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Court of Appeals
Division I
State of Washington

NO. 72912-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKARY A. HOEG,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Did the prosecutor commit error by asking the jury to hold the defendant accountable for his actions, after the defendant testified that he intended to take clothes and blankets but didn't want to be "held responsible" for taking anything of value? See 4RP 178-180.¹

2. Did defense counsel's decision not to object to the prosecutor's closing argument constitute ineffective assistance of counsel, when there were valid strategic considerations for withholding the objection and any potential prejudice was cured by the court's instructions?

II. STATEMENT OF THE CASE

A. THE CRIME.

On March 7, 2014, the defendant was walking through a wooded area behind a residential neighborhood in Marysville, when he came upon the back yard of a home owned by Kirsten Zenie. 4 RP 174-176.

The home had been owned by Ms. Zenie's parents for more than 50 years, but her mother and father passed away in 2009 and

¹ The verbatim report of proceedings is referenced using the same conventions adopted by the Appellant, as follows: 1RP = 5/9/14; 2RP = 9/18/14; 3RP = 9/22/14 (voire dire and opening statements); 4RP = three consecutively paginated volumes consisting of 9/22/14, 9/23/14, 9/24/14, 12/3/14.

2011, respectively. The home sits on a five acre wooded parcel - the only remaining parcel of that size in a neighborhood surrounded by more recently subdivided plots and newer homes. As executor of her parents' estate, Ms. Zenie had maintained the home and ensured that the utility bills and taxes were paid. The most recent tenant of the home was her brother, who lived in the home during 2012. Ms. Zenie visited the home at least once a month, but up to three times a week, attempting to sort through more than 50 years' worth of belongings accumulated throughout her family's time in the home. 4RP 95-97. Although unoccupied in 2014, the home contained a high volume of contents her parents left behind, including financial documents with bank account numbers, credit card numbers, and Social Security numbers. Id. The home was protected by an alarm system and there were multiple signs posted on the property indicating as much. 4RP 99, 102. Ms. Zenie did not know the defendant and did not give him permission to be on the property, much less enter the home or take from its contents. 4RP 104-105.

The defendant spent twenty to thirty minutes examining the house from the outside, trying to determine if anyone lived there or if anyone was home. He knocked on the doors, rang the doorbell,

and received no response. He looked through a window and thought the inside looked "like a mess." He noticed that the grass hadn't been mowed recently and determined that the house was unoccupied. 4RP 176-178. The defendant was cold and was wearing dirty clothes, and he hoped that the house might contain something warmer to wear or a blanket he could use at night. The defendant kicked in the front door to Ms. Zenie's home with the intent of finding clothes and a blanket to take for his own personal use. 4RP 178-180.

The kicked-in door set off the burglar alarm, so the defendant ran away from the house instead of going inside. 4RP 180. The alarm company called Ms. Zenie, who determined that no one should be there. She asked the alarm company to call the police. 4RP 99.

Marysville police officer Wood responded to the home after confirming with Ms. Zenie by phone that no one should be there. He was already familiar with the residence, having responded to a few prior false alarms at the location. 4RP 45-46. He arrived at the house within a couple of minutes and positioned his patrol vehicle to observe two sections of the property. 4RP 50-51. Officer Wood soon noticed the defendant leaving the back portion of the property

walking eastbound, but when the defendant looked directly at him the defendant changed course, heading southbound at a brisk pace. 4RP 52. Backup officers arrived shortly, allowing Officer Wood to approach the defendant and detain him for investigation of residential burglary. 4RP 53.

Meanwhile, the backup officers observed a fresh shoe print on the front door that had been kicked in. Armed with this information Officer Wood decided to read Miranda warnings to the defendant, to which the defendant replied, "Sure, I'll talk to you." 4RP 55-56. When confronted with the discovery of the shoe print on the door, the defendant admitted kicking the door before hearing the alarm and running away. He said he did it because he was looking for directions out to the main road, and to find clean clothes and blankets. 4RP 57. The defendant later provided a written statement to the police, a portion of which was admitted into evidence at trial. The admitted portion reads, "I was walking through the woods, came into the yard, I rang the doorbell and knocked on all the doors trying to find out how to get back to the road. Got no answer, so I tried to kick door open, alarm went off, so I took off running because I was scared. I was trying to get

inside to see if I can find clean clothes and some blankets to use at nighttime." 4RP 183.

