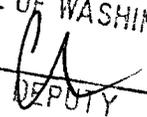


FILED  
COURT OF APPEALS  
DIVISION II

2012 JUL 26 PM 2:01

STATE OF WASHINGTON  
BY  DEPUTY

No. 42696-0-II

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

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STATE OF WASHINGTON,  
Respondent,

v

MICHAEL PICKERING,  
Appellant.

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

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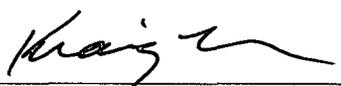
THE HONORABLE GORDON GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

The appellant was charged by information with the crime of Burglary in the Second Degree. After a jury trial he found guilty as charged. During the closing argument of the State the following was said:

Now, you're going to be hearing about reasonable doubt. Everybody's heard of that before, but it's not something that you normally use in your everyday life. So you might have a question, what does that really mean? What does it really mean to have a reasonable doubt? It's certainly not any doubt. I mean people can talk about doubts all of the time and then you look at him and say, well, that's not reasonable at all. I mean that doesn't make sense. Yeah, you just say that but that doesn't mean I have to lose faith in my - my belief.

When you're deciding this case the Court has given you an instruction that kind of enlightened us. The reasonable doubt is the standard by which you will judge the defendant it is standard that every defendant has been judged in the history of American criminal law. But the Court has given you an instruction kind of enlightening you what reasonable doubt means. And it states that if I have proven to you to an abiding belief that the defendant is guilty, I have proven to you beyond a reasonable doubt. And that's something that I think a - probably easier for you to understand because that's an idea that people deal with everyday. It's what do you believe. You know how strongly you hold your beliefs.

Now, abiding belief is a belief that survives this process. Ask yourself, why do we do this? Why - this isn't just - you know, some sort of theatrical show we put on to make all of us feel better about the criminal justice system. It has a purpose. Its purpose is to test

your belief in my evidence. Once I presented all of the evidence I know it goes pretty quick and there's cross examination and then we argue and try to convince you that our interpretation of the evidence is correct, then you go and deliberate and you talk amongst each other that tests your belief and in the end your belief survives this whole process, it's an abiding belief. It's as simple as that. And also an abiding belief is one that you've got to take out of this courthouse. If you vote guilty you need to know you did the right thing. It's simple as that. It's not a math problem.

Now, there's another instruction that talks about circumstantial evidence. Now, by watching the TV shows you probably came to the conclusion that circumstantial evidence is that lawyer made up evidence, not really good evidence. They're always saying, oh, this is just a circumstantial case, like that's a bad thing. And it's not true. Circumstantial evidence is something better than that. It's actually something quite important. It's why you're here. Circumstantial evidence is your common sense.

If you wake up in the morning and you walk out to get the paper and there's a foot of snow on the ground, look across the country side, there's snow everywhere, snow in the trees, snow on the house, where did the snow come from? Everybody knows it snowed last night. Now, it can be argued, you didn't see that with your own eyes, you did not see it snow, therefore you cannot know beyond a reasonable doubt or to any certainty that it did snow last night, but you know that's not true. Why? Because you have common sense. This is Instruction Number 4, evidence that has been presented to you may be either direct or circumstantial. The term direct evidence refers to evidence

that is given by a witness who has directly perceived something at issue in this case.

The term circumstantial evidence refers to evidence from which based on your common sense and experience you may infer something that is at issue from this case. You come out and you see the snow on the ground, it's undeniable there's snow on the ground. How did it get there? It fell from the sky, you know that because of your common sense. Somebody said, well, you don't know, maybe somebody took a snow machine and covered the country side with it. But you know that's just not practical and it doesn't raise a reasonable doubt in your mind about where the snow came from. So in this case if you trust in your belief and use your common sense you will come to the conclusion the defendant is, in fact, guilty.

#### ARGUMENT

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 is 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).

In this case the appellant failed to object, so it is his burden to prove that the comments of the state were so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. The statements quoted above are a proper statements of the

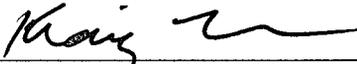
law, for this reason no error occurred. Even if these statements are not a precise statement of the proper legal standards that they were not made in flagrant disregard to the defendant right to a fair trial.

CONCLUSION

For this reason the State asks this court to deny the appellant's claim of error.

DATED this 25 day of July, 2012.

Respectfully Submitted,

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

KCN/

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

No.: 42696-0-II

v

**DECLARATION OF MAILING**

MICHAEL PICKERING,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 25<sup>th</sup> day of July, 2012, I mailed a copy of the Brief of Respondent to Rabi Lahiri, Attorney at Law, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, 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 25<sup>th</sup> day of July, 2012, at Montesano, Washington.

Barbara Chapman