

NO. 37428-5

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LANCE VALENTINO DAVIS, JR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 06-1-03466-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the prosecutor's closing argument was proper when he based it on the evidence introduced at trial and addressed the weakest points in the State's case. (Appellant's Assignment of Error 1).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant with four counts of assault in the first degree and one count of unlawful possession of a firearm. CP 1-3.

Defendant stipulated to a felony conviction. RP (01/08/08) 32.

After both parties rested, the defense requested a lesser included offense instruction of assault in the second degree. RP (01/16/08(1)) 3. The instruction was given to the jury. RP (01/16/08) 6.

The jury convicted defendant of the lesser included offenses of four counts of assault in the second degree and one count of unlawful possession of a firearm in the second degree. RP (01/22/08) 5-6; CP 60-68. In special verdicts, the jury found that the four assaults were committed with a firearm. RP (01/22/08) 7; CP 69-72. The court sentenced defendant to the higher end of the standard range, for a total of 228 months. RP (02/08/08) 6; CP 78-90.

Defendant filed a timely notice of appeal. CP 91.

## 2. Facts

On the night of July 5, 2006, Megan Patterson, her sister Brittany Patterson, Staci White, Shimarra Bennett, and Candace Jefferson went to a party together. RP (01/08/08) 58; RP (01/09/08) 128. The party took place at a private house where defendant resided at the time. Plaintiff's Exhibit 139. There, the girls got into an argument with a few other girls, and the argument grew into a brawl with multiple participants. RP (01/08/08) 59; RP (01/09/08) 135-137, 204-206; RP (01/10/08) 348-350, 425-427, 430.

The girls eventually managed to extract themselves from the brawl and retreated to their two cars that were parked nearby. RP (01/09/08) 142, 212; RP (01/10/08) 356-358. Brittany Patterson called 911. RP (01/10/08) 357.

Defendant followed the girls to Megan Patterson's car<sup>1</sup>. RP (01/09/08) 142, 212. Most of the witnesses testified that the rest of the party crowd remained in the yard. RP (01/10/08) 359, 365, 381-382.

Defendant was angry and loud. RP (01/09/08) 143, 212-213; RP (01/10/08) 437. As defendant followed the girls, he kept yelling and lifting his shirt to show a gun that was sticking out of his pants. RP (01/09/08) 254; RP (01/10/08) 433. Ms. White, who knew defendant

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<sup>1</sup> The girls knew and referred to defendant as "Tino." *See, e.g.* RP (01/09/08) 211.

better than the other girls, tried to calm him down and talk him out of shooting. RP (01/09/08) 143-144.

As all the girls, except Ms. Jefferson, got into Megan Patterson's car and started to drive off, defendant pulled the gun out of his pants and began shooting at the car with the four girls inside it. RP (01/09/08) 145, 213; RP (01/10/08) 359-360, 361, 363-364. Although the girls had to duck down, Brittany Patterson and Staci White saw the gun and described it as silver semiautomatic handgun. RP (01/08/08) 103; RP (01/09/08) 143; RP (01/10/08) 360. They also identified defendant in court as the person who shot at their car. RP (01/08/08) 108; RP (01/09/08) 145, 152; RP (01/10/08) 435. Staci White, who was the front-seat passenger, unequivocally testified that she saw defendant shoot. RP (01/09/08) 145, 148.

According to Brittany and Megan Patterson, when defendant began shooting, he was standing at the front right side of the car. RP (01/08/08) 108; RP (01/09/08) 250-251. Brittany Patterson was sure that defendant was the shooter, and that nobody else was involved in the shooting. RP (01/10/08) 372.

Megan Patterson did not see defendant shoot because she was driving and ducking down, but she had noticed the gun stuck in defendant's jeans when he was following them to the car and cursing. RP (01/09/08) 213-214. Based on where defendant was standing at the time the shots were fired and the impact on the car, Megan Patterson did not

believe that any other person could have been the shooter. RP (01/09/08) 231, 254. She also described the gun to the officer, who questioned her at the hospital the day of the shooting, as gray and silver. RP (01/15/08) 32-33.