B. THE TRIAL.

The State charged the defendant with Attempted Residential Burglary, a class C felony. 1CP 108. Trial commenced on September 22, 2014. 4RP 1.

1. Pretrial Motions.

During pretrial motions the court addressed the State's motion in limine to preclude defense from arguing that abandonment of the property is a defense to Attempted Residential Burglary. See State v. Olson, 182 Wn. App. 362, 377, 329 P.3d 121 (2014); RCW 9A.52.090(1); 2CP ____, sub 42 (State's Supplemental Motions In Limine). The court granted the motion in part:

You cannot argue that this building was abandoned. It was not abandoned. Under our statute, this is an attempted burglary case. Abandonment is not a defense. You can argue to the jury what your defendant's intent was or not. That's certainly an element of burglary. You can argue intent. But you can't argue that he believed this house was abandoned in any shape or form. That's what the statute says. 4RP 27.

2. Opening Statements.

As is usually the case, each party's opening statement set the stage for the theme of their presentation of evidence. The

prosecutor provided a summary of the anticipated evidence and ended her opening statement by asking the jury to “hold the State to the burden we have” and to “hold the defendant accountable for his actions on that day...”. 3RP 80.

The defense opening statement conceded that the defendant intentionally kicked in the victim’s door and that this action constituted an attempt at unlawful entry. 3RP 83 (“They got unlawful entry. I’m not going to try to say that wasn’t true.”). The defense argument also blurred the line between the permissible argument about the defendant’s intent to commit a crime inside the house, and the court’s prohibition on asserting abandonment of property as a defense:

He explained to the police that he thought the house had been forsaken and he was looking for a blanket or some warm clothes because he was homeless and spent the night on the street with no shelter. He told the police that he thought the blanket or clothes he was hoping to find, he thought they didn’t belong to anyone. He felt they’d been forsaken by the owner, not currently being used, nor going to be used in the future. 3RP 81.

The defense opening statement returned to this theme one minute later, telling the jury that the defendant “had no intent to deprive someone of their property because he assumed that what he was taking was junk, was forsaken property, and was set to be

discarded and no longer belonged to anyone." 3RP 82. Two minutes later the defense attorney attempted to illustrate his intent theory with an analogy to a person with Obsessive Compulsive Disorder ("OCD"), but the court sustained the prosecutor's objection to improper opening remarks. 3RP 83.

The defense attorney's opening statement also made an emotional plea by implicating the jurors' own personalities as a factor in how they would view the evidence. In so doing, defense counsel introduced a fundamental fallacy that would become the cornerstone of the defense case: that clothing and blankets are items with no value at all, and that taking them does not amount to theft:

Some may say in reviewing this case and the way the evidence breaks may depend on your view of human nature. A pessimistic person may say no way, that guy was there to take stuff of value. Optimist might say no, I believe that he might just be there to take a blanket and things that he didn't think were of value or belonged to anybody. 3RP 84.

The play on jurors' emotions turned into a plea for sympathy when defense counsel told the jury that the defendant was just 21 years old, cold, and homeless after being kicked out of his home by his mother. 3RP 85, 87. The defense opening statement attempted to

bring the jury inside the defendant's mind when he decided to kick down the victim's door:

He does the math. The items inside that house, maybe there is a blanket, maybe some clean clothes that someone else is just going to throw away. No one wants that stuff. But I can use that stuff, and if they're just going to throw it away, then I could have it. And I'm cold and I'm homeless and clearly in my mind that stuff doesn't belong to anyone. 3RP 87.

3. The Defendant's Testimony.

The State's presentation of evidence unfolded largely as both parties expected. See supra, § II.A. The defendant testified in his own defense and continued to perpetuate the defense theme introduced in opening statements. He said that he spent 20 or 30 minutes checking the windows and doors of the victim's residence trying to get inside. 4RP 178. When asked why, he said, "Because I was wearing dirty clothes, and I was cold walking around all night. So I was hoping to be able to find something warmer to wear and possibly a blanket to use at nighttime." 4RP 178-179. The defendant told the jury that if he didn't find a blanket or clothes inside the house he would have walked away. Perhaps aware of the fact that the defendant's testimony offered an insufficient legal defense of his actions, defense counsel asked, "Do you really expect this jury to believe that?" The defendant's answer

highlighted his belief in the fundamental fallacy proffered by his attorney during opening statements. He said, "I'd hope so. Because I don't – I don't steal, and I wouldn't, like, intend to take anything worth value or anything like that just to get – like, I didn't want to take risk of anything happening." 4RP 179. The court overruled the State's objection to defense counsel's next question, "What do you mean?" Defense counsel rephrased the question, and the defendant further explained why he would have limited his theft to mere blankets and clothes:

