

No. 39466-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

JORDAN M. DIXON,
Appellant.

FILED
COURT OF APPEALS
IN WASHINGTON
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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: *[Signature]*
KRAIG C. NEWMAN
Senior Deputy Prosecuting
Attorney
WSBA #33270

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

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STATEMENT OF THE CASE

Jordan M. Dixon was charged by Information with the crime of Attempt to Commit Robbery in the Second Degree. The Information against him did not allege that he was an accomplice.

At trial, Eric Calloway testified at the time of the alleged attempted robbery he had been living at the Econo Lodge in Hoquiam, Washington. (RP 4). He was familiar with Jordan Dixon in that he had met him one time prior at the supermarket. He had also seen him walking around Hoquiam on several occasions. (RP 7).

Mr. Calloway testified that a subsequent encounter he had with Mr. Dixon involved an attack. Mr. Calloway was walking back from the Hoquiam library to the Econo Lodge. He noticed that two men were following him. (RP 12). At some point on his way home he heard a voice say, "empty your pockets." (RP 13). Mr. Calloway testified that he believed the person who stated that was Jordan Dixon, the appellant. He turned and words were exchanged, at that point he was struck by both Mr. Dixon and Mr. Dixon's accomplice. (RP 14). Mr. Calloway made an effort to flee back to his home, and the two men followed him. They only broke off the altercation when a window of the hotel was broken, at which

time both men took off running. (RP 17).

Mr. Calloway followed a man that was later identified as Jason Thomas. Thomas attempted to flag down a ride to leave the scene. (RP 18). Thomas was arrested and taken to the station.

Detective Shane Krohn of the Hoquiam Police Department testified at trial that “the person in custody gave me a name of who he was with.” (RP 75). Based on this, the detective attempted to contact the appellant.

The appellant made a statement to the police which was admitted at trial. The appellant implicated Jason Thomas as the person who assaulted Mr. Calloway. The appellant flatly denied any involvement in this assault and the denied taking anything from Mr. Calloway. The appellant claimed to have left the scene of the crime prior to anything happening.

Jason Thomas did not testify, nor did any other witness to the assault on Mr. Calloway.

ARGUMENT

The appellant’s first claim of error is that inadmissible hearsay was presented at trial in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The appellant is correct that the contents of co-defendant’s statements are not admissible against a defendant unless the co-defendant testifies at trial.

In this case no statement was admitted from the co-defendant. The detective merely stated that he spoke to Jason Thomas and that Jason Thomas told him who was with him. After this the detective contacted the appellant. The defendant is right that a inference could be made that Mr. Thomas stated that the appellant was the person that was with him. But that is not a statement for the purposes of hearsay.

Hearsay is a statement, other than one made by declarant while testifying at trial or hearing, offered to prove the truth of the matter asserted. ER 801. The explanation given by the detective was presented to simply explain why he had contacted the appellant.

Even if this is deemed an error, the error was harmless. Constitutional errors may be so insignificant as to be harmless. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Constitutional error is harmless if the appellate court “is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Guloy*, 104 Wash.2d at 425, 705 P.2d 1182.

The defendant admitted to the fact that he was present when Mr. Calloway was assault. This statement was presented at trial. The fact that the appellant was present at the time of the incident was not contested by his attorney at any point and there was no objection to the testimony when it was made. For this reason the appellant was not prejudiced by the testimony.

The Appellant second claim of error is that the court below failed to properly instruct the jury. This was an error, but as explained previously, constitutional errors may be harmless. The only evidence presented at trial that implicated the defendant in the crime of Attempted Robbery was the testimony of the victim Mr. Calloway.

Mr. Calloway description of the appellant's action was of a person actively engaging in the crime. This testimony depicted the appellant as the "principle," and not an accomplice. He stated that the appellant said "empty your pockets," and then proceeded to assault him. If this testimony was believed then an accomplice instruction was not needed, because the appellant himself committed Attempted Robbery.

The only other evidence presented at trial that the appellant was even at the scene of the crime was his own written statement. The appellant argues that somehow the jury convicted based on this statement. If the jury believed that this statement was true, or at least had reasonable doubt as to its true, then the jury would have acquitted him.

The appellant denied any criminal involvement in the incident. He claimed to have left at the point the a crime occurred. By the accomplice instruction the jury was given, the appellant would have not been guilty.

The appellants claim is that he did not encourage the commission of this crime of aid in its commission. Nothing in his statement would lead the jury to believe that he was an accomplice as defended in the jury instruction presented at the end of trial, and there was no other evidence

presented at trial.

The only explanation of the conviction is if the jury completely disregarded the defendant's testimony and believed the victim beyond a reasonable doubt. If the accomplice instruction included the knowledge provision the outcome of the trial would have been the same. Therefore, the defendant was not prejudiced by this error.

Finally, the attorney for the appellant claims prosecutor misconduct. While presenting a criminal case, a prosecutor must seek a verdict free of prejudice and based upon reason, fairness, and the evidence. *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976). "Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Id.* "Allegedly improper argument should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *Id.*

The United States Supreme Court addressed "prosecutorial misconduct" in *Namet v. United States*, 373 U.S. 179 (1963). In *Namet*, the Court recognized that some lower courts were of the opinion that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government made a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of "simple" trial error.