Although previously Shimarra Bennett had told the police that she saw defendant shoot at the car, at trial she denied seeing defendant shoot. RP (01/10/08) 440, 446, 460, 462; RP (01/14/08) 541-542. She did, however, testify that she saw defendant with a gun on the night of the shooting. RP (01/10/08) 443.

Megan Patterson was hit. RP (01/09/08) 147. Fortunately, the bullet only grazed her. RP (01/14/08) 491. The exterior of Megan Patterson's car had five bullet holes and the rear window was shattered. RP (01/15/08) 13-14.

When the police located the house where the brawl had taken place, it looked vacant: the lights were off and there were no cars or people there. RP (01/08/08) 50. The police found bullet casings on the roadway in front of the house. RP (01/08/08) 52; RP (01/10/08) 317.

Detective Benson made an attempt to contact defendant within the first month of the incident, but was unable to question him. RP (01/14/08) 540, 541; Plaintiff's Exhibit 139. The police were unable to locate defendant until October 20, 2006. RP (01/14/08) 512.

On October 20, the police received a tip that defendant was at the house of Le' Anita Brown. RP (01/14/08) 513. Ms. Brown and her

children came out of the surrounded house first. RP (01/14/08) 513, 515-516. Defendant came out of the house and was taken into custody a short time later. RP (01/14/08) 594.

When contacted by the police, Ms. Brown admitted to carrying a handgun in her purse. RP (01/14/08) 517. It was a silver .45 caliber Taurus semiautomatic gun. RP (01/14/08) 518. Inside the house, the police found .45 and .22 caliber ammunition. RP (01/14/08) 524.

When questioned about the gun by the police, defendant stated that the gun had been used in the July shooting. RP (01/14/08) 596. But defendant claimed that the gun was not his. RP (01/14/08) 597. Defendant also told the police that the late Rhaczio Simms and two other men had shot at the car. RP (01/14/08) 598, 601; Plaintiff's Exhibit 139. He said the shooting started when the girl's car swerved toward him. *Id.*

When the detectives asked why he had refused to cooperate with the police and failed to come forward, defendant first claimed that he did not realize the police were trying to contact him regarding the shooting. Plaintiff's Exhibit 139. According to defendant, he thought the police wanted to talk to him about the death of his friend, Rhaczio Simms. *Id.* Defendant told the detectives that he had had nothing to do with Simms' death and did not want to get involved in that investigation. *Id.* Defendant also claimed that he had gone to California for a few weeks to clear his head because of Simms' sudden death. *Id.*

Later in the interview, when the detectives asserted that defendant had known that the police were looking for him in connection to the shooting, defendant changed his story and said that he failed to come forward because he did not want to betray his friend by telling on him. *Id.* Defendant was also forced to admit that he lied about his name when the police called Le' Anita Brown's house. *Id.*

Brenda Lawrence, a forensic scientist at the Washington State Patrol Crime Laboratory, testified that she had tested the four .45 caliber shell casings found at the scene of the shooting and concluded that all of them were fired from the Taurus pistol that Ms. Brown was trying to smuggle from her house, where defendant was staying at the time. RP (01/14/08) 557, 574-575.

Defendant did not testify at trial.

C. ARGUMENT.

1. BECAUSE DEFENDANT FAILED TO OBJECT TO THE PROSECUTOR'S CLOSING REMARKS AT TRIAL, HIS CHALLENGE ON APPEAL IS WAIVED WHERE HE CANNOT MEET HIS BURDEN OF PROOF AND SHOW THE REMARKS WERE FLAGRANT, ILL-INTENTIONED, AND PREJUDICIAL.

Generally, counsel may not ““remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.”” *State v. Kendrick*, 47 Wn. App.

620, 636, 736 P.2d 1079 (1987)(quoting *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986)).

Specifically, when defendant fails to object to an alleged prosecutorial misconduct at trial, he waives that issue for appeal unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury” or a curative instruction. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006); *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)(citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)); *see also State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000)(“improper prosecution argument, *even when indirectly touching upon a constitutional right*, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice”)(emphasis added).

The defendant bears the burden of showing that the prosecutor’s remarks were improper. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); *Stenson*, 132 Wn.2d 668, 718.

