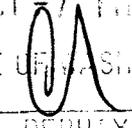


No. 37495-1-II

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

FILED
COURT OF APPEALS
DIVISION II

OCT 7 PM 12:11

STATE OF WASHINGTON
BY 

DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

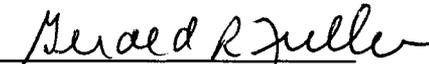
JOEL D. A. ANDERSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

T A B L E

Table of Contents

RESPONDENT’S COUNTER STATEMENT OF THE CASE 1

Procedural History. 5

RESPONSE TO ASSIGNMENT OF ERROR 8

The State did not commit the prosecutorial
misconduct during the final argument. 8

CONCLUSION 13

TABLE OF AUTHORITIES

Table of Cases

State v. Barrow, 60 Wn.App. 869, 809
P.2d 209 (1991) 8

State v. Belgarde, 110 Wn.2d 504, 507-08,
755 P.2d 174 (1988) 13

State v. Brown, 132 Wn.2d 529, 561,
940 P.2d 546 (1997) 12

State v. Castanada Perez, 61 Wn.App. 354,
810 P.2d 74 (1991) 8, 9

State v. Davis, 133 Wn.App. 415, 424,
138 P.3d 132 (2006) 13

State v. Fleming, 83 Wn.App. 209,
921 P.2d 1076 (1996) 9-11

State v. Rivers, 96 Wn.App. 672,
981 P.2d 16 (1999) 11

State v. Russell, 125 Wn.2d 24, 85-86,
882 P.2d 747 (1994) 12

State v. Stover, 67 Wn.App. 228, 231,
834 P.2d 671 (1992) 13

State v. Wright, 76 Wn.App. 811, 888
P.2d 1214 (1995) 9

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Charles Thompson lives at 1680 State Route 105, Aberdeen, Washington, about a mile away from the Ocean Spray Cranberry plant where he works. (RP 03-05-08, p. 29-30). Thompson owns approximately 9.6 acres. He has a large scrap metal pile consisting mainly of items that he obtained over the years from Ocean Spray. (RP 03-05-08, pp. 31-32). The pile measures approximately 50 x 50 feet and in some places stands as tall as six feet. (RP 03-05-08, 54).

Thompson first noticed a problem on April 2, 2007. He was on the property talking to a neighbor and discovered that some of the stainless steel appeared to be missing. (RP 03-05-08, pp. 33, 43). About a week later, he noticed that additional scrap had been moved and that more stainless steel had disappeared. He located a trail that led from his property, through the woods and down to Astoria Lane, a gravel road behind his property. Thompson found a number of items that had apparently been discarded by the thieves, including a wheel barrow, food wrappers, a water jug, a pop can, and a blanket. (RP 03-05-08, pp. 33-35, 44, 53-55). It was at this point that Thompson contacted the Grays Harbor Sheriff's Department (RP 03-05-08, pp. 33, 51-52).

On April 17, 2007, Thompson received a call at work from his wife. She had heard the sound of someone out at the scrap pile moving metal. It was apparent to Thompson that there was a theft in progress. He drove down Astoria Lane and observed an abandoned Chevrolet S10 pickup parked on the roadway. (RP 03-05-08, p. 39). A neighbor, Kenneth Graham, had also seen a Chevrolet S10 pickup truck in the area on a different occasion. (RP 64). Graham had also seen a blue Subaru station wagon on several occasions in the woods off of Astoria Lane. (RP 64-65).

As it turns out, the Chevrolet pickup truck belonged to Christopher Lovell. On April 18, 2008, Deputy Wilson of the Sheriff's Department found the vehicle parked on Astoria Lane. He ran the license number and determined that Lovell was the registered owner. (RP 03-05-08, p. 140). Wilson later contacted Lovell who admitted that he and the defendant had been stealing scrap metal from Thompson's property. (RP 03-05-08, pp. 93-94, 143-144).

On April 28, 2007, at about 5:42 a.m., Deputy Wilson responded to a report of a blue Subaru station wagon parked on Astoria Lane. (RP 03-05-08, pp. 144-145). Wilson pulled the vehicle over as it was attempting to leave the area. (RP 03-05-08, p. 147). Richard O'Leary was identified as the driver. His passenger was Brandon White. Wilson recovered over 200 pounds of scrap metal, including a stainless steel sink that Wilson had previously seen in Thompson's yard. (RP 03-05-2008, 147-149).

