

FILED
COURT OF APPEALS
DIVISION II

09 FEB -5 PM 12:05

STATE OF WASHINGTON
BY Ca
DEPUTY

No. 38176-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

RONALD J. HART,
Appellant.

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

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: Gerald R Fuller
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 COUNTERSTATEMENT OF THE CASE 1

 Procedural History 1

 Factual Background. 1

RESPONSE TO ASSIGNMENTS OF ERROR 4

 1. Argument of Counsel for the State was
 neither improper nor flagrant and ill intentioned. 4

TABLE OF AUTHORITIES

Table of Cases

State v. Wheless, 103 Wn.App. 749, 758, 14
P.3d 84 (2000) 9

State v. Barrow, 60 Wn.App. 869, 876, 809
P.2d 209 (1991) 8

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

State v. Finch, 101 Wn.App. 380, 385,
4 P.3d 857 (2000) 7

State v. Fleming, 83 Wn.App. 209, 921
P.2d 176 (1996) 8

State v. Reed, 102 Wn.2d 140, 684
P.2d 699 (1994) 7

State v. Riley, 69 Wn.App. 349, 354, 848
P.2d 1288 (1993). 8, 9

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural History.

The defendant was charged by Information on April 24, 2008, with Unlawful Possession of a Firearm in the Second Degree (CP 1). A CrR 3.5 hearing was held. The court found the statements to be admissible. (CP 6-8). The matter was tried to a jury commencing on June 26, 2008. The jury returned a verdict of guilty. (CP 22). Sentencing was held on July 14, 2008. The court imposed a sentence of 36 months in the Department of Corrections. (CP 23-30).

Factual Background.

At the time of the events herein, the defendant was a convicted felon. He had previously been convicted of Possession of a Stolen Firearm in Grays Harbor County Cause 04-1-62-1 on March 15, 2004. The parties stipulated to this fact at trial. (RP Trial, p. 32).

On April 16, 2008, Detective Peterson of the Grays Harbor County Sheriff's Office was attempting to locate the defendant. He wanted to speak to the defendant on a matter that he was investigating at the time.

Peterson was aware that the defendant had a warrant for his arrest. (RP Trial, p. 18). That afternoon, Peterson received information that the defendant had just left a trailer park on Fairgrounds Road. (RP 18). Peterson was given a description of the vehicle which turned out to be a vehicle belonging to the defendant's mother. A short time later, officers located the vehicle parked at the residence of the defendant's mother. (RP 19). Peterson and other officers spoke to the defendant's mother at the residence. She allowed them entry. The defendant was located hiding in the attic and placed under arrest on the outstanding warrant. (RP 20). The defendant was taken to the Grays Harbor County Jail.

Peterson remained at the residence, speaking with the defendant's mother for about twenty-five minutes. (RP 21). When he had finished he left and made a phone call. Peterson discovered that the defendant, when he left the Fairgrounds Road address, had a pistol grip shotgun in his possession. Peterson returned to the residence of the defendant's mother. With her consent he conducted a brief search and located the shotgun. (RP 22-23, 9-10).

Detective Peterson subsequently interviewed the defendant in the Grays Harbor County Jail. Following advisement of Miranda and the defendant's agreement to speak with him, Detective Peterson conducted a verbal interview with the defendant. Peterson did not tell the defendant what type of firearm was involved. The defendant acknowledged that his

mother gave him a ride to the Fairgrounds Road address to pick up the firearm and then returned with him back to her residence. (RP 27-28). Peterson asked the defendant to clarify what type of firearm it was. The defendant told Peterson that it was a shotgun with a pistol grip. (RP 28). Peterson subsequently prepared a handwritten statement memorializing the information given by the defendant. The defendant was allowed to read and review the statement. The defendant subsequently signed the statement. (RP 28-29).