"Just in case for some reason whatsoever that I was wrong about the house. And if anyone did live in it, ***I didn't want to be, like, held responsible for something that was worth value or anything.*** I was just going in to look for clothes. I'm not a thief. I was hoping to find something to stay warm. 4RP 180. (***emphasis*** added).

The defendant then admitted that he kicked the victim's door open. 4RP 180.

4. Jury Instructions.

The defendant's testimony was the only evidence presented in the defendant's case in chief. Prior to closing arguments the court considered the defendant's proposed jury instructions, including a written objection filed by the State. See 4RP 198-226; 2CP _____, sub #46 (State's Response to Defendant's Proposed

Jury Instructions). The court rejected the defendant's request to instruct the jury that "it is a defense to the crime of theft if the defendant believed the property was abandoned and unwanted property." 1CP 78; 4RP 209-210 ("I won't let you craft some instruction that essentially allows you to set up an abandonment defense to burglary.") 4RP 210. The court also rejected the defendant's proposal to instruct the jury on a "color of title" defense to theft, or to "borrow" the knowledge element from another statute to modify the standard "to convict" instruction for residential burglary. 1CP 70-72, 74, 77-78; 4RP 199-206; 211-214. The defendant assigns no error to the court's decision not to adopt the defendant's proposed jury instructions. Br. App. 1.

5. Closing Arguments.

The prosecutor's closing remarks began with a two minute preamble about the sanctity of the home as a repository for personal possessions. 4RP 237-238. The prosecutor followed with another one minute comment about the important principle of accountability for one's actions, a concept which had become particularly relevant given the defendant's testimony that he didn't want to be "held responsible for taking something that was worth

value or anything.” Compare 4RP 238-239² with 4RP 180³. The prosecutor then spent the next 21 minutes completing her initial closing remarks by comparing the evidence to the law as provided in the jury instructions. 4RP 239 – 251.

A primary focus of this portion of the closing argument was the fact that the defendant made admissions, either to the police or during his testimony at trial, to every element of the charged offense. 4RP 239. The prosecutor’s comment about accountability which has drawn the current challenge of prosecutorial error immediately followed⁴ her recitation of the defendant’s admissions and drew no objection from the defendant at the time. Id.

Following the prosecutor’s closing argument, the defense delivered a 38 minute closing argument designed to engender

² “The defendant admitted to what he did on March 7th. He admitted to being on the property. He admitted to kicking in the door to somebody else’s house. He admitted to kicking in the door for the purpose of taking somebody else’s property for his own use. But today we’re here because he doesn’t want to take accountability for that, and that’s why we’re here.” 4RP 238-239.

³ “Just in case for some reason whatsoever I was wrong about the house. And if anyone did live in it, I didn’t want to be, like, held responsible for taking something that was worth value or anything. I was just going in to look for clothes. I’m not a thief. I was hoping to find something to stay warm.” 4RP 180.

⁴ “The defendant admitted to what he did on March 7th. He admitted to being on the property. He admitted to kicking in the door to somebody else’s house. He admitted to kicking in the door for the purpose of taking somebody else’s property for his own use. But today we’re here because he doesn’t want to take accountability for that, and that’s why we’re here. 4RP 239.

sympathy⁵ for the defendant while personally attacking the “cynical” prosecutor and the police officers who didn’t “giv[e] a poor, homeless guy the benefit of the doubt”. 4RP 257, 271.⁶ This argument was contrary to the law as provided in the court’s jury instructions, which cautioned the jurors not to allow sympathy or prejudice to affect their deliberations. 1CP 48. The defense closing argument also completely misstated the State’s burden of proof.⁷

But more significant than any of the improper arguments previously identified was defense counsel’s effort to craft his entire

⁵ The defense closing argument began with a plea for sympathy: “This wasn’t where I was going to start, but I feel I have no choice at this point. I don’t want anyone to lose sight of the big picture in this case...The big picture is this: A poor, homeless, 21-year-old kid kicked in the door of a vacant house for the purpose of looking for a blanket and some clean clothes, and the State of Washington wants you to convict him of a felony. That’s big picture. Don’t lose sight of that.” 4RP 252.

