

69923-7

69923-7

NO. 69923-7-I

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

STATE OF WASHINGTON

Respondent

v.

JOHN J. BUCKO,

Appellant

RECEIVED
COURT OF APPEALS
DIVISION ONE
JAN 14 1993

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 3

 A. THE DEFENDANT WAIVED A CLAIM THE PROSECUTOR’S
 ARGUMENT CONSTITUTED MISCONDUCT WHEN HE DID NOT
 MAKE A CONTEMPORANEOUS OBJECTION. THE
 PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING
 ARGUMENT..... 3

 1. The Defendant Waived A Challenge To The Argument He Now
 Claims Was Misconduct. 5

 2. The Argument Did Not Misstate The Law..... 9

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN
 IT REFUSED TO CONTINUE SENTENCING IN ORDER FOR THE
 DEFENDANT TO OBTAIN A DOSA EVALUATION. 12

IV. CONCLUSION 16

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Bellevue v. Vigil</u> , 66 Wn. App. 891, 833 P.2d 445 (1992).....	12
<u>In re Littlefield</u> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	13
<u>Roberson v. Perez</u> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	8
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	10, 11
<u>State v. Cox</u> , 109 Wn. App. 937, 38 P.3d 371 (2002).....	9
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012) 6, 8, 9, 11, 12	
<u>State v. Fleming</u> , 83 Wn App. 209, 921 P.2d 1076, <u>review denied</u> , 131 Wn.2d 1018 (1997).....	6, 7
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010), <u>review</u> <u>denied</u> , 171 Wn.2d 1013 (2011).....	9
<u>State v. Jones</u> , 171 Wn. App. 52, 286 P.3d 83 (2012)	14
<u>State v. Keend</u> , 140 Wn. App. 858, 166 P.3d 1268 (2007), <u>review</u> <u>denied</u> , 163 Wn.2d 141 (2008)	7
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	10
<u>State v. Mabry</u> , 51 Wn. App. 24, 751 P.2d 882 (1983).....	10
<u>State v. Olson</u> , 19 Wn. App. 881, 578 P.2d 866 (1978).....	10
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026 (1996)	10
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	6
<u>State v. Price</u> , 33 Wn. App. 472, 655 P.2d 1191 (1982) <u>review</u> <u>denied</u> , 99 Wn.2d 1010 (1983).....	10
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert</u> <u>denied</u> , 523 U.S. 1008 (1998)	6
<u>State v. Tanzymore</u> , 54 Wn.2d 290, 786 P.2d 277 (1959)	10
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	9

FEDERAL CASES

<u>Victor v. Nebraska</u> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).....	9, 12
--	-------

WASHINGTON STATUTES

RCW 9.94A.640(1)	14
RCW 9.94A.640(b)	14
RCW 9.94A.660	12
RCW 9.96.660(3)	14

COURT RULES

RAP 2.5(a).....	8
RAP 2.5(a)(3)	8

OTHER AUTHORITIES

WPIC 4.01 4, 7, 10, 11

I. ISSUES

1. Did the defendant waive a claim of prosecutor misconduct in closing argument when he did not object to that argument at trial?

2. Did the prosecutor commit misconduct in closing argument by describing reasonable doubt as an “abiding belief” in the truth of the charge?

3. Did the trial court abuse its discretion when it denied the defendant’s request to continue the sentencing hearing to get a DOSA evaluation?

II. STATEMENT OF THE CASE

In April 2011 Patrick Ridgeway encountered the defendant, John Bucko, at a motel where they spent some time together. Mr. Ridgeway and the defendant are not friends, nor are they acquaintances. Later Mr. Ridgeway discovered that his driver’s license and credit card were missing from his wallet. Mr. Ridgeway thought that those documents had simply fallen out of his wallet because the wallet was deteriorated. He did not give the defendant

permission to have those items. 1 RP 47, 50¹.

On April 22, 2011 Trooper O'Connell was on duty and patrolling in the area of southbound I-5 near Mountlake Terrace when he stopped a blue Chevrolet S10 pickup truck because the driver was not wearing a seatbelt. The driver, later identified as the defendant, gave Trooper O'Connell Mr. Ridgeway's driver's license in order to identify himself. Because Mr. Ridgeway and the defendant bore a resemblance to each other the trooper did not question the identification. Trooper O'Connell conducted a DUI investigation, ultimately concluding the defendant was not impaired. Instead the trooper issued the defendant several infraction notices in Mr. Ridgeway's name. 1 RP 26-33, 37.