The defendant testified at trial. He admitted going to the Fairgrounds Road address but denied picking up the shotgun. He denied taking the shotgun to his mother's residence. (RP 33-34). The defendant claimed that he brought nothing back from the residence other than his clothing that he had in a backpack. (RP 34).

The defendant acknowledged signing the written statement prepared at the time of his interview with Detective Peterson. He asserted, however, that none of the information in the written statement was correct and that he never told Peterson, verbally or otherwise, that he went to pick up a shotgun at Fairgrounds Road. (RP 35). According to the defendant, he was told by Peterson that he had to sign the statement and that if he did not do so Peterson would charge his mother with harboring a fugitive. (RP 36). In fact, the defendant claimed that he was never asked about the firearm and that the written statement taken at the time of his interview

with Detective Peterson was a total fabrication. (RP 39-40):

Q That's what I'm getting at. When the detective was interviewing you, he asked you about a firearm, did he?

A No, he didn't ask me. He just slid the statement across the table.

Q You never told him anything about a firearm?

A No.

Q You - did you tell him, I don't know anything about a firearm?

A Did I tell him I didn't know anything about a firearm?

Q So --

A After he had --

Q So --

A -- talked about it.

Q What you're telling me is Detective Peterson wrote this down and made - well, made it into your statement, made it all up?

A Yes, sir.

RESPONSE TO ASSIGNMENTS OF ERROR

1. Argument of Counsel for the State was neither improper nor flagrant and ill intentioned.

In the first instance, it is apparent that the defendant has taken a very small portion of the final argument out of context and tried to raise it

to the level of prosecutorial misconduct. Upon a review of the entire final argument this court will find that the jury was asked to do nothing more than use good common sense, apply the facts to the law and decide what they believed the facts to be.

The jury was properly told that they were allowed to use their common, collective, sense based upon their life's background and experience. (RP 47). They were properly told that they were the sole and exclusive judges of the credibility of the witnesses and could decide who to believe and who not to believe, bringing their common sense and experience to bear on that question. (RP 47).

The State continued in its final argument by asking the jury to consider who might have a motive to lie, the "... law enforcement officer who is sworn to uphold the law or the defendant who finds himself in a bind..."and must now claim that he never signed the statement and never saw a gun. (RP 47). The jury was properly told "You get to make those calls and those decisions." (RP 47-48).

The State continued by addressing the concept of reasonable doubt explaining that this has to do with what you "... believe after a full and fair consideration in which you believe in your heart and in your gut." (RP 48). The State explained the concept of an "abiding belief in the truth of the charge." The State went on to point out that proof was not required beyond all doubt nor beyond a shadow of a doubt. (RP 48). The State

properly suggested to the jury that the allegation that the officer falsified the written statement did not raise a reasonable doubt. (RP 48).

Thereafter, the State went through each of the elements of the crime and talked about evidence supporting each element beyond a reasonable doubt. The State spoke of reasons to believe the officer and disbelieve the defendant. His mother did not allow firearms in the house. (RP 50). The mother never saw the firearm. No stranger brought the firearm into the house. Detective Peterson interviewed the defendant, but it was the defendant, himself, who told Peterson what type of firearm it was. (RP 50). The defendant admitted signing the statement. In summation the State argued that it was up to the jury to decide who they believed. (RP 51).

So, now you've got to ask yourself, who do you believe? Did this officer make up the whole thing? Is he so desperate that he made up the whole thing? What did he do? Did he twist his arm and make him sign? He told the defendant that he would put his mother in a bind and that's the truth, but didn't threaten him. He didn't threaten to prosecute the mother and, I'm sorry that I told you the truth at the time, and now he wishes he hadn't.

Ladies and gentlemen, the evidence is here. The evidence is clear. The evidence is beyond a reasonable doubt. The defendant is guilty as charged.

