p.m. 4RP 7, 15. Harding had no disciplinary dealings with Carter prior to October 27, 2008.

At approximately 8:00a.m., Harding started the inmate's hour out, which meant each individual is released from of their cell for one hour to use the common dayroom. 4RP 16. Harding opened Carter's door, woke him up and told him it was his hour out. 4RP 16. Harding walked back to his desk. 4RP 16. Approximately five minutes later, Carter pushed the dayroom button and appeared agitated. 4RP 18-19. Carter disputed with Harding that he had his correct hour out, as he believed it should be in the evening. 4RP 19. After Harding offered to show him the log book for the scheduled hour out, Carter walked back into his cell and slammed the door. 4RP 20.

At approximately 8:45a.m., Harding conducted a security check on all the inmates in the unit. 4RP 20, 22. As Harding passed Carter's cell, Carter began yelling and using profane language directed at Harding. 4RP 22. Carter continued with derogatory remarks towards Harding the entire time Harding conducted the security check and continued to yell when Harding

returned to his desk. 4RP 24. At approximately 9:45a.m., Harding conducted another security check and could hear Carter yelling additional profanity, sexual innuendoes and racial slurs at the top of his lungs. 4RP 25. Harding tried to calm Carter down by telling him he needed to stop his actions. 4RP 26. Up to this point, Carter had been continuously yelling, and then the yelling suddenly stopped. 4RP 26. Harding was standing directly in front of Carter's cell when Carter said in a very calm voice, "When I get out, I'm going to look up your address on the Internet, I'm going to come over to your house, cut your phone line, and I'm going to stab you and your family to death." 4RP 26. Harding was scared and "absolutely" believed the threats were going to be carried out. 4RP 27. Harding acknowledged he often received threats and derogatory comments as a part of his profession, however, he believed this particular threat was different because it had "the intent to kill, when, where and how." 4RP 27. Harding went back down to his desk and called his sergeant. 4RP 28-29. Carter was removed to another cell by fellow corrections officers. 4RP 28-29. Harding wrote a report detailing the events at approximately 11:26a.m. and logged the threat in a log book at the same time. 4RP 31-32.

Carter chose to testify at trial. 4RP 107. His testimony was vastly different from the testimony he gave for the CrR 3.5 hearing. 2RP 51-55; 4RP 107-29. At the CrR 3.5 hearing, he told the court that he "can't recall the situation that day because it's been so long ago [his] memory don't go back that far." 2RP 54. At trial, Carter miraculously remembered specific details regarding his altercation with Harding. 4RP 112-13. Carter recalled talking to another inmate about a movie where prisoners had broken out of prison and invaded a house and stabbed the family, mom, dad and kids. 4RP 113. Carter was telling the other inmate this story when Harding stepped in front of his cell. 4RP 113. It was at this point that Carter testified Harding mistakenly believed Carter had threatened to kill him and his family. 4RP 113. Carter was impeached at trial with his CrR 3.5 testimony. 4RP 123-24.

**C. ARGUMENT**

**CARTER RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT**

On appeal, Carter makes several erroneous arguments alleging prosecutorial misconduct. To establish prosecutorial misconduct, the defendant must show that the prosecutor's

comments were improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Comments are prejudicial only if "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The failure to object to misconduct at trial and to request a curative instruction constitutes waiver on appeal, unless the misconduct is so "flagrant and ill-intentioned" that the resulting prejudice could not be neutralized by a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Ordinarily, a defendant must move for a mistrial or request a curative instruction for an appellate court to consider alleged misconduct in closing argument. Id.

The State has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Allegedly improper comments are reviewed in the context of the entire argument, the issues presented, the evidence addressed, and the instructions to the jury. Brown, 132 Wn.2d at 561. Juries are presumed to follow the trial court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that

the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

Carter argues that the prosecutor's arguments to the jury to put themselves in Harding's shoes were an improper appeal to jurors' emotions. Throughout his brief, Carter persistently takes the prosecutor's arguments in closing out of context. In order for the jury to have convicted Carter of felony harassment, one of the elements the State had to prove was "that the words or conduct of the defendant placed Michael Harding in reasonable fear that the threat to kill would be carried out." CP 57, 91; RCW 9A.46.020. "Felony harassment based on threat to kill requires the State to prove the person threatened be placed in reasonable fear the threat would be carried out, rather than mere fear of bodily injury; plain meaning of statute indicates that fear of the 'the threat' must be fear of actual threat made." State v. C.G., 150 Wn.2d 604, 609, 80 P.3d 594 (2003). The words or conduct of the defendant that place the person threatened subjectively in fear that the threat will be carried out must be weighed by the trier of fact in assessing the reasonableness of that person's fear. State v. J.M., 101 Wn. App. 716, 720, 6 P.3d 607, affirmed, 144 Wn.2d 472, 28 P.3d 720 (2000).