The defense closing argument ended with the same plea. He asked jurors to imagine how they would describe this case to their friends and family after their service was complete: “How will you describe this case? That a 21-year-old homeless kid stumbled upon a vacant house in the woods, vacant for one and a half to two years, and he kicked in the door because he was looking for blankets and clean clothes and we convicted him of a felony. That shouldn’t be the story, ladies and gentlemen. I ask you to do justice and find Zack not guilty.” 4RP 273.

⁶ “I told you in opening this case may boil down to a simple thing: cynics versus hopeful people. Police officers can be cynical when it comes to criminal allegations and people’s explanations for what happened. You listened to [the prosecutor’s] closing argument. You can tell she’s cynical. She doesn’t believe what Zack said. 4RP 257.

Defense counsel returned to the theme later in his closing remarks: “Maybe that’s where we’re coming back to optimists vs. pessimists, giving a poor, homeless guy the benefit of the doubt as to his testimony. Police officers didn’t do that. Their solution to his homelessness was to take him to jail.” 4RP 271.

⁷ “The only way you can convict him if you’re convinced beyond all reasonable doubt that he was lying and the State proved that he intended to commit a crime inside the house.” 4RP 258.

legal argument around the very theory the court had prohibited him from making; while delivered under the guise of arguing the defendant's intent to commit a crime inside the residence, the thrust of the defense argument was that the defendant didn't consider it stealing to take clothes and blankets he deemed abandoned.⁸ As the court had previously ruled on multiple occasions, this argument was improper. 4RP 209-213 (The court declared: "It doesn't matter...whether he steals something that's a piece of garbage in a person's home or a diamond. That has nothing to do with his intent."); 4RP 20-27 (... "you can't argue that he believed this house was abandoned in any shape or form").

The prosecutor's nine minute rebuttal closing argument was very straightforward. Her first comment was to remind the jury that

⁸ Defense counsel displayed a carefully chosen vocabulary to establish his theme using only synonyms for the word 'abandoned:' "He felt the blankets and clean clothes he was hoping to find were discarded and set aside, relinquished ownership by the owner. Therefore, he did not intend to commit a theft or to deprive [the victim] of her property. Now, if his intention was to take something that he thought was not discarded, then you can find him guilty, but that wasn't his intent." 4RP 256.

Defense counsel returned to this argument seven minutes later: "I submit to you that is our issue here. Zack had no intent to commit a crime therein. And why? He thought the property was discarded. Thought the house was discarded. Thought the property was junk and had no owner." 4RP 260-261.

Counsel repeated the argument five minutes after that: "[The prosecutor] says, well, he didn't go to one of the other houses because, well, that's too close and everyone will see what you're doing. That's a cynical view. The other one is also this house out in the woods, maybe this doesn't belong to anyone. Maybe it's been just left vacant and maybe the stuff inside, and that's more important, the stuff inside is just going to be thrown way (sic) and left vacant." 4RP 262-263.

sympathy, prejudice, and personal preference deserved no place in their deliberations. 4RP 273. She then stressed the importance of differentiating between testimonial evidence from the witness stand and the attorneys' arguments, which are not evidence. 4RP 274.⁹ The prosecutor then told the jury that the defendant's theory of negated intent due to perceived abandonment was wholly unsupported by the law as defined in the jury instructions. 4RP 275. This observation was correct. Finally, the prosecutor ended with a textbook plea for the jury to render a verdict based on the law and the facts:

The State has now done its job and we've presented the evidence that they've collected to you and now we're asking you to do your job as the jury. We're asking you to go over that evidence that's been presented to you, to discuss it, to go over the law, to apply the law to the facts that have been proved to you. And I'm asking you to, when you do that, hold the defendant accountable. And the only way to do that at this point is we, the jury, find the defendant guilty as charged. Thank you. 4RP 279.