The objected to argument is found in the rebuttal argument of the State. (RP 57). The State believes that this portion of the argument, in

the context of the entire final argument, simply told the jury that they were allowed to disbelieve the testimony of the defendant, in which he claimed that he read and signed an admission of guilt that was not true. The jury was properly told that they could conclude that the officer did not put information in the statement not given to him by the defendant. This argument simply mirrors the argument made by the State in its opening remarks that the jury was the final arbiter of the facts and that the jury had to decide who they believed. It was simply a way of asking the jury whether it was reasonable to believe that the officer made up a written statement for the defendant to sign which contained information that the defendant did not tell the officer.

The standard of review is well established. State v. Finch, 101 Wn.App. 380, 385, 4 P.3d 857 (2000):

Prosecutorial misconduct allegations are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). We review a prosecutor's allegedly improper remark 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." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert denied*, 523 U.S. 1007 (1998).

There certainly are times when a conviction should be reversed for repeated, flagrant, improper final argument by the prosecution. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1994). The jury was not told that

they had to find that the officer was lying in order to acquit. They were told to consider whether the defendant had read and signed a statement that was not true. The jury was asked to consider whether they believed that the officer intentionally put false information in the written statement signed by the defendant. (RP 51). This is a far cry from the facts as cited by the defendant in State v. Fleming, 83 Wn.App. 209, 921 P.2d 176 (1996).

Even if this court were to find misconduct, reversal of the conviction is only required when there is a substantial likelihood the argument affected the jury's verdict. State v. Barrow, 60 Wn.App. 869, 876, 809 P.2d 209 (1991). The burden is on the defendant to prove such prejudice. As pointed out in Barrow, 60 Wn.App. at 876:

Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice.

No objection was made to the argument. It is now incumbent upon the defendant to prove that the alleged misconduct was so egregious that the resulting prejudice could not have been obviated by a curative instruction. State v. Riley, 69 Wn.App. 349, 354, 848 P.2d 1288 (1993).

The result in Riley is nearly identical to the case at hand. In Riley, the State conceded that the prosecutor committed error by stating during

closing argument that, if the jury to believed Michael Riley, it would have to find it the arresting officer and other witnesses were not telling the truth. Riley, 69 Wn.App. at 353. This is far more egregious than the alleged misconduct herein. In Riley the court held that such argument did not merit reversal of the conviction.

Similarly, in State v. Wheless, 103 Wn.App. 749, 758, 14 P.3d 84 (2000) the State told the jury in final argument "...that in order to find [him] innocent, the police of Seattle, Washington, must be lying." The court found that this was "likely" improper, but that the argument was not "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."

An even more egregious case is found in State v. Casteneda-Perez, 61 Wn.App. 354, 810 P.2d 74 (1991). In Casteneda-Perez, the prosecutor during cross-examination of the defendant continually asked the defendant whether he believed the officer was lying under oath when the officer testified that the defendant had delivered cocaine to the officer. Casteneda-Perez, 61. Wn..App. at 357-59. The court in Casteneda-Perez found that the argument was completely improper but, nevertheless, harmless as there was no substantial likelihood that it influenced the outcome of the trial.

In short, these brief remarks, in the context of the entire trial and final argument of the parties were not improper. Even if the jury could somehow draw the inference that the State was intentionally trying to misrepresent the burden of proof, any such error is harmless beyond a reasonable doubt. This conviction must be affirmed.

Respectfully Submitted,

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

FILED
COURT OF APPEALS
DIVISION II

09 FEB -5 PM 12:05

STATE OF WASHINGTON
BY Cm
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD J. HART,

Appellant.

No.: 38176-1-II

DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 4th day of February, 2009, I mailed a copy of the Brief of Respondent to Jennifer L. Sweigert; Nielsen, Broman & Koch, PLLC, 1908 East Madison Street; Seattle, WA 98122, and //Ronald J. Hart 847992; Airway Heights Correction Center; P. O. Box 2109; Airway Heights, WA 99001, 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 4th day of February, 2009, at Montesano, Washington.

Barbara Chapman