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Court of Appeals
Division I
State of Washington

72004-0

NO. 72004-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD A. GRANT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A: ISSUES

1. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that an instruction could not have cured any prejudice. In the second trial (count 2), defense argued in closing that the State should have provided more evidence. In rebuttal, the prosecutor argued that the defense argument was not reasonable and prefaced part of the argument with, "So if you want to follow defense down Alice's rabbit hole." Defense did not object and the jury was correctly instructed to base their decision on the evidence and the law. Has Grant failed to show that the prosecutor's brief remark was improper or so flagrant and ill-intentioned that it could not have been cured by an instruction?

2. A prosecutor may not argue that in order to acquit the defendant the jury must find that a witness lied. In rebuttal closing argument in the first trial (count 1), the trial fellow argued that the only way the evidence was insufficient was if the jury found that the deputy had lied. He made a similar argument twice more. Defense objections were sustained each time and, after the third sustained objection, the trial court provided a brief instruction to the jury to

disregard the argument. The trial court denied a motion for a mistrial. Has the State properly conceded that reversal is required because there is a substantial likelihood the misconduct affected the verdict and the instruction did not cure the prejudice?

3. The State dismissed count 3, yet it was included in Grant's offender score at sentencing. Remand is necessary to correct the offender score and to resolve count 1, which the State has conceded should be reversed. Should Grant's case be remanded to resolve count 1 and for resentencing on count 2?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Richard A. Grant by amended information with three counts of possession of a controlled substance, methamphetamine: count 1 occurred on April 17, 2013; count 2 occurred on May 23, 2013; and count 3 occurred on May 25, 2013. 1RP¹ 10-11; CP 7-10. The counts were severed for trial and the Honorable Jeffrey Ramsdell presided over the jury trial on count 1, at which Grant was found guilty. 1RP 3, 5; 5RP 23; 6RP 105-08. Judge Ramsdell then presided over the jury trial for count 2, and

¹ The State adopts the Appellant's method of referring to the verbatim report of proceedings. Br. of App. at 1.

Grant was again found guilty. 7RP 2; 11RP 76-79. The State dismissed count 3. CP 35.

At sentencing, Grant's offender score was calculated as "10" to include his prior convictions and counts 1, 2, and 3 as current offenses, although the State had dismissed count 3. 12RP 35; CP 56, 61. The trial court sentenced Grant to concurrent standard range sentences of 20 months. CP 58.

2. SUBSTANTIVE FACTS FROM THE TRIAL OF
COUNT 1.

On April 17, 2013, King County Sheriff's Deputy Robert Nishimura stopped a vehicle on Vashon Island for failing to signal properly prior to making a turn. 6RP 6, 13, 16. Nishimura approached the vehicle on the passenger side and recognized the passenger as Richard Grant. 6RP 22-23. Nishimura knew that Grant had an active warrant for his arrest. 6RP 23. Nishimura confirmed the warrant and arrested Grant. 6RP 24.

Nishimura searched Grant incident to arrest and found 3.5 grams of suspected methamphetamine in a container in Grant's left jacket pocket. 6RP 25. He also found a scale and glass pipe of the type commonly used to smoke methamphetamine in Grant's pocket. 6RP 26. Grant told Nishimura he had purchased the

methamphetamine in West Seattle for \$60. 6RP 26. Chemical analysis later confirmed that the substance from Grant's pocket was methamphetamine. 5RP 28-30.

3. CLOSING ARGUMENT AND THE MOTION FOR A MISTRIAL IN THE TRIAL OF COUNT 1.

Two attorneys represented the State at Grant's two trials; one was a deputy prosecutor and one was a trial fellow.² 1RP 3; 7RP 7. The trial fellow delivered the closing and rebuttal arguments on behalf of the State in the trial of count 1 (the first trial). 5RP 23; 6RP 56. In closing argument, Grant's counsel argued that the testimony of one police witness was insufficient to convict Grant. 6RP 60-61, 68. He suggested that the officer may have misrepresented the facts or set Grant up:

You might say, you know, well, why would this officer implicate Mr. Grant if it weren't true? Well, first of all, it's not my job to tell you that. I will tell you that a most miniscule familiarity with history will tell you that it happens. And when it happens, jurors don't know it's happening. . . . I can't tell you necessarily why someone would set someone up. I can tell you this, though, we don't know what happened. They didn't provide evidence.