On May 14, 2011 Officer Ciri from the Portland Police Department arrested the defendant. The defendant identified himself using Mr. Ridgeway's driver's license. Officer Ciri referred to the defendant as Mr. Ridgeway throughout their contact. Mr. Ridgeway's driver's license was returned to the defendant after he was released from custody in Oregon. 1 RP 58-63.

¹ The record consists of four volumes designated as follows: 1 RP (trial 1-22-13), 2 RP (supplemental verbatim report of proceedings containing portion of the trial conducted between 11:39:15 a.m. and 13:55:00 p.m. on 1-22-13 prepared and filed August 22, 2013), 3 RP (that portion of the trial on 1-22-13 prepared and filed October 2013), 4 RP (sentencing 1-24-2013).

Mr. Ridgeway went to the Department of Licensing to replace the license he thought that he had lost. There he learned that an infraction notice that he had not received had been issued in his name and that his license was going to be suspended. Mr. Ridgeway contacted Trooper O'Connell. Upon face to face contact Trooper O'Connell realized that Mr. Ridgeway was not the person that he had stopped and issued infraction notices to on April 22, 2011. 1 RP 34-35, 49.

The defendant was charged by amended information with one count of second degree identity theft. The jury found the defendant guilty of the charge. The trial court sentenced the defendant within the standard range.

III. ARGUMENT

A. THE DEFENDANT WAIVED A CLAIM THE PROSECUTOR'S ARGUMENT CONSTITUTED MISCONDUCT WHEN HE DID NOT MAKE A CONTEMPORANEOUS OBJECTION. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Prior to being selected the judge gave the jury instructions.

In part the court instructed the jury

A reasonable doubt is one for which a reason exists. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an

abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

3 RP 5-6 (emphasis added).

The State proposed a reasonable doubt jury instruction that stated in part “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” 2 CP ___ (sub 27, WPIC 4.01). The defendant proposed a reasonable doubt instruction that was identical to the State’s proposed instruction except that it did not include the “abiding belief” language. 1 CP 58. The court gave the defense proposed reasonable doubt instruction. It acknowledged that it had already instructed the jury on reasonable doubt using the abiding belief language, but reasoned that the written instruction accurately stated the law. 1 RP 71-72. The trial court did not order the prosecutor to refrain from discussing reasonable doubt in terms of the abiding belief language.

In closing the prosecutor argued in part

One way to describe what beyond a reasonable doubt is if you have an abiding belief in the truth of the charge, does the fact that three separate witnesses who have no connection who all came and testified separately, if you’re convinced that that evidence is credible, if you have an abiding belief in that evidence, then you are satisfied beyond a reasonable doubt. Few things in life we know with absolute

certainty. The law doesn't require it. It does require, however, you have an abiding belief in the truth of this charge.

1 RP 89-90.

The defense did not object to this argument. Instead defense counsel argued

You, in your jury instructions, you'll be given or you have been given have the definition of reasonable doubt. And like Mr. Hendrix, I don't mean to belabor it, but I would note Mr. Hendrix added a bunch of language to reasonable doubt that you won't see in your instructions. It's one for which reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.

1 RP 93.

The defendant now argues that the prosecutor committed misconduct by misstating the burden of proof. He argues that despite his failure to object he may raise the issue for the first time on appeal.

1. The Defendant Waived A Challenge To The Argument He Now Claims Was Misconduct.

If the defendant has not objected to the alleged misconduct the issue is waived unless the misconduct is so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State

v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008 (1998), State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

The defendant argues that he did not need to simultaneously object because he had relied on the trial court's earlier ruling, citing State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Powell dealt with whether the defendant was required to object to admission of evidence during trial when the trial court had ruled on the admissibility of that evidence in pretrial hearings, in order to preserve a claim of error in admission of that evidence on appeal. The Court was not concerned with a claim of prosecutorial misconduct in closing argument. Because the Court has articulated a different standard for determining when a claim of prosecutor misconduct may be considered for the first time on appeal, Powell does not support the defendant's position that he is entitled to raise this issue despite his failure to object at trial.

Alternatively the defendant argues the prosecutor's argument was "flagrant" so that he may still raise the issue despite his lack of objection. To support this claim the defendant points to the trial court's ruling on jury instructions. He relies on State v. Fleming, 83 Wn App. 209, 213, 921 P.2d 1076, review denied, 131

Wn.2d 1018 (1997). In Fleming this Court held a prosecutor's closing argument met the "flagrant and ill-intentioned" standard for review in the absence of a contemporaneous objection when it had previously held that same argument was improper in an opinion published two years before the argument had been made. Id. at 214.