The issue was first addressed by the Washington Supreme Court in *State v. Nelson*, 72 Wn.2d at 282. In *Nelson*, the prosecutor called a witness whom the prosecutor knew would claim his Fifth Amendment privilege against self-incrimination solely as a means of getting the government's theory of the case before the jury via the questions asked of the witness. The court stated that "the prosecutor called Patrick to the stand, and in the presence of the jury, asked 28 questions of Patrick outlining substantially in its entirety the State's theory of the case." *Id.* at 282. The "conduct of the prosecutor in placing Patrick on the stand, knowing that Patrick intended to claim his privilege against self-incrimination to questions relating to the alleged crime, and seeking to get the details of Patrick's purported confession before the jury by way of impermissible inferences drawn from the witness' refusal to answer the questions propounded, constituted a denial of Nelson's right to confrontation under the Sixth Amendment." *Id.*

In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the defendant testified that he had some affiliation with the American Indian Movement (AIM). The prosecutor made several references to AIM in his closing argument. The court characterized the prosecutor's closing argument as follows:

The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.

A prosecutor cannot be allowed to tell a jury in a murder case that the defendant is “strong in” a group which the prosecutor describes as “a deadly group of madmen,” and “butchers that kill indiscriminately.” The prosecutor likened the American Indian Movement members to “Kadafi” and “Sean Finn” of the IRA. This court will not allow such *testimony*, in the guise of argument, whether or not defense counsel objected or sought a curative instruction. An objection and an instruction could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor’s description of the Indians involved in AIM. This court cannot assume jurors did not believe the prosecutor’s description. We have repeatedly explained that the question to be asked is whether there was a “substantial likelihood” the prosecutor’s comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Charlton*, *supra* at 664. There is a substantial likelihood this egregious departure from the role of a prosecutor did affect the verdict. “If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” 110 Wn.2d at 508-09.

A defendant's failure to object or move for a mistrial at the time a prosecutor in a case makes an allegedly improper statement is strong evidence that the argument was not critically prejudicial to the defendant. *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557 (1999) citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The fact that defense counsel did not object to the prosecutor's statement "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993). Absent a proper objection, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001).

To determine whether the remarks were prejudicial the court must analyze them in context, taking into consideration the total argument, the issues in the case, the relevant evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If the court is satisfied that the outcome of the trial would not have been different had the alleged error not occurred, given all the evidence, then the error is harmless. *Rogers*, 70 Wn. App. at 631.

A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The attorney for the appellant first errorlessly equates flight from the scene of a crime with pre-arrest silence. The latter is a matter that is not admissible and should not be committed on in closing argument. Evidence of flight is admissible if it creates “a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.” *State v. Hebert*, 33 Wash.App. 512, 656 P.2d 1106 (1982). The fact that the appellant, admittedly, left the scene of the crime is relevant to prove is knowledge of guilt. As the Washington Supreme court once wrote “it often happens that persons conscious of guilt seek safety by flight even before they are suspected of crime. ‘The wicked flee when no man pursueth.’” *State v. Deatherage*, 35 Wash. 326, 77 P. 504 (1904).

The appellant believes that it is ones right to flee from the police as it is one’s right to remain silent in there presence, and neither should be committed on at trial. He also claims that I am vindictive for doing so, but this is not the law in the State of Washington. Evidence of flight is relevant, and has always be relevant, as to a persons guilt. It is not misconduct to comment on this in closing argument.

The attorney for the appellant also, takes exception to the suggestion that every person who responds to a subpoena and swears to tell the truth in a court of law *deserves* to be believe until they prove themselves untrustworthy. This is equated to instructing the jury as to a

presumption of truthfulness, and is vindictive misconduct. Not only is this comment not misconduct, it is also true. People who respond to subpoenas and swear to tell the truth in a court of law do deserve to be believed until they prove themselves untrustworthy. If we have no faith that a witness is going to do as he or she has sworn to do, then why is the oath administered. The purpose is to instill in the jury some assurance that these witnesses must tell the truth under penalty of perjury. If a witness is willing to make this oath then they deserve some benefit of the doubt that they are abiding by it. A jury does not have to give them this benefit, but the State did not state that it was *required*.

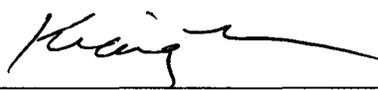
The Appellant explains in great length that these two lines of argument taken together was a deliberate effort by the State to draw the attention to the jury that the defendant did not testify. An effort by the State to point out to the jury that the defendant did not testify is prosecutor misconduct, but that is not what happened here. The appellant suggest that the State's entire closing argument, read together, was crafted to maliciously prejudice the jury against the defendant, but does not give any more explanation than the State argued that the defendant fled the scene of the crime because he knew he was guilty and that witnesses deserve to be believed until they prove themselves untrustworthy. It is for this court to read the closing argument and judge it as a whole.

CONCLUSION

This is a rare case where conviction rested on the testimony of a single witness. The only explanation for the conviction was that the jury simply believed the man beyond a reasonable doubt. For this reason all of the claimed errors are harmless. Simple saying to a jury that they should believe the victim is not going to sway their decision, they in fact have to believe him. The most clever closing argument cannot pull such a case from an acquittal. If the jury does not believe your only material witness then they will acquit.

It is easy and common for appellant attorneys to make claims of sanctionable conduct on the part of the trial attorneys. But, even if true it does not mean that the outcome of the trial would be any different, and that is the crucial question in this case.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Senior Deputy Prosecuting
Attorney
WSBA #33270

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DECLARATION OF MAILING

JORDAN M. DIXON,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 24th day of March, 2010, I mailed a copy of the Brief of Respondent to David L. Donnan and Oliver R. Davis; Attorney at Law; 1511 - 3rd Avenue, Suite 701; Seattle, WA 98101-3635, and Jordan M. Dixon; c/o Jackie Russell; 702 L Street; Hoquiam, WA 98550, 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 24th day of March, 2010, at Montesano, Washington.

Randi M. Toyra