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NO. 50401-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JORY EDWARD DENMAN,

Appellant.

RESPONDENT'S BRIEF

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**HALL OF JUSTICE
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I. ISSUE

1. Did the State present sufficient evidence to support the Appellant's conviction for Bail Jumping?
2. Did the State commit prosecutorial misconduct during its closing argument?
3. Did the Appellant receive ineffective assistance of counsel?

II. SHORT ANSWER

1. Yes. The State presented sufficient evidence to support the Appellant's conviction for Bail Jumping.
2. No. The State did not commit prosecutorial misconduct during closing argument when it argued reasonable inferences from the facts and evidence presented during the trial.
3. No. The Appellant did not receive ineffective assistance of counsel.

III. FACTS

The State generally agrees with the facts and procedural history as laid out in the Appellant's Brief. Where appropriate, the State will point to specific parts of the record to clarify any ambiguities and address any misstatements.

IV. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTION FOR BAIL JUMPING.

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 707-08, 821 P.2d 543, *review denied*, 118 Wn.2d 1028 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). A reviewing court does not reweigh the evidence and substitute its judgment for that of the fact finder. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A person is guilty of bail jumping if he fails to appear as required, after having been released by court order or admitted to bail, with knowledge of the requirement of a subsequent personal appearance before a court. RCW 9A.76.170.

- a. *The State presented sufficient evidence that the Appellant was given notice of the court dates he was required to appear.*

The Appellant argues that the State did not present sufficient evidence due to both a deficiency in the written order to appear and no proof that the Appellant received a copy of the order to appear. This argument is without merit. In regards to the written order to appear, the lack of the year “2016” being listed does not determine the outcome of this analysis. Contrary to the Appellant’s position, this was not the only evidence that the State presented. Exhibit One was the clerk’s minutes for the Appellant’s arraignment from May 17, 2016. Ms. Kleine testified that according to this document, the Appellant was ordered by the trial court to appear on three specific dates and times: (1) July 11, 2016 at 2:00 p.m. for the pre-trial hearing, (2) August 4, 2016 at 9:00 a.m. for the readiness hearing, and (3) August 8, 2016 for the jury trial. RP at 54; Exh. 1. These dates and times are consistent with the written order to appear. CP 12; Exh. 2

Additionally, it was reasonable to infer that the clerk’s minutes were correct, that the trial court order the Appellant to appear on August 4, 2016, and the Appellant knew about that court date. One only has to look at Exhibit Three – the clerk’s minutes from the Appellant’s pre-trial hearing on July 11, 2016. The Appellant appeared in court as ordered on that date. RP at 58; Exh. 3. If we were to take the Appellant’s argument as logical,

then the Appellant would have not known that he was required to appear at the pre-trial hearing on July 11, 2016 because the written order to appear entered on May 16, 2016 did not include “2016.” Instead, the Appellant appeared as order because he was ordered by the trial court to appear on that date. As for August 4, 2016, reasonable inferences from *all of the evidence*, was sufficient to show that the Appellant failed to appear after being given the proper notice that he had an obligation to appear.

The Appellant’s second assertion is that the State failed to provide proof that the Appellant received a copy of the written order to appear. The Appellant does not provide any authority to support such a contention. Simply put, there is no requirement that a defendant receive a written copy of an order to appear. The statute only requires that a defendant be notified of that subsequent obligation to appear in court. The State presented sufficient evidence to show that the Appellant was in court on May 16, 2016, was ordered to appear on July 11, 2016 and August 4, 2016, and the Appellant failed to appear on August 4, 2016.

b. The State presented sufficient evidence that the Appellant failed to appear on the date and time he was ordered to appear.

As stated above, the Appellant was ordered to appear on August 4, 2016 at 9:00 a.m. for his readiness hearing. Upon review of Exhibit Four, Ms. Kleine testified that the Appellant did not appear for his court date on

August 4, 2016. RP at 59; Exh. 4. This exhibit also shows that the assigned prosecutor and the Appellant's trial counsel were present for the hearing. RP at 59; Exh. 4. The prosecutor requested a bench warrant, which was granted by the court, and all future court dates were stricken. RP at 59; Exh. 4. Ms. Kleine's testimony and Exhibit Four show that the Appellant did not merely fail to be in the courthouse at a random time, but in fact failed to appear as required at the appointed time.

The Appellant relies upon *State v. Coleman*, 155 Wn. App. 951, 964, 231 P.3d 212 (2010). In *Coleman*, the defendant signed an order to appear that required his presence in court on February 4, 2009, at 9:00 a.m. 155 Wn. App. at 963. The clerk's minutes and the clerk's testimony indicated the defendant failed to appear at an 8:30 a.m. status conference. *Id.* There was no testimony or evidence given that the defendant was not present at 9 a.m., the time specified on his notice. *Id.* at 964. The court held that the reasonable inference to be made in *Coleman* is that the defendant failed to appear at 8:30 a.m., but could have been present at 9:00 a.m. Therefore, the evidence was insufficient.

