

NO. 40849-0-II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY

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

STATE OF WASHINGTON, RESPONDENT

v.

JAYCEE FULLER, APPELLANT

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

No. 10-1-00480-9

Brief of Respondent

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

1. Whether the conviction should be reversed where the prosecutor's closing arguments taken in context were proper arguments relating to the evidence put forth in the case, and where even if they were error, they were not flagrant and ill intentioned and there is not a substantial likelihood they affected the jury's verdict?

B. STATEMENT OF THE CASE.

1. Procedure

On February 1, 2010, based on an incident that occurred on the January 15, 2010, the State charged the defendant with unlawful possession of a controlled substance by a prisoner. CP 1-2. On June 9, 2010 the jury delivered a verdict of guilty. CP 27. On June 17, 2010, the court sentenced the defendant to eight months in custody. CP 32-44.

The defendant timely filed this notice of appeal on June 14, 2010. CP 45.

2. Facts

On January 15, 2010, Jaycee Fuller was incarcerated in the Pierce County Jail. 3 RP 45, ln. 12-24. At that time, he was housed and living in Three West, cell number Charlie 28 of the jail. 3 RP 46, ln. 2-7; p. 48, ln. 19. At that time, Fuller was the unit worker for the unit, which means that

he helped officers feed the units, and was also responsible for cleaning the day room and facilities the inmates use. 3 RP 46, ln. 15-17. In exchange for doing that he earned special privileges, such as an extra food tray if there was one, and additional TV and telephone time, etc. 3 RP 46, ln. 18-22.

Officers conduct random searches of the cells, and will also search cells based on tips that inmates possess contraband. 3 RP 47, ln. 1-22. On January 15, 2010, officers conducted a cell search of Fuller's cell on a random basis. 3 RP 46, ln. 23-25; p. 48, ln. 5-16. In the search of Fuller's cell, officers found a pipe that was homemade out of toilet paper hardened with soap and toothpaste, and pieces of pencil lead that had been stripped of all the surrounding wood. 3 RP 50, ln. 20-24; p. 52, ln. 1-5. The pencil leads could be inserted into an electrical socket and then be used to ignite material, including marijuana. 3 RP 92, ln. 23 to p. 96, ln. 14. Officers also found two bags of leafy substances under Fuller's bunk. 3 RP 50, ln. 24-25. Some of the substance was tested and showed positive as marijuana. 3 RP 126, ln. 2-3. Along with the marijuana was also tobacco that was kept in a plastic container left over from a food item that Fuller regularly purchased from the jail commissary. 3 RP 52, ln. 6 to p. 53, ln. 6; p. 54, ln. 25 to p. 55, ln. 25; p. 99, ln. 25 to p. 104, ln. 20.

Fuller testified that someone put the marijuana in his cell. 3 RP 151, ln. 9-14. At one point, he testified that his cell had been thoroughly searched only three days before the marijuana was found in this case. But

elsewhere Fuller claimed that somebody could have put the contraband into his cell up to a week before it was discovered. 3 RP 153, ln. 1-6. Fuller claimed he had broken the wood off the pencil seven months earlier to make a needle so he could make a hacky sack. 3 RP 154, ln. 16-17; p. 155, ln. 20 to p. 156, ln. 21.

C. ARGUMENT.

1. THE PROSECUTOR'S STATEMENTS DID NOT CONSTITUTE MISCONDUCT WHERE THE PROSECUTOR FIRST ARGUED THAT THE STATE HAD ALREADY PUT FORTH EVIDENCE BEYOND A REASONABLE DOUBT BEFORE THE DEFENDANT TESTIFIED.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were

improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court reviews a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury’s verdict. *Finch*, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error, and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294.

The defense relies on *State v. Moreno* for the proposition that where a prosecutor's comment refers to a constitutional right, the court applies the stricter standard of constitutional harmless error. Br. App. 9 (citing *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (citing *State v. Contreras*, 57 Wn. App. 471, 473, 788 P.2d 1114 (1990))). However, the defense claim is inaccurate in its summary of the court's position in *Moreno*. What the court in *Moreno* said is that when a prosecutor's comment refers to a constitutional right that is separate [from the defendant's right to a fair trial], it is subject to constitutional harmless error. *Moreno*, 132 Wn. App. at 671-72. [Emphasis added.]

In *Moreno*, the separate right at issue that the prosecutor commented on was the defendant's right to defend himself. *Moreno*, 132 Wn. App. at 672. The prosecutor argued that the defendant was the

perfect example of a domestic violence abuser who had to be in control and was still trying to call the shots, so much that **he has exercised his constitutional rights to defend himself, because power is that important to him.** *Moreno*, 132 Wn. App. at 672. [Emphasis in original.]

The case upon which the court in *Moreno* relied, *State v. Contreras*, involved a comment by the prosecutor on the defendant's failure to call an alibi witness where the defendant asserted an alibi defense. *Contreras*, 57 Wn. App. at 474. The court in *Contreras* held that it was not error for the prosecutor to comment on the defendant's failure to call the alibi witness in that case because the absence of that witness was directly relevant to the credibility of the defendant's alibi defense. *Contreras*, 57 Wn. App. at 474.