Because Davis’s trial counsel never objected to the prosecutor’s closing remarks, defendant’s challenge does not survive on appeal unless he can establish both that the remarks were flagrant and ill-intentioned, and that they caused an incurable prejudice. RP (01/16/08) 4-30, 62-81; *Weber*, 159 Wn.2d 252, 270; *Stenson*, 132 Wn.2d at 719. Defendant,

however, cannot prove either of those prongs because the prosecutor's remarks were neither flagrant nor incurably prejudicial.

- a. The prosecutor's remarks were not flagrant and ill-intentioned.

Here, defendant assigns error on appeal to the following remarks by the prosecutor:

Then we get to other circumstantial issues. The defendant refused to cooperate with the investigation per his statement that he understood that Detective Benson wanted to talk to him, but he wasn't going to talk to him. He knew he was being looked for. He knew that Detective Benson wanted to talk to him. He was not going to cooperate. It's probably easy to understand why every single person in this case pled<sup>2</sup>. It's probably clear. You know, nobody wants to be implicated or involved in a case where someone's been shot. And at least in this crowd, nobody also wanted to help in case someone had been shot, called the police. That's not what this was about. This was about a shooting, and everybody get out of there and nobody talk. That's exactly what happened. So the only people law enforcement gets to talk to are the victims. That side, so to speak. But the defendant, when they got his name and got some information that led Detective Benson to locate him, at least over the phone through his family, he understood he wanted to talk to him and he said, "I'm not going to do it." Then he apparently fled the state. And I say "apparently," because all we know is that the defendant tells you, you know, that statement. He says he went to California to visit some friends and take some time away from, I guess, not only the heat of this, but Rhaczio's murder, and maybe that's true.

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<sup>2</sup> This appears to be a scrivener's error. The word is likely "fled" and not "pled."

But it's what the defendant says. So apparently he left the state. He took considerable time to come out of the house when he knew that the police wanted him.

RP (Closing Arguments) 22-23.

When deciding whether the prosecutor's remarks were flagrant and ill-intentioned, the court should view the remarks in "context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)(internal citation omitted).

In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963)(internal citations omitted). It is not misconduct for a prosecutor "to argue that the evidence does not support the defense theory," and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d 24, 87 (internal citations omitted).

While the prosecutor may not comment on the exercise by the accused of the right to remain silent, a mere reference to the defendant's silence by the government is not necessarily a constitutional violation. *State v. Burke*, 163 Wn.2d 204, 206, 217, 181 P.3d 1 (2008). It is only a violation if the State invites the jury to infer guilt from defendant's silence. *Burke*, 163 Wn.2d 204, 206, 217; *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

For example, in *Gregory*, a detective testified that he had left a message for defendant and asked defendant to get back to him, but defendant did not do so. 158 Wn.2d 759, 838-839. When defendant eventually talked to the detective, his story was consistent with the statement given by his grandmother. *Id.* at 840. In closing argument, the prosecutor asked the jury to infer that the delay in contacting the police gave defendant time to fabricate the alibi. *Id.* at 839, 840.

The Supreme Court held that the testimony and the closing argument did *not* constitute an impermissible comment on defendant's constitutional right to silence. *Id.* at 840. The court reasoned that the prosecutor used the delay for the permissible purpose of impeaching defendant by suggesting that he had time to make his story consistent with the story of his grandmother. *Id.* at 840.

Further, the court agreed with the State that the detective's testimony was also offered to explain the investigative process in the case, and not to imply that Gregory was avoiding the police because he was guilty. *Id.* Finally, the court noted that "the prosecutor's argument regarding suspiciousness was so subtle and brief that it did not naturally and necessarily emphasize any testimonial silence." *Id.*

In contrast, in cases, in which the court found that the prosecutorial comments were flagrant and prejudicial, the prosecutor clearly asked the jury to infer guilt from defendant's silence. *See, e.g., State v. Knapp*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2009). Thus, in *Knapp*, the prosecutor argued

the following to the jury in his closing: “And another reason to believe that this defendant... did the burglary, both times that it was mentioned to him that Darren Blakeslee identified him and then Officer Harris identified him, what did he do? He put his head down. Did he say, “No. It wasn’t me” [sic] No.” *Id.* Thus, the prosecutor impermissibly implied that an innocent person would have denied the accusation.