6. Verdict And Sentencing.

The jury had the option of considering the lesser included offense of criminal trespass in the second degree if they could not reach a verdict on the charged count of attempted residential

⁹ "I want you to keep that separate because if we make mistakes in our argument, we expect you to remember what was said by the real evidence and sort that out..." 4RP 274.

burglary. 1CP 57. The jury returned a verdict of guilty as charged to attempted residential burglary. 1CP 44.

The defendant faced a standard range sentence of 2.25 to 6.75 months in jail. 1CP 15. The defendant requested an exceptional sentence downward, or a first time offender waiver, or a low end sentence with credit for time served in in-patient drug treatment. 1CP 24. The State did not oppose a first time offender waiver, which would have allowed for a sentence of 60 days. 2CP _____, sub # 63 (State's Sentencing Memorandum, page 3); RCW 9.94A.650(2). However, the court decided against a first time offender waiver but still imposed a sentence of just 60 days. 4RP 290; 1CP 16. This appears to be a sentence below the 2.25 month standard range, but the State did not point out or object to this discrepancy at the sentencing hearing. The State is not pursuing a correction of that error in this appeal because the value to the community of pursuing the additional 7.5 days of custody, which would be required to bring the sentence into the standard range, is outweighed by the resources it would take to litigate the issue and then implement the correction.

III. ARGUMENT

A. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS IMPROPER AND PREJUDICIAL

In a prosecutorial misconduct¹⁰ claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Thorgerson, 172 Wn.2d at 442-443, citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The "failure to object to an improper remark constitutes a

¹⁰ "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Sept. 24, 2014); American Bar Association Resolution 100B (Adopted 8/9-10/10), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited Sept. 24, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Faucj, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Thorgerson, 172 Wn.2d at 443, citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Since the statements defendant complains about were not objected to at trial, they must be analyzed under the “enduring and resulting prejudice” standard. Russell, 125 Wn.2d at 86. “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); Russell, 125 Wn.2d at 85. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

1. The Prosecutor’s Closing Argument Was Not Error. It Was A Direct and Appropriate Response To The Defendant’s Plea For A Sympathy-Driven Acquittal And To The Defendant’s Own Testimony.

In a challenge to a prosecutor’s statement during closing argument, the defendant bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial. State v.

Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defense has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, defendant did not object to the challenged statement during the prosecutor's closing argument. Nor did defendant request 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 the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Faced with a case in which the defendant admitted to each element of the charged crime yet sought an acquittal based on sympathy and a prohibited legal theory, the prosecutor's closing

argument simply observed that the State also had equitable arguments in its favor. The prosecutor's preamble about the sanctity of the home was a direct response to the defendant's notion (repeated in opening statements, his own testimony, and eventually in closing argument) that his intent to steal was negated either by the relative worthlessness of the items he was seeking, or by his homelessness, hunger, and fatigue. It was completely appropriate for the prosecutor to draw on jurors' common experience to reinforce the notion that personal possessions have intrinsic value to their owners precisely because of their presence within the zone of residential privacy.

The point of the prosecutor's closing remarks was to highlight the defect in the defendant's own thinking, as displayed through his testimony, that he didn't want to be "held responsible" in case the items he tried to steal were "worth value or anything." 4RP 180. In doing so the prosecutor drove home the point that the court had already made outside the jury's presence – that the defendant's claimed lack of intent due to perceived abandonment of the victim's home or its contents was no defense to the charged crime. While the prosecutor could have taken a more litigious approach by objecting repeatedly throughout the defense closing

argument, the strategic choice to allow the improper argument was an effective method of proving to the jury that the defendant's only argument was unsupported by the law or common sense.

A trier of fact is expected to bring to bear common sense and everyday life experiences in determining whether the prosecution has proved an essential element of the charged offense. State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989) (citing United States v. Howard, 506 F.2d 865, 867 (5th Cir.1975)). In closing argument, counsel may draw reasonable inferences from the evidence presented. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012, 917 P.2d 130 (1996). The prosecutor's challenged remarks were brief and designed to draw on the jury's commonsense to persuade them that stealing clothes and blankets is still stealing. When viewed in the context of the entire trial and the defendant's own testimony the prosecutor's remarks did not amount to error.

The defendant now asserts that "the repeated use of the terms 'you,' 'your,' and 'we' personalized the threat and made it clear that jurors were among the potential victims of Hoeg or someone like Hoeg." The defendant portrays the use of these pronouns as an improper appeal to passion or prejudice. Br. App.