In contrast the prosecutor here had every reason to believe that the abiding belief argument was permissible, despite the trial court's decision not to include that optional language in its written instructions to the jury. The trial court had already given that instruction orally to the jury.² As discussed below, appellate courts have repeatedly stated that definition is a correct statement of the law. Finally, when the trial court ruled that it would not include the optional language in WPIC 4.01 it did not rule that the prosecutor would be barred from arguing reasonable doubt in terms of the abiding belief language. Nor did the defendant bring a motion to preclude the prosecutor from arguing that language. The trial

² The defendant's argument that the prosecutor reference to the court's earlier instruction was evidence of a "blatant attempt to confuse the jury" should be rejected. The jury is presumed to follow all of the court's instructions. State v. Keend, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 141 (2008). The court's preliminary instructions to the jury on reasonable doubt were as valid as its written instructions given prior to closing argument.

court's decision to exclude the optional abiding belief language from the jury instruction did not transform reasonable doubt under the law of the case as the defendant argues. BOA at 12.³ Under these circumstances the prosecutor's argument was neither flagrant nor was it ill-intentioned.⁴

The defendant also cites RAP 2.5(a) as a basis to permit him to raise this issue for the first time on appeal. Under that court rule a court may consider a claim of error for the first time on review if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). He provides no argument to support using this standard rather than the enduring and resulting prejudice standard the Supreme Court has recently reaffirmed for claims of prosecutorial misconduct. Emery, 174 Wn.2d at 762. The court should decline to consider whether RAP 2.5(a) provides authority for him to raise this issue for

³ The defendant argues that the trial court's decision to omit the optional language from WPIC 4.01 became the law of the case. BOA at 12. The law of the case is a "broad rubric referring to three distinct doctrines" involving the law to be applied in a case during and after appellate review. Roberson v. Perez, 156 Wn.2d 33, 49, 123 P.3d 844 (2005). The defendant does not explain why this doctrine should apply in the context of a trial court's ruling on jury instructions.

⁴ The Supreme Court most recently stated that reviewing courts should focus less on whether the prosecutor's conduct was flagrant and ill-intentioned and more on whether the resulting prejudice could have been cured. Emery, 174 Wn.2d 762. Because the challenged argument has been approved as a correct statement of the law, the State will not address the prejudice prong of this analysis.

the first time on appeal. State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002).

2. The Argument Did Not Misstate The Law.

In order to prove a claim of prosecutor misconduct the defendant bears the burden to prove that the prosecutor's conduct was both improper and prejudicial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). Both improper conduct and resulting prejudice must be established in order to be entitled to a new trial. Emery, 174 Wn.2d at 756.

Due Process requires that a jury be instructed that the State bears the burden of proof beyond a reasonable doubt. Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). There is no requirement that instruction take any particular form. Id.

A prosecutor's argument is improper if it misstates the law. Emery, 174 Wn.2d at 759-60. Thus an argument that shifted the burden of proof while discussing the reasonable doubt instruction was error. Id. Conversely, when the prosecutor's arguments are a correct statement of the law, those arguments do not constitute misconduct. State v. Johnson, 158 Wn. App. 677, 683-84, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011).

The challenged argument derives from a portion of the standard instruction on reasonable doubt which trial judges have the option to include or omit. See comments to WPIC 4.01. That portion of the instruction has been repeatedly approved as a correct statement of the law. State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996), State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1983), State v. Price, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982) review denied, 99 Wn.2d 1010 (1983), State v. Lane, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989), State v. Tanzymore, 54 Wn.2d 290, 291, 786 P.2d 277 (1959). In one case this Court recommended the language the defendant here takes issue with. State v. Olson, 19 Wn. App. 881, 884-85, 578 P.2d 866 (1978), reversed on other grounds, 92 Wn.2d 134 (1979).

The Supreme Court approved WPIC 4.01 and specifically directed trial courts to use that instruction when instructing jurors on the State's burden of proof. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). That instruction includes the optional abiding belief language which the prosecutor argued to the court. Because the prosecutor's discussion regarding reasonable doubt in terms of an abiding belief in the truth of the charge was a correct

statement of the law, the prosecutor did not commit misconduct. The defendant's claim that he is entitled to a new trial on that basis should fail.

The defendant acknowledges that the Court in Bennett approved WPIC 4.01 without comment on whether the optional abiding belief in the truth of the charge language should be omitted. BOA at 8-9. However he argues the Court's decision in Emery demonstrates that argument was erroneous. In Emery the prosecutor's closing argument referred to the Latin translation for verdict, i.e. "to speak the truth." The prosecutor then argued that jurors should "speak the truth" by convicting the defendant of the charged crimes. Emery, 174 Wn.2d at 751. The Supreme Court found the "speak the truth" argument was improper because it misstated the jury's role. "The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.' Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Id. at 760.