This case is like *Gregory* and unlike *Knapp* because the prosecutor’s argument went to explaining the investigative process in the case and to repudiating defendant’s story. First, in his closing, the prosecutor rightfully addressed the weakest point of the State’s case: its lack of eye witnesses. It was apparent that even though the shooting happened at a crowded party, the State’s only witnesses to the crime were the victims themselves.

The prosecutor attempted to explain that the State did not present any other eye witnesses because no one at the party, including defendant, wanted to get involved. RP (Closing Argument) 22-23; *see supra*. No one tried to help the victims during the shooting; no one made sure they were alright after the shooting; and no one came forward with the information about the shooting when the police commenced their investigation. *Id.*

In making that argument, the prosecutor was responding to defense counsel’s cross-examination of Detective Benson, in which the counsel questioned the quality of police work, specifically attacking the number of

eye witnesses interviewed by the police. RP (01/14/08) 541-546. The prosecutor also based his closing on the testimony of defense witnesses and defendant's statement to the police that was played to the jury. Plaintiff's Exhibit 139; RP (01/15/08) 99, 113-114, 152-154.

Further, the prosecutor was permissibly commenting on defendant's veracity based on the evidence presented to the jury. "[P]rosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)(internal citation omitted). Like Gregory, defendant in this case had time and opportunity to fabricate his story about the shooting and to come up with an explanation for the gun. The police tried to contact and interview defendant shortly after the shooting, but were unable to locate him for a few months, until October 20. RP (01/14/08) 512, 540, 541. After defendant was finally located and interviewed, he had explanations for his uncooperativeness; his story about the gun was corroborated by Le'Anita Brown, the woman he had been staying with; and he claimed that his deceased friend was the shooter. Plaintiff's Exhibit 139.

The prosecutor, like the prosecutor in *Gregory*, attempted to repudiate defendant's story and show that it was not credible. RP (01/14/08) 539. Under *Gregory*, the prosecutor in this case permissibly brought to the jury's attention that defendant had time and opportunity to

fabricate a plausible version of events and make his story consistent with the story of his girlfriend. RP (Closing Argument) 22-23; *see supra*.

Moreover, the defense counsel in his closing used the same points from defendant's interview with the police to argue that defendant's story about why he had not cooperated actually showed his sincerity and credibility. RP (Closing Arguments) 56. Defense counsel argued:

You have a taped recording. ... [Detective] asked, "Why weren't you cooperating?" And he says, you know, a couple of things. One, he thought, you know, he didn't have anything to do with Rhaczio's murder and didn't want to talk to them about that. But also, he says in there – and you'll be able to listen to it – that he didn't want to have to be involved in this case. He didn't want to have to be in the position of, you know, ratting on his friend. He didn't want to be in the position of having to testify against his friend, which I think is the position that the detectives even acknowledged that – using this word "snitch" – and that's a factor. People don't often want to do that. So you can hear in there that, you know, he's speaking – he's speaking with sincerity. He's talking to them. He could have lawyered up, but he didn't. And we can't hold that against him, his silence.

RP (Closing Arguments) 56. Defense's argument, therefore, further highlights that the prosecutor's remarks were perceived at the time as a challenge to defendant's veracity and not as a request to infer guilt from his silence. While the prosecutor referenced defendant's uncooperativeness, his reference in the context of the entire argument was not flagrant and ill-intentioned. The prosecutor did not try to show that defendant was guilty because he failed to cooperate with

the police, but rather he asked the jury to infer that defendant's story was not credible because defendant had time and opportunity to fabricate it. *Id.*

In sum, defendant cannot meet his burden and prove that the prosecutor's closing argument was flagrant and ill-intentioned. On the contrary, the prosecutor properly responded to defense counsel's attack on the State's case, argued the evidence that was in front of the jury, and remained within the limits of permissible closing argument. Assuming arguendo this court were to find that the prosecutor's remarks were flagrant and ill-intentioned, defendant's argument still fails because a curative instruction would have cured any prejudice.

b. The prosecutor's remarks were not incurably prejudicial.