11. Yet the jury was instructed not to allow sympathy or prejudice to factor into their deliberations, and the prosecutor specifically reminded the jury of this instruction during her rebuttal argument. 1CP 48; 4RP 273. It is also widely recognized that the use of the pronouns “we” and “you” is an acceptable, albeit informal, replacement for the pronoun “one” when referring to a generic or hypothetical person. See, e.g., https://eng.wikipedia.org/wiki/Generic_you (last visited November 2, 2015). The court should afford all attorneys, including prosecutors, the flexibility to craft their verbal arguments using forms of English most commonly used and understood by jurors, rather than insisting on adherence to formal grammatical rules more applicable to writing than to verbal speech. The defendant has not established that the prosecutor’s use of “we” and “you” pronouns was any sort of deliberate attempt to personalize the jury’s assessment of the evidence, much less than it actually succeeded.

The defendant also alleges that the prosecutor “invit[ed] jurors to view themselves as parents who need to correct a wayward child,” referencing a portion of the prosecutor’s closing argument in which she talked about “accountability” by discussing

why parents teach children not to hit or bite others, and to respect other children's space and bodies. Br. App. 22; 4RP 238-239. While the State concedes that similar arguments would be improper coming from a prosecutor in many cases, the defendant's testimony and novel legal theory made this far from the average case. Again, this case involved a defendant's own testimony that he didn't consider it stealing if he was only looking for blankets and clothes, and that he didn't want to be held responsible for taking anything of value. The prosecutor was not wrong to indirectly comment on the fallacy of the defendant's immature moral code because it was also the crux of his entire legal defense to the charged crime. While perhaps in artful, the prosecutor used the parent-child analogy to address a question that must have been on the jurors' minds: How could the defendant really believe that stealing clothes and blankets is not stealing? The analogy was not only appropriate in this case, it was consistent with the defendant's own trial counsel referring to the defendant as a "kid" three separate times in his closing argument. 4RP 252, 263, 273. In the context of the defense closing argument and the defendant's testimony at trial, the prosecutor's closing argument was not error.

2. Defendant Has Not Shown Any Prejudice Affecting The Verdict.

The prosecutor may attack a defendant's exculpatory theory. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The State is permitted to explain, clarify, or contradict evidence introduced by defendant. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Moreover, closing argument is, after all, argument. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727; Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence); State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the conduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); Swan, 114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). The reviewing court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 762. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the conduct resulted in prejudice that "had a substantial

likelihood of affecting the jury verdict.” Emery, 174 Wn.2d at 760-761, citing Thorgerson, 172 Wn.2d at 455. The reviewing court’s focus is on whether any resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932). Here, defendant has failed to show that the prosecutor’s comments engendered an incurable feeling of prejudice in the mind of the jury. The prosecutor did not commit error by helping the jury recognize and confront a legal defense based on sympathy and without any basis in the law as provided in the jury instructions.

3. Any Prejudicial Effect Was Cured By The Court’s Instructions.

Further, in the present case the court’s instructions cured any potential prejudice stemming from the prosecutor’s remarks. The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The court may mitigate potential prejudice by so instructing the jury. Guizzotti, 60 Wn. App. at 296. In the present case, the trial court did instruct the jury:

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.

1CP 47 (Jury Instruction 1, WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any potential prejudice from the prosecutor's statement was obviated by the court's instruction to the jury. The prosecuting attorney's conduct, even if deemed error, falls short of reversible error because of the curative measures contained in the jury instructions.

4. Overwhelming Evidence Rendered Any Error Harmless Beyond A Reasonable Doubt.

Though the State does not concede that the prosecutor's closing argument was error, if the defendant prevails in characterizing the argument as a comment on the defendant's right to go to trial, the jury's verdict still survives a constitutional harmless error analysis. The constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments. State v. Emery, 174 Wn.2d 741, 757, 278 P.3d 653, (2012)(citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996))

(pre-arrest silence); State v. Fricks, 91 Wn.2d 391, 396–97, 588 P.2d 1328 (1979) (post-arrest silence)).

