

69336-1

69336-1

NO. 69336-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANGEL DAVIS,

Appellant.

2013 AUG -7 PM 2:57  
COURT OF APPEALS  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

1. It is not misconduct for the prosecutor to argue reasonable inferences from the facts presented at trial. Even comments that might otherwise be considered improper are not grounds for reversal if they are invited or provoked by defense counsel and are not so prejudicial that a curative instruction would be ineffective. Where the prosecutor's arguments in closing and rebuttal contained reasonable inferences from the evidence presented at trial, were made in direct response to defense arguments, and did not result in prejudice to the defendant, did the prosecutor commit prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Angel Davis was charged by information with one count of forgery. CP 1. A jury found her guilty as charged. CP 44. She received 30 days of electronic home detention. CP 68.

2. SUBSTANTIVE FACTS.

On October 24, 2011, Angel Davis entered the Overlake Key Bank located at 15110 NE 24,<sup>th</sup> in Redmond, WA. 1RP 26-27.

Davis approached the desk of Customer Service Representative Kelly Alaghemand and stated that she wanted to open a new account. 1RP 27, 141. Alaghemand invited Davis to sit down at her desk, where they were joined by Assistant Branch Manager Brandon Hamblin. Id. The three discussed Davis' banking needs. 1RP 28, 141. Davis told Alaghemand and Hamblin that she worked as an assistant manager at Whole Foods, and said that she was on her lunch break. 1RP 28-30, 38-41, 141-42, 144. She specified that she wanted a free checking account into which she could deposit her paychecks. 1RP 29.

Alaghemand quickly determined the type of account that would best suit Davis' needs and explained to Davis that although the account was free, it would require a minimum fifty-dollar deposit, of either cash or a check. 1RP 29, 36-37, 143. Davis agreed to these terms, and gave Alaghemand her full name, address, date of birth, and mother's maiden name, and social security number. 1RP 30-31, 141-42. Alaghemand entered the information into the database, following all the necessary prompts. 1RP 31, 127. As verification of her identity, Davis provided Alaghemand with her driver's license and a debit card from another bank. 1RP 30, 141. Alaghemand explained that the bank's system

would run a credit check on Davis before her account could be approved. 1RP 30-31. Davis expressed concern that she might not pass a credit check because she had experienced identity theft in her past. 1RP 52-53.

Ultimately, Davis passed the credit check and an account was generated in her name. 1RP 31. Alaghemand printed out a "signature card" summarizing the information that Davis had provided orally, gave the card to Davis, and asked her to review the information and sign if it was all correct. 1RP 31-35, 127. The signature card listed Davis' social security number as 533-777-706. Ex. 1. Davis signed the signature card and handed it back to Alaghemand. 1RP 31-35. Alaghemand then accompanied Davis to the teller window where Davis made the minimum required deposit, using cash. 1RP 37. The entire process took approximately twenty minutes and Hamblin was present throughout. 1RP 38-39. At no time during their interaction did Davis mention having a check that she needed to cash or deposit. 1RP 38, 53, 142. Once the deposit was complete, Davis left the bank alone. 1RP 41, 145, 162.

After the defendant left, Alaghemand and Hamblin discussed the transaction. 1RP 42, 145. Both were somewhat wary of Davis,

primarily due to her inconsistent statements regarding her job at Whole Foods. 1RP 39-40, 42, 144, 146. Alaghemand recalled that Davis initially stated that it was her day off, but then later indicated that she was in a hurry because she was on her lunch break.

1RP 39. Hamblin called Whole Foods attempting to verify Davis' employment and he was unable to do so. 1RP 144.

Alaghemand reviewed the account that she had just opened for Davis and discovered that a check for over \$2,500 had just been deposited into the account from the nearby Key Bank Crossroads branch. 1RP 41. This concerned Alaghemand, and she notified Hamblin immediately. 1RP 42-43, 145-46. Hamblin in turn called the Crossroads branch and spoke to teller, Tina Responde.

1RP 146. Responde confirmed that Davis had just been at the branch, 18 minutes after leaving the Overlake branch, and that she had deposited check # 3145, made out to Angel Davis and drawn on the US Bank account belonging to Teriyaki Wok. The check was written in the amount of \$2,567.36. 1RP 58, 61-63, 69, 146; Ex. 3. Hamblin questioned Responde about the nature of the transaction and told Responde to place a hold on the funds.