Christopher Lovell subsequently plead guilty to Trafficking in Stolen Property in the First Degree. O'Leary and White both plead guilty to Theft in the Third Degree arising out of their arrest on April 18, 2007. (RP 03-05-08, pp. 114, 133). Lovell, O'Leary and White testified at the trial in this matter.

O'Leary and White explained that they had known the defendant for some time. (RP 03-05-08, pp. 104- 108, 126). O'Leary explained that about a month prior to his arrest the defendant had taken him to the scrap pile on Thompson's property and the two of them had moved some scrap metal. O'Leary testified that earlier on the night of his arrest he and the defendant had been to Astoria Lane. The defendant asked O'Leary to remove the scrap metal. (RP 03-05-08, pp. 109-110). The defendant had previously been out to the property and segregated the metal he wanted, but claimed that he was unable to go out and retrieve it himself. (RP 03-05-08, p. 110).

White confirmed this information, stating that the defendant had walked out of the woods off Astoria Lane with Billye Wade. (RP 03-05-08, pp. 127-28). He and O'Leary gave the defendant and Wade a ride to Westport and returned to Astoria Lane. (RP 03-05-08, pp. 128-30). O'Leary and White had just loaded the Subaru station wagon when they were caught and arrested. (RP 03-05-08, pp. 111-114, 126-133).

Lovell had known the defendant for a number of years and had been staying at the defendant's residence in Westport in March and April, 2007. (RP 03-05-08, pp. 67-68). Lovell first learned about the scrap metal pile from the defendant. When Lovell mentioned that he did not have any money, the defendant suggested that they could steal the scrap and sell it. The defendant directed Lovell to the location. Lovell was driving his S10 pickup truck. (RP 03-05-08, p. 69).

Lovell had initially been out to the site with the defendant in late March or early April, 2007. (RP 03-05-08, p. 68). A flashlight failed to work so the two of them did not actually steal any metal that night. (RP 03-05-08, pp. 69, 77-79). As Lovell explained, however, they returned the following night and loaded stainless steel into Lovell's Chevrolet S10 pickup truck which they later hauled to Tacoma Metals, a recycling center. The two of them split the proceeds. (RP 03-05-08, pp. 69-72, 79-81).

Lovell testified that the two of them made as many as four trips together to Tacoma Metals. (RP 03-05-08, p. 71). Tacoma Metals had issued checks to Lovell on April 2, April 6, April 9, and April 23, 2007, for the sale of stainless scrap. (RP 03-05-08, pp. 72, 89, Exhibit 7-10). The records from Tacoma Metals reflected that the transactions on April 2 and April 9 involved large amounts of stainless steel. (RP 03-05-08, pp. 84-85).

Lovell explained that when the two of them sold scrap to Tacoma Metals the checks were issued to Lovell because he had valid identification. (RP 03-05-08, pp. 86, 96). Tacoma Metals did have a copy of both Anderson and Lovell's identification on file. Anderson's identification dated from January, 2007. (RP 03-05-08, p. 96, Ex. 1, 2).

In fact, records from Tacoma Metals showed that they first purchased metal from Lovell on April 2, 2007, (RP 03-05-08, p. 97, Ex. 1) and from the defendant on January 6, 2007. (RP 03-05-08, pp. 97-99). Copies of the checks from Tacoma Metals and the inventory for what was sold on each occasion were admitted at trial. (Ex. 5-10, RP 03-05-08, pp. 99-100).

Procedural History.

The matter was tried to a jury on March 5-6, 2008, on charges of two counts of Trafficking in Stolen Property in the First Degree, alleged to have occurred on April 2, 2007, and April 9, 2007. The jury found the defendant guilty as charged.

During final argument, both sides pointed out what had to be obvious under the facts of this case. A good deal of the jury's determination would turn on whether or not they believed Chris Lovell's testimony. During the State's opening argument attention was called to jury instructions directly relating to how the jury was to consider the

testimony of Christopher Lovell. (RP 03-06-08, p. 9). The State pointed out that the jurors were the sole judges of the credibility of the witnesses and weight to be given, taking into account the opportunity and ability to observe their memory, their manner during testifying, and any interest, bias or prejudice they might have. (RP 03-05-08, p. 9). The State also addressed the specific instruction dealing with the testimony of an accomplice (RP 03-06-2008, p. 9):

“And you will also see an instruction that talks to you about the fact that Chris Lovell is an accomplice and how you are to evaluate his testimony. All right. And it talks about to really look at it hard and determine whether you believe his testimony. And the answer is when you do that you will believe his testimony, because it makes sense. He lost his job,, he was living with the defendant, he was the only one that had the pickup truck. The two of them went out. This was not a one-man operation. The one time that Mr. O’Leary and Mr. White were arrested out there hauling, there were two of them. This is not - 200 pounds, 300 pounds of stainless steel is not what you’re going to do by yourself. Somebody needed to know where to go, that was Mr. Anderson who first pointed out to Mr. White where to go. The two of them went out there.”