While normally prejudice is established if there is a substantial likelihood that the instances of misconduct affected the jury's verdict, in this case, because defendant did not object at trial, he must meet a higher burden and show that the prosecutor's remarks caused such an enduring and resulting prejudice that even a curative instruction would have been insufficient. *Weber*, 159 Wn.2d 252, 270; *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981)(emphasis added); *see also Russell*, 125 Wn.2d at 86 (even improper remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or

her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective”)(internal citations omitted). This is a very high standard to meet.

For example, in *State v. Warren*, the prosecutor committed misconduct by repeatedly misstating the burden of proof in her closing and suggesting that defendant did not enjoy the benefit of any reasonable doubt. 165 Wn.2d 17, 24, 27, 195 P.3d 940 (2008). Even though Warren’s defense counsel objected at trial and thus had a lower burden of proof on appeal, the Supreme Court held that defendant failed to show that he was prejudiced. *Warren*, 165 Wn.2d 17, 28. The court emphasized that while the prosecutor’s remarks were flagrant, defendant was not prejudice because the judge gave a timely and appropriate curative instruction to the jury. *Id.* at 28. *See also State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001)(“[w]hile it may be improper to comment on a defendant’s demeanor so as to invite a jury to draw a negative inference about the defendant’s character, the prejudice flowing from such comments is not necessarily incurable by instruction...if defense counsel had objected at the time, the trial judge could have cured the impropriety with an instruction for the jury...”)(superseded on other grounds).

In this case, the prosecutor’s comments never rose to the level of being so flagrant and ill-intentioned as to create a resulting and enduring

prejudice. *See supra*. In fact, on appeal, defendant admits that the comments in question were merely indirect remarks. Appellant's Brief, p. 11. Moreover, they were so insignificant that the defense counsel did not feel the need to object.

Rather, the defense counsel made a strategic decision to emphasize the same points during his closing argument and present them as evidence of defendant's sincerity and credibility. RP (Closing Arguments) 56; Plaintiff's Exhibit 139. Defense counsel's use of the objectionable information in his closing undermines defendant's subsequent claim of prosecutorial misconduct. *See Smith*, 144 Wn.2d 665, 679-680; *see also State v. Russell*, 125 Wn.2d 24, 89, 882 P.2d 747 (1994)("[t]he incorporation of this [objectionable] statement into the defense argument weakens the contention that it denied Russell a fair trial").

In addition, contrary to defendant's assertion, this case was not all about credibility. *See* Appellant's Brief p. 12. The State presented significant evidence of defendant's guilt. For example, most of the witnesses (State and defense) agreed that defendant was the only person standing in the road when the shots were fired. RP (01/09/08) 149, 152, 212, 213, 250; RP (01/15/08) 103-104, 149-150. The police found multiple .45 caliber shell casings on the road. RP (01/08/08) 52; RP (01/10/08) 317. Three out of four victims were sure that defendant was

the shooter. RP (01/08/08) 108; RP (01/09/08) 145, 152, 231, 254; RP (01/10/08) 372, 435. Finally, when defendant was arrested outside his girlfriend's house, his girlfriend tried to smuggle out a gun that was later shown to be the gun used in the shooting. RP (01/14/08) 517-518; RP (01/14/08) 557, 574-575.

In sum, defendant failed to meet his burden and show that the prosecutorial remarks created an enduring and resulting prejudice that could not have been neutralized by a curative instruction. The prejudicial effect, if any, could have been mitigated by a timely instruction to the jury.

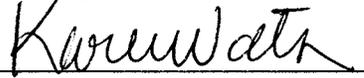
D. CONCLUSION.

This Court should affirm defendant's assault convictions because the prosecutor's comments in relation to the total argument were not so

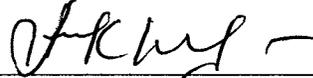
flagrant, ill-intentioned, and prejudicial as to warrant reversal. Defendant failed to preserve the error on appeal by not objecting.

DATED: FEBRUARY 17, 2009.

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Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/17/09 Johnson  
Date Signature

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