The prosecutor's arguments were not improper when viewed in light of the elements of the crime charged. The State did not only have to prove that the fear was reasonable, but that Harding's subjective fear was real. Id. Harding's unique employment as a correctional facility officer was itself an issue the State faced at trial because threats are common occurrences as a jail officer. 4RP 22, 24, 27. Therefore, the State needed to explain why Carter's threat to Harding on October 27, 2008 was different than the "everyday stuff." 4RP 22. In doing so, the State argued why the jurors should find Harding's testimony of being fearful credible, "You've heard the testimony of Officer Harding. And it's your job to determine whether or not his testimony is credible. Whether or not you believe what he said." 4RP 140. The State went on to describe what it was that Harding felt at the time the threat was made, "[Harding] told you that he was positive those threats were going to be carried out. And he was scared, and he was fearful. But he also told you that it made him angry." 4RP 141. In arguing that his fear was reasonable, the State went on to argue that any reasonable person would feel the same way by stating, "And I think when you reflect on his testimony and put yourself in his shoes, those are all the same emotions that you would feel if you were in that position. You

would feel scared, you would be fearful, and you would be angry that someone would say this to you." 4RP 141-42. This was not misconduct. The State did not ask the jurors to render a verdict based upon what they would want if they were in Harding's position nor did the State encourage the jury to render a verdict based upon sympathy, but only to analyze whether the reasonable person standard had been met, as required by the harassment statute.

In making the above arguments, the State was also responding to the defense counsel's cross-examination of Harding. It was clear from the counsel's cross-examination, that he was attacking Harding's credibility and whether Harding's fear was real. Defense counsel elicited from Harding that he was a man who liked to be in control and not one who likes to "lose their cool." 4RP 37. Defense then went on to elicit that Carter's comments made the jail officer "mad." 4RP 38. The defense counsel's cross examination suggested that there was a motive to make up the allegations. The defense counsel went back to his cross examination in closing:

I submit to you, ladies and gentlemen, that Officer Harding was mad as a hatter about what happened that morning. But he was not scared. He was not personally scared of Mr. Carter...Harding is mad because he was losing control over his unit that morning...Harding is mad because he believed Mr. Carter was disrespecting him. Harding is mad

because Mr. Carter got out of jail before there was an opportunity for the jail to give him an infraction in this case. He lost control. And that's one thing that he doesn't want to have happen. He can't tolerate to have happen.

4RP 151.

Later, the defense counsel argued,

So, was there a threat? If you believe Officer Harding, there might have been a threat. If you believe Officer Harding, the question is whether it was reasonable for him to conclude that.

4RP 153.

"[T]he prosecutor, as an advocate is entitled to make a fair response to the arguments of defense counsel." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). A prosecutor's remarks, even if improper, are not grounds for reversal if defense counsel invites or provokes them, unless the remarks are not a relevant reply or are so prejudicial that a curative instruction would be ineffective. Id. at 86. The State's arguments were in direct response to defense counsel's attack of Harding's credibility and were not so prejudicial that a curative instruction would be ineffective had Carter objected.

Next, Carter claims the prosecutor appealed to the passions and prejudice of the jury by urging jurors to convict Carter in order

to stand up against the harsh conditions faced by the community of correctional officers. Carter's argument is not supported by the record. The prosecutor never argued to the jury to convict Carter based on the harsh conditions faced by jail officers. The prosecutor did characterize the jail officers' job as "thankless" but that is a far cry from what Carter is alleging the prosecutor argued. In actuality, it was the defense counsel in closing who suggested to the jury the harsh conditions of jail officers. The defense counsel stated, "It's a tough job, ladies and gentlemen. The whole criminal justice system is a mess." 4RP 153. A short time later the defense counsel again acknowledges, "And we want to stand up for our corrections officers. You know, they are doing a tough job." 4RP 155. Perhaps Carter has confused the defense counsel's closing with the prosecutor's closing, as his argument is clearly not supported by the record.