1RP 146.

At trial, Tina Responde testified that Davis came through her teller line on October 24, 2011, and asked to cash a check. 1RP 55, 69. Responde processed the check and notified Davis that the funds would not be available for 7-9 business days due to a "new account hold." 1RP 56. Davis appeared upset that she could not immediately access her funds but left the branch. 1RP 56-57.

Responde testified that approximately two days later, Davis returned. 1RP 57, 70-71. She approached Responde's window and asked to withdraw the total amount of the check that she had deposited two days before. 1RP 71. Responde informed Davis that the funds were still on hold and would be released once the check cleared. 1RP 57. Davis became upset and asked Responde for the check back. Id. Responde told Davis that the check had already been processed and could not be returned to Davis. Id. Davis argued with Responde for several minutes, becoming very upset. 1RP 57, 70. She then left the branch. Responde had no further contact with Davis.

Business owner Keuk Phong also testified at trial. He testified that he owned a restaurant in Renton called Teriyaki Wok. 1RP 92-93. On October 24, 2011, Phong reviewed the US Bank checking account associated with his restaurant and discovered

that a large check had recently cleared his account. 1RP 94-96. That check was check number #3145, made payable to Angel Davis, in the amount of \$2,567.36. 1RP 97; Ex. 4. Phong did not know anyone named Angel Davis and had not authorized the use of his checks. 1RP 97-99. When Phong went to the location where his checks were kept, he discovered that an entire book of checks was missing. 1RP 95-96. He reported the loss to US Bank and the Renton Police Department. 1RP 99.

On November 2, 2011, Officer Kristen Knott was assigned to investigate the fraud associated with Phong's account. 1RP 106. Officer Knott took statements from Alaghemand and Responde. 1RP 108. On December 28, 2011, Officer Knott arrested Davis. 1RP 109. Officer Knott advised Davis of her Miranda rights which Davis stated that she understood. 1RP 109-10. Officer Knott asked Davis if she had ever been to Teriyaki Wok in Renton. 1RP 110. Davis stated that she had not. Id. Officer Knott did not question Davis further.

At trial, Angel Davis testified in her own defense. 1RP 165-81. She testified that sometime in the beginning of October 2011, a woman named Rita Wynn had approached her at the library and offered her a job. 1RP 167. Davis stated that she

agreed to work for Wynn, who later came to Davis' residence and provided her with a box of receipts that she wanted organized and entered into a ledger. 1RP 167-68. Davis stated that she did the work that Wynn had requested, and waited for Wynn to call her. 1RP 168. Wynn eventually called Davis "on the last day" and appeared at Davis' home with a check, which she gave to Davis as payment. Davis testified that Wynn asked her to "wait a couple of days until she was sure the funds would be in and that it would clear" before cashing the check. Id. Davis stated that she went to the Key Bank Overlake branch on October 24, 2011, with the intent to deposit the check, but upon arrival realized that "she had misplaced it." 1RP 169. Davis testified that she went into the branch anyway, and was assisted in opening a new account by Kelly Alaghemand and Brandon Hamblin. 1RP 169. Davis claimed that it was only after she left the Overlake branch that she located the check between the seats in her vehicle, so she stopped at the Crossroads branch and deposited the check. 1RP 172.

Davis maintained that she never tried to cash the check at Crossroads, as Responde had testified, but rather that she merely tried to "take out \$25.00 of my own money...." 1RP 173. Davis testified that she was "a little sad" when Responde told her that she

could not access her funds but that she was not “mad or upset or anything.” 1RP 174. Regarding her transaction at the Overlake branch, Davis testified that she had provided Alaghemand with her correct social security number and acknowledged that she had signed the signature card despite it containing a different social security number. 1RP 178. Davis further testified that, contrary to what Alaghemand had testified to, she did not express concern about not passing a credit check due to identity theft but rather that she had asked what the bank did with her personal information “because [she] didn’t want to be the victim of identity theft, so [she] was just making sure that it got shredded or was kept somewhere secure.” 1RP 173. Davis admitted to lying to Hamblin and Alaghemand about her employment at Whole Foods because she “didn’t want to go into a whole spiel about what [she] actually did...” 1RP 171.