6RP 74.

² A trial fellow is a private attorney who works as a King County deputy prosecutor for a short period of time. See 7RP 7.

In rebuttal argument, the trial fellow argued that the officer's testimony was sufficient evidence. 6RP 82. He continued:

The only way for you to determine that that's not sufficient evidence to convict this evidence [sic] is if you believe that the defendant – I apologize, if you believe the deputy was lying when he took the stand.

6RP 83. Defense objected; the trial court sustained the objection and instructed counsel to rephrase. 6RP 83. A short while later, the trial fellow made the same argument, stating, "The only way you can break that link between those drugs and that defendant is if you find that Deputy Nishimura was lying." 6RP 84-85. The trial court again sustained a defense objection. 6RP 85.

Near the end of rebuttal, the trial fellow repeated the argument: "And the only way you find that link broken between his testimony and those drugs and that defendant is if you find that he wasn't truthful." 6RP 86. Defense counsel again objected, asked that the statement be stricken, and stated, "He can't keep talking about that." 6RP 86. The trial court responded, "I will sustain, counsel, and instruct the jury to disregard that portion of the argument that pertains to that being the only way they could acquit the defendant." 6RP 87.

After the jury was excused to deliberate, the trial court admonished the trial fellow that there was “an abundance of case law” that it is misconduct to argue to the jury that the only way to acquit the defendant is to find a particular witness not credible. 6RP 92. Defense requested a mistrial. 6RP 92. Prior to ruling on the mistrial, the trial court explained that it felt that the State’s argument went beyond refuting defense counsel’s argument. 6RP 94. The trial court agreed to allow the State and defense to consider the issue of a mistrial over the lunch recess. 6RP 95.

After the lunch recess, the State provided relevant case law regarding the improper argument and deferred to the court on the mistrial. 6RP 96. The trial court denied the mistrial because: 1) the argument was a response to defense’s argument and there was not any misconduct, 2) the jury had been instructed that it determined credibility so it did not matter what the lawyers had argued, and 3) there would be no benefit to Grant in a retrial as that would allow the prosecution the opportunity to address weaknesses in its case. 6RP 101-02. Lastly, the trial court reasoned that the instruction it provided to the jury distinguished this case from the appellate cases where the courts had not had an opportunity to correct the error. 6RP 102.

4. SUBSTANTIVE FACTS FROM THE TRIAL OF
COUNT 2.

On May 23, 2013, King County Sheriff's Deputies Jeff Hancock and Joel Anderson went to Grant's home to arrest him on an outstanding warrant. 10RP 25, 32; 11RP 8. The previous day, a court had dismissed a different drug possession case involving Grant and both deputies. 10RP 25, 34, 56-58; 11RP 16. The deputies decided to use the ruse of congratulating Grant on getting his case dismissed in order to entice Grant to step out of his home. 10RP 34.

Hancock knocked on Grant's door and Grant's girlfriend answered. 10RP 35. Hancock told her that he was there to congratulate Grant on "beating" the case. 10RP 35. Grant came to the door and stepped outside to speak to Hancock. 10RP 35. They spoke briefly and Hancock placed him under arrest for the warrant. 10RP 35. The deputies searched Grant incident to arrest and located suspected methamphetamine in a tin in Grant's upper right shirt pocket. 10RP 36; 11RP 11-13. A glass pipe of the kind commonly used to smoke narcotics was secured to the tin with rubber bands. 6RP 36.

After Grant was read his Miranda³ rights, he offered to wear a wire and purchase drugs for the deputies if they returned his drugs and apologized to him for arresting him on a “fake” warrant. 10RP 51-52. Grant also said that he felt it was his constitutional right to possess methamphetamine. 10RP 53. Chemical analysis later confirmed that the substance the deputies found in Grant’s pocket was methamphetamine. 10RP 81-82.

5. CLOSING ARGUMENT IN THE TRIAL OF COUNT 2.

The deputy prosecutor delivered the closing and rebuttal arguments in the trial of count 2 (the second trial). 11RP 40, 67. The prosecutor argued that the deputies’ testimony, Grant’s statements, and the chemical analysis established beyond a reasonable doubt that Grant was guilty. 11RP 40-44.