It is improper for a prosecutor in closing to make remarks that conflict with the presumption of innocence, including argument that shifts the burden of proof to the defendant. *See State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

Here, the defense claims that six statements the prosecutor made in closing constituted misconduct. *See* Br. App. 8. However, when understood in context, these statements did not constitute misconduct.

At the beginning of its closing, the State started off with the argument that if at the beginning of the trial the jurors had been asked to describe what they would expect to be found in the defendant's cell if he was storing marijuana there, one would expect them to describe a scenario exactly like what occurred in this case. 4 RP 191, ln. 23 to p. 92, ln. 2. The prosecutor then reviewed the evidence in the State's case: that the defendant was a regular marijuana user [outside of jail]; that the marijuana was stored in a container in a secret spot; that there was a homemade pipe in the cell, as well as a device to make a flame. 4 RP 192, ln. 3-13. The prosecutor then noted that the evidence put forth by the close of the State's case, and before the defendant testified, established the defendant's guilt.

It was at this point that the prosecutor made four of the six statements that the defense now challenges. He said,

The question for you now, when you go back into that jury room is to decide whether the defendant's testimony created a reasonable doubt in your mind. Is there a reasonable doubt based on what he told you that it wasn't his marijuana? It's not enough for him to simply tell you it's not his marijuana. It's not enough for you to go back and say, well, that's plausible, therefore I must have a reasonable doubt.

If that's the standard you impose, if that's the litmus test for deciding whether you have a reasonable doubt, then no one will ever be found guilty of their crimes when they are in constructive possession of something. Someone who has got drugs in their pocket, someone who has got a gun under their seat, or in their backpack, someone who had got child pornography in their home, all they have to tell you is

that, hey, I have an enemy and maybe that enemy planted that in my house, and if that's the test then you must find that person not guilty. That's not the test.

The test for you all is to decide do you believe him, do you think there's a real possibility of what he's telling you? So when you look at the defendant's testimony, ask yourself: Is there a real possibility that he's telling you the truth? If there is, then you have a reasonable doubt.

The answer to that question is no. This defendant has every motive to lie. He's been sitting, waiting for trial, has every opportunity if he doesn't want to accept responsibility to think about it over the months in advance of how to craft his testimony, how to put something together that sounds plausible, how to work on his testimony, how to take the stand and sound like a choir boy, how to present himself as a choir boy, how to make the jury like him and engender him. He's got every chance to do that in the months before his trial.

Don't assume because he tells you and his attorney tells you and he's demanded his trial that he's adamant in his innocence that he must be innocent. ***As long as there are people who don't want to accept responsibility for their actions they will demand their trials and put together a story that they hope you will sign off on. You have to look at his testimony and ask: Do you believe him?*** If you look at his testimony and say there's something there that just doesn't sound right, I think he's lying to me about this or that, then the story doesn't present a real possibility that he was framed.

If he has no possession of that marijuana, if he was framed, he doesn't have to lie to you about anything. He would come and tell you everything that's the truth and the truth would set him free. So are there any bits of his testimony that don't make sense? The answer to that is yes.

4 RP 192, ln. 17 to p. 194, ln. 22. [Emphasis added to the portions cited by the defendant. See Br. App. 8.]

As a preliminary matter, none of these statements is a comment on a separate constitutional right of the defendant. All of the comments the

defense challenges relate to the reasonable doubt standard and the defendant's right to a fair trial. Accordingly, the harmless error standard does not apply. *See Moreno*, 132 Wn. App. at 671-72. Therefore, because the comments were not objected to below, the defense has the burden of showing that the challenged comments were so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice. *See State v. Hoffman*, 116 Wn.2d at 93.

When understood in their proper context, the prosecutor's arguments made logical sense and were not error. He argued that at the close of the State's case in chief, there was no question the defendant was storing marijuana in his cell. 4 RP 192, ln. 14-17. Said otherwise, the prosecutor argued that the State had at that point put forth evidence that proved Fuller's guilt beyond a reasonable doubt. Accordingly, where the prosecutor's argument was that the evidence from the State's case in chief established the defendant's guilt beyond a reasonable doubt, the primary question for the jury was whether the defendant's testimony called that evidence into question such that it raised a reasonable doubt.

When understood in context the prosecutor's argument did not shift the burden of proof to the defendant. It asserted that the State had put forth sufficient evidence and then considered whether the defendant's testimony raised a doubt about that evidence.

This argument is logically correct, consistent with the evidence at trial, and legally proper. Indeed, defense counsel at trial recognized as much. He did not object to the argument, notwithstanding the fact that he understood the prosecutor's argument very clearly. Instead, he responded to it with the most logical and effective counter-argument – that contrary to the prosecutor's argument, there was a lot of doubt even before Fuller testified and even more doubt after he testified. 4 RP 200, ln. 19-22.