The defense also called Lemaun Lancaster to the stand. 1RP 183-87. Lancaster testified that he was a friend of Davis’ and had been present during each of Davis’ interactions with the woman Davis had described as Rita Wynn. Id. Lancaster could not recall what the woman’s name was or anything specific about her appearance. He indicated that he was “not sure” if he would be

able to recognize Wynn if he saw her again. 1RP 185. No other defense witnesses were presented.

C. ARGUMENT

1. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT IN HER CLOSING ARGUMENT OR REBUTTAL.

a. The Prosecutor's Remarks During Closing And Rebuttal Argument Were Proper.

Davis contends that the prosecutor committed misconduct in closing and rebuttal by arguing facts not in evidence and "testifying as an expert" on people who commit fraud. Brief of Appellant 8. Viewed in the full context of the trial, the prosecutor's arguments did not constitute misconduct. The prosecutor's remarks were properly confined to evidence presented at trial and reasonable inferences therefrom, and appropriately responded to defense counsel's arguments as to witness credibility. The prosecutor's unintentional misstatement of the number of times a witness was interviewed was harmless and unlikely to have affected the verdict, given the court's instructions to the jury.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in

the case, the evidence presented at trial, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A defendant bears the burden of establishing that the prosecutor's conduct was improper and that it was also prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper, and then determines whether the defendant has shown that any improper comments resulted in prejudice to the defendant. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432, 442 (2003) (citing State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) and State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Dhaliwal, 150 Wn.2d 559 at 577 (citations omitted); State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). Counsel is prohibited from intentionally arguing facts not in evidence, but is permitted a reasonable latitude in arguing inferences from the evidence. State v. Papadopoulos, 34 Wn. App. 397, 662 P.2d 59 (1983); United States v. Necochea, 986 F.2d

1273, 1279 (9th Cir.1993). A prosecutor is also entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87. Even improper remarks by the prosecutor will not support the reversal of a conviction, "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." Id.; Jones, 144 Wn. App. at 300.

Davis first asserts that the prosecutor committed misconduct during closing argument by "misstating" Brandon Hamblin's testimony, and "testifying as an expert on the behavior of persons who commit fraud." Davis further argues that this constituted reversible error. Davis is mistaken. During closing argument, the deputy prosecutor appropriately summarized Hamblin's testimony, drew a reasonable inference from that testimony, and properly argued that inference to the jury. The record contains ample evidence to support the prosecutor's argument; thus, it was not improper.

At trial, the assistant manager of the Crossroads Key Bank, Brandon Hamblin, testified that he had been employed at Key Bank for approximately five years, as both a customer service

representative and manager. 1RP 125. Hamblin described the general process of opening a new account and indicated that most fraud is committed within the first 30 to 60 days of a new account being opened. 1RP 129. He further testified Key Bank places nine-day holds on all new accounts when they are opened to ensure that any checks deposited into those accounts clear before the funds are disbursed. 1RP 129. Hamblin stated that this information is communicated clearly to everyone who opens a new account, to avoid customer upsets. 1RP 130.

Hamblin testified that he was present on October 24, 2011, when Kelly Alaghemand opened a new account for Angel Davis and that he was involved in that process. He testified that Davis deposited fifty dollars in cash for the requisite opening deposit, and confirmed that Davis never mentioned having a large check that she needed to cash. 1RP 130, 142-43. Hamblin also testified that it was "a very big red flag" when he realized that a "check of that size" had been deposited into Davis' account mere minutes after she left the Crossroads branch. 1RP 146, 156-57.

During her closing argument, the deputy prosecutor addressed each of the elements of the crime charged and highlighted the evidence that supported each element.

1RP 203-09. With regards to the intent and knowledge elements, the prosecutor reasoned that there were a number of suspicious circumstances that supported the inference that Davis knew the check was forged and that she passed it with the intent to injure or defraud. Id. The prosecutor then identified five such circumstances, or “red flags,” and articulated how each one was evidence of the defendant’s knowledge and intent. Id.