Grant’s counsel delivered a fairly lengthy closing argument, arguing that the deputies’ testimony was insufficient and that the State should have provided additional corroborating evidence. 11RP 45-66. He argued that the State had not proved its case because they did not present other evidence, such as photographs, recordings of Grant’s statements, fingerprints, or DNA. 11RP 51-54. Grant’s counsel argued that the deputies’ testimony was

³ Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

flawed because it hinged on their credibility and that people are not very good at ascertaining credibility. 11RP 54. He continued that sometimes people fabricate, but that risk could be avoided if the State had provided corroborating evidence. 11RP 55.

In rebuttal, the prosecutor responded by arguing that the defense argument was not reasonable. 11RP 67. He argued that additional evidence was not necessary to prove the elements of the case. 11RP 71. The prosecutor continued, "So if you want to follow the defense down Alice's rabbit hole and start thinking about all the possible things that could have been provided, you are going to be looking at an infinite number of possibilities, none of which are reasonable." Defense counsel did not object. 11RP 72. Finally, the prosecutor argued that the State had provided sufficient evidence to convict Grant. 11RP 72.

C. ARGUMENT

1. THE DEPUTY PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT IN REBUTTAL CLOSING ARGUMENT IN THE TRIAL OF COUNT 2.

Grant contends that the prosecutor's isolated comment in rebuttal closing argument stating, "So if you want to follow the defense down Alice's rabbit hole," was misconduct and requires reversal. 11RP 70. Because the comment was not improper in

context and any prejudice could have been cured by an instruction, Grant's claim fails.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Failure to object waives any error, unless the misconduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice. Emery, 174 Wn.2d at 760-61. A defendant must show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). "A prosecutor can certainly argue that the evidence does not support the defense theory." State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). In responding to defense counsel's arguments, a prosecutor may use language that is "strong, but fair."

State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997) (not misconduct for prosecutor to characterize defense theory as “ludicrous” because evidence supported that characterization).

Yet a prosecutor may not argue in a manner that impugns the role of defense counsel. Lindsay, 180 Wn.2d at 431-32. A prosecutor commits misconduct by referring to defense counsel’s arguments in a manner that implies deception and dishonesty. Id. at 433 (misconduct to refer to defense counsel’s argument as a “crock,” as it implies dishonesty and is a shortened version of an explicit phrase); see also State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (misconduct to refer to defense counsel’s argument as “sleight of hand” and “bogus”).

On review, the prosecutor’s remarks are viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Generally, improper arguments in rebuttal do not warrant reversal if made in response to defense counsel’s argument, unless an instruction could not have cured any prejudice. State v. Weber, 159 Wn.2d 252, 276-78, 149 P.3d 656 (2006).

Here, the context of the argument shows that the prosecutor's comment did not disparage defense counsel's role, but simply responded to the defense argument. The prosecutor responded to Grant's counsel's argument that the State should have provided other evidence, such as DNA or fingerprints. 1RP 57, 61-63. The prosecutor recounted the items defense claimed the State should have produced as evidence and explained why each was unnecessary to prove the case. 11RP 71-72. The prosecutor also responded to defense's contention that the State would respond in rebuttal by arguing that had the State produced other evidence, defense would claim it was insufficient. 11RP 59.

The prosecutor argued:

So defense is right in many ways when he says that the State's going to respond by claiming well, if we did provide this evidence, the defense would be asking for more. That's absolutely true. That's absolutely what would be happening.

So if you want to follow the defense down Alice's rabbit hole and start thinking about all the possible things that could have been provided, you are going to be looking at an infinite number of possibilities, none of which are reasonable in the circumstances.

What you should be worried with in this case is the evidence that has been presented, the fact that you have the actual methamphetamine, the container, the meth pipe, all of which were taken from the defendant

on that day. There is no reason to doubt the credibility of the officers. . . .

The fact of the matter is that all of the evidence that's been presented firmly establishes that [Grant] possessed these drugs, establishes it beyond a reasonable doubt.

11RP 72-73.

The context of the entire rebuttal argument shows that the prosecutor was simply responding to and characterizing defense counsel's argument. The reference to "Alice's rabbit hole," while colorful, referred to the *defense argument* not to *defense counsel*. The reference did not impugn defense counsel's integrity by implying deception or deceit. Instead, the prosecutor simply argued that the defense argument regarding necessary evidence was not reasonable.