The prosecutor's closing statements quoted above were not improper because they began with the argument, and were based on the evidence. The prosecutor's argument that by itself the evidence adduced in the State's case in chief established the defendant's guilt beyond a reasonable doubt. As a result, he further argued that the primary issue before the jury was whether the defendant's testimony was credible such that it undermined the case the State put forward. The State's argument did not improperly shift the burden. Rather, it focused the jury on the issue of the defendant's credibility, which was the primary issue for jury determination under the State's theory of the case.

The defendant challenges two additional statements made by the prosecutor. At the end of his closing, the prosecutor said:

As I said, when you look at this case what you see is someone who got caught and someone who now wants to deflect responsibility. Look carefully at his attempt to deflect responsibility and ask yourself: Are there just too many coincidences, too many coincidences between the food container and the items found on his table and the fact that he was an avid marijuana smoker, and the chance, the very rare chance that anyone would actually attempt to plant the evidence in his room? And the conclusion you come to is that he is guilty and that's what your common sense tells you, ***and don't allow a defendant who simply doesn't want to accept responsibility to create a reasonable doubt in your mind.***

4 RP 199, ln. 23 to p. 200, ln. 11. [Emphasis added to the portion cited by the defendant. See Br. App. 8.] This argument relates directly to what credibility the jury should give the defendant's testimony. It does not shift the burden of proof and is not improper.

The other statement by the prosecutor that the defendant challenges came in rebuttal.

[...] At some point coincidences stop becoming coincidences and start meaning something. At some point it stops becoming a coincidence that he had it in the very container of nacho cheese dip that he liked, and at some point it stops becoming a coincidence that he had all the items on his desk that he would use to create a lighter.

Did you notice in the 25 minutes that Mr. Gant got up and spoke to you that not once did he talk about those items? There's a reason for that. You don't address what you can't explain. Now, ***what the defense can't explain to you is why all the implements for a lighter were sitting on his desk. Simply can't explain it.*** That's why Mr. Gant didn't talk to you about it.

At the end of the day, things stop becoming coincidences and start being something more. When all these pieces of evidence are put together it's not a coincidence. It's not a coincidence that an avid pot smoker had pot in his cell. It's not a coincidence that he had all the implements to smoke it in his cell. It's not a coincidence that he had tobacco and marijuana and a pipe in his cell.

At the end of the day the evidence says one thing that is beyond a reasonable doubt, not simply pure speculation, not simply throwing something against the wall as defense has tried to do, the evidence says that he had marijuana and that was his marijuana.

4 RP 219, ln. 13 to p. 220, ln. 8. [Emphasis added to the portion cited by the defendant. *See* Br. App. 8.]

The prosecutor had previously argued in his closing that if the jury didn't find to be credible some portions of the defendant's testimony that he was framed, then the jury shouldn't believe any of it because if his story was true he would be honest with them. 4 RP 194, ln. 17-22. Thus, if there were inconsistencies or claims that were not believable in the defendant's testimony, the jury shouldn't believe the defendant because he wasn't being honest.

When properly viewed in context, the portion of the argument the defense challenges above does not attempt to shift the burden to the defense. Rather, where the defendant has testified and by that testimony the defense put forth an alternative theory of the evidence, it is an argument that challenges the credibility of the defendant's testimony, and

the defense theory of the case. The fact that the pieces necessary to make a lighter were found in the defendant's cell discredit his claim that he was framed by another inmate within the jail. It was not improper to argue that the defense theory was implausible because it was contradicted by additional evidence, which evidence the defense chose to ignore. Accordingly, the argument was not improper and was not error.

When understood in context, the arguments in this case were not flagrant and ill intentioned. They were an attempt to argue that the State had proved the defendant's guilt beyond a reasonable doubt in its case in chief, and as a result the central issue under the State's theory of the case is whether the defendant's testimony undermined the State's evidence such that it raised a reasonable doubt. In rebuttal, the prosecutor went on to argue that the evidence did not support the defense theory because the evidence the defense chose to ignore contradicted the defense theory.

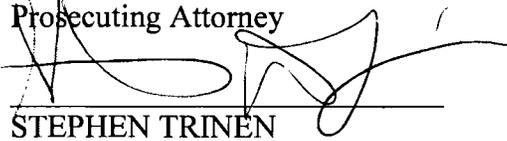
The prosecutor's argument was consistent with the evidence put forth in the case, as the defendant's trial counsel himself recognized. Accordingly, the defendant has failed to meet his burden to show that the prosecutor did not act in good faith. They certainly were not flagrant and ill intentioned. Nor is there a substantial likelihood even if the comments were improper that they affected the jury's verdict. For all these reasons, the appeal is without merit and should be denied.

D. CONCLUSION.

The prosecutor's statements in closing were not impermissible where they properly argued the evidence in the case. Moreover, they were not flagrant and ill intentioned so that the defense has failed to show that the prosecutor did not act in good faith. This court should affirm the conviction.

DATED: February 10, 2011.

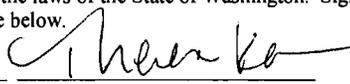
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Certificate of Service:

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.

2-10-11 
Date Signature