The prosecutor's argument here did not urge jurors to seek the truth. Rather it discussed the level of certainty they must have based on the evidence presented to them in order to be satisfied

beyond a reasonable doubt. The Court found similar language did not diminish the State's burden of proof in Victor v. Nebraska, 511 U.S. at 21. Thus, Emery does not support the contention that the prosecutor's argument diminished the State's burden of proof.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO CONTINUE SENTENCING IN ORDER FOR THE DEFENDANT TO OBTAIN A DOSA EVALUATION.

The defendant next argues that the trial court abused its discretion when it refused to grant him a DOSA sentence pursuant to RCW 9.94A.660. However, the defendant did not ask the court to grant him a DOSA sentence. Rather he asked the court to continue the sentencing hearing in order to obtain an evaluation so that the court could decide whether to impose a DOSA. 4 RP 2. The State opposed the motion to continue sentencing in part because the sentencing had been set shortly after the verdict at the defendant's request, and his criminal history did not favor imposition of that sentence alternative. 4 RP at 2-3.

The trial court's decision to grant or deny a request for continuance is reviewed for an abuse of discretion. Bellevue v. Vigil, 66 Wn. App. 891, 892, 833 P.2d 445 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable

or based on untenable grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard

Id. at 47.

Here the trial court articulated the reasons for denying the motion to continue sentencing. First, based on information from the Department of Corrections, DOSA sentences were not as valuable for offenders who committed non-drug crimes as for those who had committed drug crimes. Second, the defendant had an extensive criminal history which the trial judge believed warranted a prison sentence. 4 RP 3-4.

The defendant was not convicted of a drug crime. The judgment and sentence shows the defendant had eleven prior convictions, including three prior convictions for second degree robbery and "quite a few misdemeanors". 4 RP 7; 1 CP 16. Since the defendant's original request for quick sentencing had been granted, and the trial court was unlikely to grant a DOSA even if an evaluation had been performed in light of the circumstances the

court articulated, it did not abuse its discretion when it denied the motion to continue for a DOSA evaluation.

The decision to deny a motion to continue sentencing so that the defendant could be evaluated for a DOSA sentence is not the same as a decision to grant or deny that sentencing alternative. Even if an evaluation had been performed, the trial judge still had the discretion to deny a DOSA sentence if he did not believe the evaluation established the defendant's eligibility for that alternative sentence. Whether that alternative is imposed is based on the trial court's determination that (a) the offender meets the criteria set out in RCW 9.94A.640(1) and (b) that the alternative sentence is appropriate. RCW 9.96.660(3). Even if the offender meets the statutory criteria, the trial court may still find that sentence is not appropriate after a consideration of the facts and circumstances of the individual case.

In one case the Court of Appeals found no abuse of discretion when the trial court refused to grant the defendant's request for a DOSA even though he met the statutory criteria to request that sentence. State v. Jones, 171 Wn. App. 52, 55, 286 P.3d 83 (2012). Like the trial court here, the court in Jones had considered the defendant's criminal history, whether he would likely

benefit from treatment, and whether the defendant and the community would benefit from a DOSA sentence. Id. Thus, even if the trial court's decision here could be characterized as one denying the DOSA sentence, the trial court did not abuse its discretion because it was based on the same tenable reasons for denying the motion to continue sentencing so that he could be evaluated for that alternative.

The defendant states that the trial court acknowledged that he qualified for that sentence alternative. He then takes statements made by the trial judge out of context to argue that the trial court's decision to deny him a DOSA was an abuse of discretion because it was based on the defendant's exercise of his constitutional right to have a trial.

The trial court did not acknowledge that the defendant qualified for a DOSA. The trial court did acknowledge that there likely would have been no opposition to delaying the sentence hearing in order for him to get an evaluation had he pled guilty. In light of that a judge would likely have granted the continuance. 4 RP 10. These were not the only comments the trial judge made regarding the reasons for denying a DOSA sentence. The trial judge went on to state that he considered the defendant's 20 year

history of committing crimes, a history “that’s unabated and unending notwithstanding substantial commitments to prison,” and the impact on Mr. Ridgeway, to justify the high end sentence. Those reasons also led the court to conclude that a DOSA sentence was not appropriate. 4 RP 11. Those reasons were tenable grounds on which to deny a DOSA sentence. The trial court did not abuse its discretion in sentencing the defendant.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant’s conviction and sentence.

Respectfully submitted on October 25, 2013.

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