As previously noted, the court did instruct the jury to disregard the attorneys' arguments which were not supported by the evidence or the law contained in the jury instructions. 1CP 47. Presuming as courts must that the jury heeded this instruction, the jury would have turned from any improper comment on the defendant's right to go to trial and refocused on the evidence presented. This effort would inevitably lead to only one outcome – a guilty verdict based on a defendant who was caught by police in the immediate aftermath of kicking the victim's door down, then confessing to his intent to steal property from inside the home. The jury could only have viewed the defendant's testimony and his attorney's arguments for what they were – efforts to deflect legal responsibility based not on the facts or the law, but instead on appeals to sympathy and emotion. Surely on these facts the Court should be able to confidently declare beyond a reasonable doubt that such an emotional appeal would have failed.

B. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). Here, defendant argues that he was denied effective assistance of counsel by counsel not objecting to the prosecutor's statement during closing argument. Br. App. 1, 24-28. To prove that failure to

object rendered counsel ineffective, defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged

conduct. McFarland, 127 Wn.2d at 336. Here, defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance.

1. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), quoting Reichenbach, 153 Wn.2d at 130. Here, the defendant simply presumes that counsel's representation was deficient as a matter of course, if the prosecutor's closing argument can be classified as error. See Br. App. at 26. Conversely, the court employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130; McFarland, 127 Wn.2d at 335-336; Brett, 126 Wn.2d at 198; In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992); Thomas, 109 Wn.2d at 226.

Defense counsel had legitimate strategic or tactical reasons for not objecting to the prosecutor's statement during closing argument in the present case. The determination of which arguments to advance in closing is a tactical decision susceptible to

a wide range of acceptable strategies. State v. Israel, 113 Wn. App. 243, 271, 54 P.3d 1218 (2002). Not wanting to risk emphasis with an objection is a legitimate trial strategy or tactic. Davis, 152 Wn.2d at 714; State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object rather than calling added attention was legitimate tactical decision) review denied, 134 Wn.2d 1003 (1998); State v. Donald, 86 Wn. App. 543, 551, 844 P.2d 447 (1993) (not asking for limiting instruction to not reemphasize evidence is a valid trial tactic). Here, defense counsel's tactical and strategic decisions were well within the boundaries of reasonable performance. Defendant has not met his burden to rebut the strong presumption that there was no conceivable trial strategy or tactic for counsel's not objecting to the challenged statement during the prosecutor's closing argument. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

2. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. The mere possibility of prejudice is

not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Here again, defendant does not demonstrate prejudice, but simply references his own testimony that he did not intend to commit a crime inside the victim's residence as proof that the State's case was "less than overwhelming" and "vulnerable to prejudicial comments...". Br. App. 27. Since this court must assume that the jury followed its instructions, the allegedly-improper arguments advanced by the prosecutor were not prejudicial. Even if counsel's performance is considered deficient, the defendant still has the burden of showing prejudice.

To satisfy the prejudice prong of the Strickland test, the defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In assessing prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like.

Grier, 171 Wn.2d at 34 (citations omitted).

In this case the jury instructions correctly set out the elements for the charged offense. 1CP 53 (Jury Instruction 6). The

jury was expressly told to disregard any argument that was not supported by the law in the court's instructions. 1CP 47 (Jury Instruction 1). This court cannot properly assume that the jurors accepted the prosecutor's arguments if the arguments contradicted the court's instructions. Defendant has not met his burden of showing that he was prejudiced by defense counsel's performance. He has not shown that but for counsel's performance, the jury's verdict would have been different. This is particularly true in light of the overwhelming evidence of the defendant's guilt, with the majority of that evidence deriving from the from the defendant's statements to the police and later corroborated by his own testimony. As discussed above with respect to the defendant's claim of prosecutorial error, the overwhelming evidence showing his guilt precludes a finding that the outcome would have differed had his counsel objected. .See supra §III.A.4.

Defendant's ineffective assistance argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has not established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22. Defendant's claim of ineffective assistance fails.

IV. CONCLUSION

For the reasons stated above, the State requests that the Court affirm the jury's verdict.

Respectfully submitted on November 4, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Respondent

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

THE STATE OF WASHINGTON,

Respondent,

v.

ZACKARY A. HOEG,

Appellant.

No. 72912-8-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 4th day of November, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Casey Grannis, Nielsen, Broman & Koch, grannisc@nwattorney.net and Sloanej@nwattorney.net.

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

Dated this 4th day of November, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office