Grant compares this brief comment to the prosecutor's much more extensive, explicit argument in State v. Warren. Such a comparison fails. In Warren, the prosecutor directly referred to defense counsel's role and said that the "number of mischaracterizations" in defense counsel's argument were "an example of what people go through in a criminal justice system when they deal with defense attorneys." 165 Wn.2d 17, 29, 195 P.3d 940 (2008). The prosecutor also stated defense counsel's

argument was a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” Id.

By contrast, the prosecutor in this case did not imply any deception on the part of defense counsel or directly comment on defense counsel's role. The comment was isolated and referred only to the defense argument. It was not improper.

Moreover, Grant did not object and any prejudice could have been cured by a jury instruction. Grant's reference in his brief to overruled objections to this comment is incorrect, as those objections did not relate to this comment. Br. of App. at 24. Far more extensive improper arguments have been found curable by an instruction. See e.g. Warren, 165 Wn.2d at 30 (prosecutor's comments on defense counsel's role did not require reversal); Thorgerson, 172 Wn.2d at 452 (any prejudice from prosecutor's remarks that defense counsel's argument was “bogus” and “sleight of hand” could have been cured by an instruction).

Similarly, here, an instruction could have cured any prejudice. The jury was also correctly instructed that the lawyers' remarks were not evidence and that the jury should base its decision on the evidence and law as provided in the instructions.

CP 39-40. The jury is presumed to follow the court's instructions. Warren, 165 Wn.2d at 28. Thus, the prosecutor's brief comment in rebuttal does not require reversal of Grant's conviction for count 2.

2. THE STATE CONCEDES THAT REVERSAL OF
COUNT 1 IS REQUIRED.

Grant contends that the trial fellow committed misconduct in rebuttal closing argument of the trial on count 1 by arguing that the only way for the jury to find the evidence insufficient to convict was if it found that the deputy had lied. Because the argument could have substantially affected the verdict and the trial court's instruction did not adequately cure the potential prejudice, the State concedes that count 1 should be reversed.

A prosecutor may not argue that in order to acquit a defendant, the jury must find that the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); see also State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (misconduct for prosecutor to argue that to find the defendant not guilty the jury had to completely disbelieve the officers' testimony). Such an argument is flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214; In re Personal Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d

673 (2012). The argument misstates the law, the role of the jury, and the burden of proof. Fleming, 83 Wn. App. at 213. The jury does not have to find anything in order to acquit the defendant; it must find the defendant not guilty unless it finds that the State proved the elements of the charged crime beyond a reasonable doubt. Id.

The cumulative effect of a repeated improper argument may overwhelm the power of an instruction to cure its prejudicial effect. Glasmann, 175 Wn.2d at 707. Statements made in rebuttal argument have a potentially greater prejudicial effect because these are the last words the jury hears prior to deliberations. Lindsay, 180 Wn.2d at 443.

Here, the prosecutor's statements in rebuttal likely affected the jury's verdict because the improper arguments misstated the burden of proof and were not cured by the instruction. The improper arguments were at the beginning, middle, and end of the rebuttal argument. 6RP 83-86. Only after the third sustained objection did the trial court instruct the jury to "disregard that portion of the argument that pertains to that being the only way they could acquit the defendant." 6RP 87.

The trial court's instruction did not cure the prejudice from the prosecutor's improper arguments because it did not address that the State had the burden of proof and instruct the jury that it did not have to find anything in order to acquit the defendant. The trial court simply told the jury to disregard the argument.

The case also depended solely on Deputy Nishimura's testimony. He found the methamphetamine on Grant. In this short case, with only two witnesses and Deputy Nishimura the only witness to connect the drugs to Grant, the argument could have unfairly swayed the jury. Thus, there is a substantial likelihood that the repeated improper argument, which the jury heard immediately prior to deliberations, affected the verdict.

Moreover, the trial court abused its discretion by denying Grant's motion for a mistrial. In deciding whether to grant a mistrial, the trial court must consider: 1) the seriousness of the trial irregularity, 2) whether it involved cumulative evidence, and 3) whether the jury was properly instructed to disregard it. Emery, 174 Wn.2d at 765. A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. Id. A trial court abuses its discretion when its decision is based on untenable grounds or

made for untenable reasons or if it was based on an incorrect legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

Here, Grant timely moved for a mistrial due to the misconduct. 6RP 92-95. The State did not object and provided the trial court with the controlling authority of Fleming, 83 Wn. App. at 213-14. 6RP 96, 100, 102. Regardless, the trial court denied the motion for a mistrial:

I am disinclined to grant the motion for mistrial for a couple of reasons. Number one, although maybe it wasn't the most elegant way to attack the defense's argument, I think [he] was doing his best to try and counter what was said So I am not finding that there is any real misconduct here.