One particular circumstance that the deputy prosecutor identified was the manner in which Davis had gone from branch to branch of Key Bank in quick succession. She pointed out that Davis went to the first branch of Key Bank where she spent considerable time, opened an account, deposited fifty dollars cash, yet never mentioned anything about needing to cash or deposit a large check. 1RP 207. Davis then appeared at the second branch of the same bank, minutes later, and tried to cash a check for over \$2,500. Id. The prosecutor referred to this behavior as “bank hopping” and asked the jury to consider “who does this?” She then answered that question by reminding them of Hamblin’s testimony regarding Davis’ behavior, and arguing that, not only was Davis’ “bank hopping” abnormal, but also that it was strongly indicative of intent to defraud the bank. Id. Davis objected during the argument,

suggesting to the court that the prosecutor was “arguing facts not in evidence.” 1RP 208. The court did not sustain the defendant’s objection but issued a cautionary instruction that “the jury is going to have to rely on their memory of the evidence to see if it supports the argument.” 1RP 208.

The inference drawn by the prosecutor that “people who are trying to defraud the bank and avoid detection” engage in “bank hopping” behavior such as Davis did was reasonable in light of Hamblin’s complete testimony and the evidence presented at trial. 1RP 207-08. While a prosecutor may not express a personal opinion to the jury, he or she may argue inferences from evidence presented at trial. State v. Price, 126 Wn. App. 617, 653, 109 P.3d 27, 45 (2005) (misconduct does not occur unless it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.).

Hamblin did not explicitly testify that people who go from bank to bank in rapid succession and under otherwise suspicious circumstances are necessarily committing fraud, but he did testify that the behavior displayed by Davis was very concerning to him due in large part to the fact that most fraud is committed during the initial days after a new account is opened. The prosecutor was not

limited to repeating Hamblin's testimony verbatim during argument. The prosecutor was entitled to summarize Hamblin's testimony and present an obvious inference that could reasonably be drawn from that evidence. The fact that the prosecutor presented the inference to the jury as "I submit to you" does not convert the argument into her own opinion or "expert testimony" by virtue of the mere fact that the sentence begins with the pronoun "I." Nor does the fact that she unsuccessfully attempted to qualify Hamblin as an expert witness during direct examination.

Hamblin's testimony alone provided the prosecutor with more than sufficient evidence to argue the inference of intent as a result of Davis' "bank hopping" behavior. Moreover, the testimony of other two bank employees supported the inference. Customer service representative Kelly Alaghemand testified that she was so concerned when she learned that Davis had been at the second bank within minutes of leaving hers that she went straight to her assistant manager with the information. 1RP 44. Tina Responte testified that "nobody [goes from one bank where they just opened an account, straight to a second bank where they attempt to cash a check] unless you are trying to hide something." 1RP 59-60. When viewed in light of all of the evidence admitted at trial, the

prosecuting attorney's argument that Davis' bank hopping behavior was evidence of her intent to defraud the bank was entirely reasonable, and it was not improper for the prosecutor to present that inference to the jury during the State's closing argument.

The second comment that Davis argues was improper was made during the prosecutor's rebuttal argument in response to an argument made by defense counsel during closing. Specifically, Davis contends that the prosecutor "inferred that witness Tina Responde made additional statements during other interviews the contents of which were not presented to the jury during examination." Brief of Appellant 8. The record does not support this contention, which seeks to penalize the State for appropriately responding to defense counsel's argument that Responde fabricated a portion of her testimony at trial; therefore her claim must be rejected.

During Davis' closing argument, defense counsel maintained that Davis was totally unaware that the check she presented to Tina Responde was forged, and asserted that, contrary to Responde's testimony, Davis never asked Responde to cash the check. To explain the discrepancy between Davis' and Responde's testimony, defense counsel argued that the bank employees, in particular

Responte, could not remember what had happened on the dates in question and implied that Responte had made up the fact that Davis had asked to cash the check after she learned that the check was bad. 1RP 213.

In her rebuttal argument, the prosecutor directed the jury's attention to the credibility instruction and went over that instruction in detail. 1RP 215-16. She then made the following argument, which is presented in whole so that this Court can judge the context in which the challenged statements were made:

I'd like to go through a couple of people that [defense counsel] talked about. Tina Responte is the first one. She really took a beating up there. She's a bank teller, who got this woman who came into her line, it was her lucky day. The defense wants you to totally discredit her testimony because when she gave a paragraph long statement to the police over the phone when she was at work, she didn't include every single detail, that she has included in three other interviews that have taken place over nine months.

Ms. Romonovich: Objection, facts not in evidence.