During opening argument the State asked whether the jury believed Lovell was bright enough to make this up, or whether he, O’Leary and White got together to make up their stories and implicate the defendant. The State asked the jury to consider whether the defendant was offered some incentive for his testimony in his plea agreement. (RP 03-06-2008,

p.10). The State pointed out that the jury didn't have to like Chris Lovell. They just had to decide whether they believed Lovell was telling the truth about the defendant's involvement. (RP 03-06-2008, pp. 10-11).

In response, Counsel for the defendant argued that there was no evidence, other than the testimony of Lovell, linking Anderson to his presence at the Thompson property in early April or his presence with Lovell at Tacoma Metals. (RP 03-06-08, pp.19-20). Counsel for the defendant tried to ascribe a motive for Lovell to implicate Anderson falsely, suggesting that the two of them had had a "major falling out." (RP 03-06-08, pp. 24-25).

In response to this, counsel for the State argued in rebuttal that the jury should believe Chris Lovell and that the jury needed to decide who they believed. The State made the following argument, only a portion of which was included in the Brief of the Appellant. The defendant made no objection. (RP 03-06-08, p. 29).

You need to decide the case this case on the facts. You need to decide who you believe. This is not about whether Chris Lovell, Richard O'Leary and Brandon White are simply mistaken about some fact. To find this defendant not guilty you have to believe that Christopher Lovell is not telling the truth, that he made this up, that he implicated Joel Anderson. All right. That he had a falling out with Joel Anderson and that's the reason perhaps. Well, this falling out as I understand was an argument that happened on the morning of the 28th after he had already been arrested and after he had already talked to Deputy Wilson and after he had already made his statement. All right.

RESPONSE TO ASSIGNMENT OF ERROR

The State did not commit the prosecutorial misconduct during the final argument.

Perhaps it would be best to first point out what did not occur in this case, as the defendant has cited authorities which do not apply to the facts of this case. The State in this case did nothing more than point out the obvious, that the outcome of this case turned upon how the jury evaluated the testimony of Christopher Lovell, Brandon White and Richard O'Leary. (RP 03-06-08, pp. 9-12).

In State v. Barrow, 60 Wn.App. 869, 809 P.2d 209 (1991), the defendant's testimony at trial contradicted the testimony of the officers. The State, in final argument, characterized the defendant's testimony as an accusation that the police were lying. Barrow, 60 Wn.App. at 874-875. The defendant did not testify in this matter. The State did not accuse anyone of lying under oath.

In State v. Castanada Perez, 61 Wn.App. 354, 810 P.2d 74 (1991), a co-defendant, Ricardo Rodriguez, testified at trial on behalf of the defendant. The court held that it was improper for the deputy prosecuting attorney to ask Rodriguez a series of questions designed to make Rodriguez respond that he believed the police were lying in their direct testimony. Castanada-Perez, 61 Wn.App. at 357-58. In the case at hand,

the State did not invite any witness to speculate on the testimony of another witness.

Likewise, State v. Wright, 76 Wn.App. 811, 888 P.2d 1214 (1995), cited by the defendant, involves a case in which there was conflicting testimony between the police officers and the defendant. Wright held that it was improper to cross-examine a witness regarding the testimony of another witness, not because this invades the province of the jury, but because such cross-examination is irrelevant. Wright, 76 Wn.App. at 821-822. Likewise in Wright, the court affirmed the holding in Castanada-Perez, that it was improper for the State to argue that in order to find the defendant not guilty, the jury had to believe the defendant's testimony and completely disbelieve the officer's testimony. Wright, 76 Wn.App. at 822. This is not a case in which there were conflicts between State and defense witnesses. There was no argument that one witness should be completely believed or another completely disbelieved.

In State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996), the State, in final argument, made a number of arguments that the court found to be were improper. The State argued repeatedly that the jury, in order to acquit, would have to believe that the complaining witness was lying or that she was confused or fantasized what had occurred during the rape. But beyond that, the State in Fleming pointed out that there was no evidence to support a belief that the witness fabricated her testimony or was confused and that certainly if there was such evidence:

You... would expect and hope that if the defendants are suggesting there is reasonable doubt, they would explain some fundamental evidence in this [matter].