And to the extent that there is any concern in light of these cases like Fleming, it's clear to this jury that the question is, is the evidence sufficient, and the sufficiency of the evidence is going to be determined by the credibility of the one officer who's really the only guy who's testifying to everything, as pointed out by the defense.

So I don't think there is any harm, in all honesty because the jury knows that the credibility calls are theirs to make, and I said over and over again that as much as I like you guys, the stuff that you have to say doesn't really much matter, because the evidence is what they hear from the witnesses and the law is what they get in the instructions.

So I don't think there is really any intentional misconduct
. . . .

And last but not least, there is no real benefit to be gained by granting a mistrial and doing it all over again. And if anything, there would be a potential downside to the defense, because the few things that the State might be able to put together in the next trial would not necessarily be helpful.

6RP 100-02.

The trial court abused its discretion because its conclusion that the misconduct was cured by the jury instruction to disregard the argument is not supported by the record. The trial court's instruction did not address the true impropriety of the argument—that it misstated the burden of proof. 6RP 87 (“[D]isregard that portion of the argument that pertains to that being the only way they could acquit the defendant.”). The trial court also applied an incorrect legal standard in concluding that Grant had nothing to gain from a mistrial because the State could address any weaknesses in its case prior to a retrial.

In addition, the trial court's own conclusion and statements to the prosecutor that there was “an abundance of case law” prohibiting the arguments and that the prosecutor went beyond simply responding to the defense's closing argument, undercut its ultimate conclusion that there was no “real misconduct” and that the prosecutor was simply countering defense's argument. 6RP 92-94,

100-01. Because the improper argument was substantially likely to have affected the jury's verdict and was not cured by the instruction, the trial court abused its discretion in denying the mistrial. Reversal of count 1 is required.

3. REMAND IS REQUIRED FOR RESENTENCING.

Grant correctly asserts that the offender score mistakenly included count 3, which the State dismissed. Because the State also concedes that count 1 should be reversed, remand is required so that the trial court may resolve count 1 and sentence Grant based on the correct offender score.

A defendant may challenge a miscalculated offender score for the first time on appeal. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). The appellate court reviews such an error de novo. Id.

A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. In re Personal Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). If the defendant was sentenced based on an incorrect offender score and standard range, resentencing is required unless the court clearly would have imposed the same sentence despite the error. Parker, 132 Wn.2d at 192; see also

In re Personal Restraint of Toledo-Sotelo, 176 Wn.2d 759, 766, 297 P.3d 51 (2013) (error in offender score did not render judgment and sentence facially invalid because court imposed sentence based on correct standard range).

Here, the State dismissed count 3, yet it was included in Grant's offender score of "10" on the judgment and sentence. CP 56, 61. Because the State has also conceded that count 1 should be reversed, remand is required so that count 1 can be resolved and the court can sentence Grant. CP 56.

Grant's correct standard range is "8," which excludes count 1 and count 3. CP 56, 61. His standard range remains 12 months plus 1 day to 24 months.⁴ CP 81. Although Grant's standard range will remain the same, resentencing is required because it is not clear that the trial court would have imposed the same sentence for count 2 alone. 12RP 29-32; CP 81.

⁴ RCW 69.50.4013 provides that possession of methamphetamine is a seriousness level I offense. RCW 9.94A.517 is the drug offense sentencing grid, which states that an offender score greater than 6 for a seriousness level I offense results in a standard range of 12+1 day to 24 months.

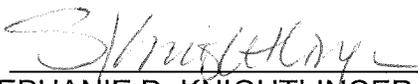
D. CONCLUSION

For the foregoing reasons, Grant's conviction for count 2 should be affirmed, count 1 should be reversed, and Grant's case remanded for resentencing based on the correct offender score and to resolve count 1.

DATED this 15th day of June, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Steed, the attorney for the appellant, at Steedj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Richard Arthur Grant, Cause No. 72004-0, 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.

Dated this 1st day of June, 2015.

U Brame

Name:

Done in Seattle, Washington