Ms. Meyers: ...that she is not credible, that she is somehow not credible, that she didn't remember every single detail the same every single time. I'd just ask you to think about this. How many times have you told a story various times over the course of nine months and told it the exact same every single time? The major points, she was sure about. She remembered it. She remembered this lady. She was obviously nervous, and she was obviously

uncomfortable. I don't think that means she was not believable. Consider what the credibility instruction says. If anything, I'd argue that makes her more believable. She did not feel comfortable being here. She was getting essentially picked apart, and she was still honest with you.

1RP 216.

Defense counsel did not follow her objection with a motion to strike, request a curative instruction, or move for a mistrial.

Here, the prosecutor's remarks regarding the number of times Responte was interviewed about this case must be examined in the context of the full trial, including the total argument presented above. During trial, the jury heard testimony that Responte gave at least two statements (or interviews) about the events in question, besides her testimony in court. 1RP 67, 69-70, 73. One of the statements was given over the phone, to Officer Kristin Knott, months after Davis passed the forged check. 1RP 64-67. The second statement Responte gave was during a pre-trial interview with defense counsel in July of 2012, approximately nine months after the event in question. 1RP 70.

Defense counsel herself elicited a large amount of testimony regarding Responte's various statements during cross-examination. RP 67, 69-70. She then pointed out during closing argument that

Responte had not initially mentioned to Officer Knott that Davis had tried to cash the check the first time she came in, but she had testified to this fact in court. Counsel ultimately concluded that this inconsistency in Responte's statements necessarily meant that Responte "didn't remember what had happened" and that it was grounds for the jury to discredit her testimony entirely. 1RP 212. By making this argument to the jury, defense counsel invited a response from the prosecutor addressing other possible reasons for the discrepancy.

The prosecutor did not, as Davis claims, suggest to the jury that they consider additional evidence of guilt that had not been admitted during the trial. On the contrary, she responded appropriately to defense counsel's attack on Responte's credibility by addressing the inconsistency that defense counsel made an issue. In doing so, the prosecutor pointed out that Responte had given statements about the incident multiple times, over many months. She then argued the reasonable inference that, it was highly unlikely that anyone would tell the same story, multiple times, and include exactly the same details each time. Thus, the inconsistency was natural, and as such made Responte that much more credible.

While the prosecutor did misstate the actual number of out-of-court statements that Responde gave, the misstatement was minor, and clearly unintentional. She did not suggest that Responde had given twenty other statements, or even five. She stated three, when in fact it was only two, in addition to her in court testimony. Given the minor nature of this mistake, and the court's instructions that the attorney's arguments were not evidence and that they were to rely on their own memories as to the evidence, it cannot be said that Davis suffered any prejudice as a result.

Davis does not address the fact that counsel invited the prosecutor's remarks by arguing that Responde was not credible because she had given inconsistent versions of the events. Nor does Davis articulate how the statement, appearing in the context of the arguments and evidence, is still improper. The statements of counsel in closing argument are not to be read in a vacuum but rather in the context of the arguments and evidence presented at trial. Moreover, a statement is not considered improper if it is invited or provoked by defense. State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646, 659 (2006).

b. Even If The Prosecutor's Statements Were Improper, Davis Has Not Established Prejudice.

Even if the prosecutor's remarks regarding Davis' "bank hopping" and the number of times Responde was interviewed could be characterized as improper, Davis' claim fails because neither of the comments caused prejudice. The evidence against Davis was strong and the trial court properly instructed the jury that the lawyers' statements were not evidence. CP 30. Moreover, although the defendant objected to the challenged portions of the prosecutor's argument, she never requested a curative instruction or moved for a mistrial, which strongly suggests that the comments did not appear unduly prejudicial at the time. Given all of this, there is no substantial likelihood the jury would have acquitted Davis but for the prosecutor's allegedly improper statements.