Lastly, Carter's argument that the prosecutor misstated the law in closing argument is also not supported by the record. In making this passing claim, Carter does not cite to which part of the record supports his argument. Near the beginning of closing arguments, the prosecutor went through the elements of the crime in the "to convict" instruction with the jury and did not leave out any

of the elements. 4RP 140; CP 91. The record simply does not support Carter's argument.

Even if this court finds that any arguments made by the State were improper, they were not prejudicial. Carter did not move to strike the State's remarks, request a curative instruction, or move for a mistrial. "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." Swan, 114 Wn.2d at 661. A curative instruction advising the jury to disregard the State's remarks would have remedied any error. Carter should have to show that the State's comments were so "flagrant and ill-intentioned" that the resulting prejudice could not have been obviated by a curative instruction. Swan, 114 Wn.2d at 661. Carter's failure to request a curative instruction or move for a mistrial strongly suggests that the State's remarks did not appear "critically prejudicial" in context. Swan, 114 Wn.2d at 661. Given the weight of the testimony against him, Carter cannot show that there is "a substantial likelihood" that the State's remarks affected the jury's verdict. Brown, 132 Wn.2d at 561.

Further, the State's comments were brief and represented a small part of the State's overall closing argument. The court properly instructed the jury that the "lawyers' statements are not evidence" and that they should disregard any argument not supported by the evidence. CP 84. The jury is presumed to have followed the court's instructions. Swan, 114 Wn.2d at 662. Given these circumstances, Carter cannot show that there is a substantial likelihood that the State's remarks affected the jury's verdict. See State v. Barajas, 143 Wn. App. 24, 40-41, 177 P.3d 106 (2007), review denied, 164 Wn.2d 1022 (2008) (holding that the prosecutor improperly compared the defendant to a "mangie [sic], mongrel mutt," but the misconduct did not require reversal because it was brief and an instruction from the court to disregard the characterization could have neutralized any prejudice).

Finally, Carter cannot show that the State's remarks were "so flagrant and ill-intentioned" that no curative instruction would have eliminated their prejudicial effect. Swan, 114 Wn.2d at 661. The State's comments here fall far short of other comments deemed to have required reversal based on their flagrant and ill-intentioned nature. See State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988) (holding prosecutor's remarks that the

defendant was “strong in” a group that the prosecutor described as a “deadly group of madmen” and “butchers that kill indiscriminately,” were flagrant, highly prejudicial, and could not have been neutralized by a curative instruction); State v. Echevarria, 71 Wn. App. 595, 597-99, 860 P.2d 420 (1993) (holding prosecutor’s repeated comments about the “war on drugs” were flagrant, ill-intentioned, and “a blatant invitation” to the jury to convict the defendant based on fear and repudiation of drug dealers in general, rather than based on the evidence); State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984) (finding prosecutor’s reading of a poem in closing argument detailing the effect of rape on victims was “nothing but an appeal to the jury’s passion and prejudice” that could not be erased by a curative instruction).

None of the State’s challenged comments warrant reversal of Carter’s conviction, particularly when viewed in context of the total argument, the issues in the case, the court’s instructions, and the evidence addressed in argument. Brown, 132 Wn.2d at 561. The State’s remarks were a fair response to the defendant’s arguments and reasonably drawn from the evidence. Given the overwhelming weight of the evidence against Carter, there is not a

a substantial likelihood that the jury's verdict would have been different. Any prejudice caused by the State's comments could have been neutralized by a curative instruction. Carter cannot show that prosecutorial misconduct deprived him of a fair trial.

**D. CONCLUSION**

For all of the foregoing reasons, the Court should affirm Carter's conviction.

DATED this 5<sup>th</sup> day of June, 2012.

Respectfully submitted,

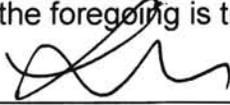
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
TUYEN T. LAM, WSBA #37868  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. LONNIE R. CARTER, Cause No. 67617-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



\_\_\_\_\_  
Name Tuyen T. Lam  
Done in Kent, Washington

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