Fleming, 83 Wn.App. at 214. As pointed out by the court in Fleming the prosecutor went on further to ask why the defendant had not presented testimony to controvert evidence presented by the State. These two errors, "...taken together and by cumulative effect" were the basis for the reversal. Fleming, 83 Wn.App. at 216. No one is suggesting, in the case at hand, that the State argued the defendant had a burden to produce evidence.

In the case at hand, the statements made in final argument come nowhere near the remarks made by the prosecution in Fleming. The State made no statements of any kind infringing on the right of the defendant to remain silent. The court in Fleming reversed the convictions primarily on the basis of this comment on the evidence. Fleming, 83 Wn.App. at 215.

A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. *State v. Traweek*, 43 Wn.App. 99, 107, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citing *In re Winship*, 397 U.S. 358, 90, S. Ct. 1068, 25 L.Ed.2d 368 (1970)). The prosecutor's statements infringed on the defendants' constitutionally guaranteed right to remain silent, which error was compounded by the prosecutor's earlier misstatement of the law that the jury could acquit only if it found D. S. to be lying or mistaken.

The argument in this case is closely akin to the argument held improper in *Traweek*,

wherein the prosecutor questioned the defendant's failure to present witnesses and evidence to provide innocent explanations for the State's evidence. *Traweek*, 43 Wn. App. at 106. The *Traweek* court held that the argument infringed upon the defendant's privilege against self-incrimination and improperly shifted the burden of proof to the defense. *Id.*, at 107.

The case at hand does not present the facts as occurred in Fleming. Indeed, the jury was told in final argument by the State that they could not draw any inference of any kind from the failure of the defendant to testify.

Likewise, this is not a situation in which the prosecutor injected his personal opinion or attacked the character of a witness by inflammatory remarks. State v. Rivers, 96 Wn.App. 672, 981 P.2d 16 (1999).

The argument to which the defendant objects is one sentence in this entire case. The State pointed out, as did the defendant, that the testimony of Christopher Lovell was critical. The State pointed out reasons why he should be believed. The defendant pointed out reasons why Lovell might have a motive to lie. In the end, the jury's verdict was going to turn on what they chose to do with the testimony of Christopher Lovell.

This was not an issue about whether Lovell was mistaken concerning who helped him steal from Mr. Thompson or who went with him to sell the metal in Tacoma. The only issue that made sense in the context of the testimony at trial, as pointed out by counsel for the defendant, was whether Christopher Lovell had a recollection now as to

the specific dates or the exact number of times the two of them went to Tacoma Metals and whether Christopher Lovell may have had a falling out with the defendant and a motive to falsely implicate the defendant.

The defendant bears the burden of establishing the impropriety of the prosecuting attorney's comments and the prejudicial affect of the comments. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The complained of remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. Brown, 132 Wn.2d at 561. When one does so, it is apparent that the complained of remarks are not improper. The remarks in context were only a backwards way saying that it was proper for the jury to take a long hard look at Lovell's testimony and that it was proper for them to determine whether they believed he was telling the truth. It would not have been improper, for example, for the State to ask the rhetorical question "Do you really believe Christopher Lovell is lying, making this up? If so, then acquit the defendant."

Furthermore, in order for there to be a reversal of this conviction, the remarks must be so fragrant and ill-intentioned as to cause "...an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In this matter no objection was made. No curative instruction was asked for.

The remarks were not inflammatory. The State did not argue facts not in evidence or ask that he be convicted because of his political beliefs. See State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). A curative instruction could easily have resolved any alleged problem. See State v. Davis, 133 Wn.App. 415, 424, 138 P.3d 132 (2006) (failure to object to cross-examination in which prosecutor asked the defendant if other witnesses were lying found to be harmless error when no objection was raised. State v. Stover, 67 Wn.App. 228, 231, 834 P.2d 671 (1992) (repeated questions to defendant as to whether other witnesses had lied found to be harmless error when no objection was raised.)

In short, there was no improper argument, taking into account the entire context of the argument made by the State. In any event, any alleged problem could readily have been cured by a timely objection.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

FILED
COURT OF APPEALS
DIVISION II

03 OCT -7 PM 12:11

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

JOEL D. A. ANDERSON,

Appellant.

No.: 37495-1-II

DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 6th day of October, 2008, I mailed a copy of the Brief of Respondent to Nielsen, Broman & Koch, PLLC; 1908 East Madison; Seattle, WA 98122, and Joel D. A. Anderson 749134; Cedar Creek Corrections Center; P. O. Box 37; Littlerock, WA 98556, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 6th day of October, 2008, at Montesano, Washington.

Barbara Chapman

H. STEWARD MENEFFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563