Even if an improper argument is objected to, prejudice is established only where there is a substantial likelihood the misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d 559 at 578. The absence of a motion for mistrial strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Davis has failed to establish that there was a substantial likelihood that the challenged remarks during closing or rebuttal affected the jury's verdict. First, the evidence against Davis was strong. There was significant evidence of the defendant's guilt presented at trial, most of which was entirely unrelated to Davis' "bank hopping" behavior. This included evidence that Davis provided the bank with a fraudulent social security number, that she expressed concern about passing a credit check, that she lied to the bank about her employer, and that she failed to mention having a sizeable check to cash when she went into the Overlake branch to open her new account. Additionally, the amount that the check was written for made little sense considering the type of work that Davis claimed to have received the check as payment for. Further, there was no credible evidence that Davis was unaware that the check was forged or that she did not intend to defraud the bank. As the prosecutor pointed out, Davis' self-serving testimony did not comport with the other evidence, and defense witness Lemaun Lancaster did little to bolster her credibility. When the challenged comments by the prosecutor are considered in light of the considerable evidence of defendant's guilt, it is unlikely that those comments substantially affected the verdict.

Secondly, the court's instructions to the jury mitigated any potential prejudice to the defendant as a result of the allegedly improper comments. A jury is presumed to follow the court's instructions. See State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940, 945 (2008); State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) (even some improper prosecutorial remarks that touch upon constitutional rights are still curable by a proper instruction); State v. Stenson, 132 Wn.2d 668, 730, 940 P.2d 1239 (1997). Improper remarks of a prosecutor do not constitute prejudicial error if the instructions given substantially mitigate the prejudicial effect of the remarks, the remaining possibility of prejudice could have been obviated by additional instructions not requested, and the appellate court is satisfied that the improper remarks did not affect the verdict. State v. Papadopoulos, 34 Wn. App. at 401.

The court's instruction 1 read in relevant part:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.

CP 30. In addition to this instruction, the court gave an additional oral instruction during the prosecutor's closing argument, in response to defense counsel's objection regarding the prosecutor's characterization of Hamblin's testimony. ("The jury is going to have to rely on its own memory of the evidence to see if it supports the argument.") 1RP 208. Also, the prosecutor redirected the jury's attention to the court's instructions multiple times during closing, particularly when discussing Responde's credibility, where she pointed out that the instructions provided that "you alone are the sole judges of the credibility of each witness. You determine the value and weight to be given to each person's testimony. You alone." 1RP 215. The court's oral and written instructions were more than sufficient to eliminate any potential prejudice caused by the prosecutor's allegedly improper remarks. When the prosecutor's arguments are considered within the context of these instructions, there was no substantial likelihood that they affected the jury's verdict.

Davis contends that because the allegedly improper statements regarding the number of out-of-court statements Responde made and Davis' "bank hopping" behavior related to two

of the key issues in the case that they necessarily affected the jury's verdict. This argument is without merit, as it asks the court to disregard the relevant case law and evaluate the allegedly improper comments in isolation rather than considering them "in the context of the total argument, the issues in the case, the evidence addressed in the entire argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Davis also argues that, by failing to sustain defense counsel's objections regarding both of the allegedly improper statements, the trial court lent legitimacy the otherwise improper remarks, thereby increasing the likelihood that the comments affected the jury's verdict. This argument must also be rejected. As discussed above, the statements were not improper. But even if they were, the judge instructed the jury that any objections that they heard during trial should not influence them and that they were not to be concerned with the court's rulings regarding any objections. CP 30; 1RP 201. The jury is presumed to have followed these instructions, which required them to disregard the fact that defense counsel's objections during the State's closing were not sustained, and Davis has presented no evidence to the contrary. Furthermore, the fact that defense counsel did not move for a

mistrial when the comments were made strongly suggests that the comments did not appear prejudicial. Given the court's instructions to the jury, there is no substantial likelihood that the challenged arguments, even if improper, affected the verdict and Davis' arguments should be rejected.

D. CONCLUSION

Davis has not established that the prosecutor committed prejudicial misconduct during closing argument and rebuttal, therefore her conviction should be affirmed.

DATED this \_\_\_\_ day of August, 2013.

Respectfully submitted,

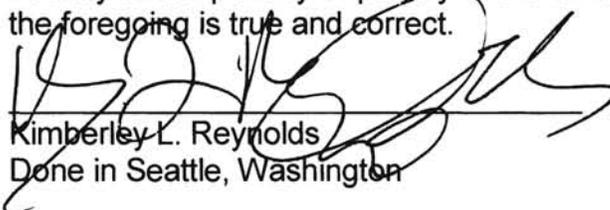
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Office WSBA #91002

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 Andrew Peter Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ANGEL DAVIS, Cause No. 69336-1-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.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

8/7/13  
Date