The present matter is factually distinguishable from *Coleman* simply because there was no testimony or evidence presented that referenced any hearing other than the readiness hearing. There was no 8:30 a.m. status conference. This case is more akin to *State v. Hart*, 195 Wn. App. 449, 381

P.3d 142 (2016). In *Hart*, the defendant, relying on *Coleman*, argued that the State failed to present sufficient evidence to prove that he did not appear at his hearing “at the required specific time. *Hart*, 195 Wn. App. at 457. The Court disagreed:

Unlike in *Coleman*, where the evidence established that the defendant had failed to appear *before* the time he was ordered to do so, here the jury could reasonably infer that Hart failed to appear at the time specified in his order based on Myklebust’s testimony that Hart did not appear for his September 9 hearing, together with the clerk’s minute entry showing that Hart failed to appear at that hearing and that the prosecutor had requested a bench warrant on Hart’s absence from the hearing.

Id. at 458.

Taking the evidence and reasonable inferences in the light most favorable to the State, a reasonable jury could find that the docket started at 9:00 a.m., just as Ms. Kleine testified and shown by the clerk’s minutes from May 16, 2016 (Exhibit One), and the written order to appear (Exhibit Two). It is also reasonable to infer that the Appellant’s case was called *after* the docket started and the defendant was not present. Thus, the State presented sufficient evidence that the Appellant failed to appear on the date and time he was ordered.

- c. *The State presented sufficient evidence that person who was given notice to appear and who failed to appear was the Appellant.*

In addition to the listed elements of bail jumping, the State must also prove the person on trial is the same person who failed to appear at the prior hearing. *State v. Huber*, 129 Wn. App. 499, 502-03, 119 P.3d 388 (2005). In *Huber*, the Court reversed the defendant's conviction for bail jumping based upon insufficient evidence. The State's case solely relied upon four certified court documents – an information, a court order requiring the defendant to appear, clerk's minutes indicating the defendant failed to appear, and the bench warrant. The State did not call any witnesses, nor did they make any attempt to prove the exhibits related to the same defendant who was on trial. *Huber*, 129 Wn. App. at 501. The Court held that the State failed to establish the defendant's identity because it did not link the Wayne Huber in the certified court documents to the defendant on trial. "The State can meet this burden in a verity of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking fingerprints, *eyewitness identification*, or, arguably distinctive personal information." *Id.* at 502-503 (*emphasis added*).

Here, unlike *Huber*, the State did in fact link the person named in the certified documents and the Appellant. Ms. Kleine positively identified the Appellant as the same Jory Denman who had appeared in court on this

specific case. RP at 52. Thus, a face was connected to the name listed on a variety of documents. The Appellant is seemingly suggesting that it would be reasonable to believe that the person who appeared in court on May 16, 2016 and signed the written order to appear could have been someone pretending to be the Appellant. Or, maybe the Appellant was in court on May 16, 2016, but an imposter was present on July 11, 2016. Or maybe the imposter appeared for the Appellant on August 8, 2016 to quash the bench warrant. And, if any of this happened, the prosecutor, judge, court clerks and the Appellant's trial counsel all failed to notice. This is not a logical conclusion to reach from the evidence presented in this case.

The trial court ordered the Appellant to appear on August 4, 2017 at 9:00 a.m. The Appellant signed an order to appear on August 4 at 9:00 a.m. The Appellant appeared on July 11, 2016 as ordered. The Appellant did not appear on August 4, 2016, which resulted in his future court dates to be stricken and a bench warrant to be issued. The Appellant appeared on August 8, 2016 to quash his bench warrant. The Appellant was identified as trial as the same person in the certified documents. The State presented sufficient evidence to support the Appellant's conviction for bail jumping.

2. THE APPELLANT DID NOT OBJECT DURING THE PROSECUTOR'S CLOSING ARGUMENT;

THEREFORE, HIS CLAIM OF MISCONDUCT WAS WAIVED.

“A defendant’s failure to object to a prosecuting attorney’s improper remark constitutes a waiver of such error, unless the remark is deemed 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.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). With all claims of misconduct, “the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial.” *Id.* at 718 (citing; *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, “prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict.” *Stenson*, 125 Wn.2d at 718-19.

When the defendant fails to object, a heightened standard of review applies: “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an

admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

If a defendant—who did not object at trial—can establish that misconduct occurred, then he must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d

747 (1994) (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

“In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *Gentry*, 125 Wn.2d at 641. When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Although he did not object to the prosecutor’s closing argument, the Appellant now claims misconduct for the first time on appeal. However,

this claim of misconduct is without merit because the prosecutor argued reasonable inferences from the facts and evidence. Because there was nothing improper about the prosecutor's argument, an objection would not have been successful.

The Appellant's points specifically at the following remarks made by the prosecutor during closing argument:

And we know from the testimony that he was aware of these dates because he signed a document saying here are your dates, you need to appear here in court on these days and times, you are ordered to do so.

RP at 89.¹ This isolated statement is not prosecutorial misconduct; rather, this is an isolated example of the prosecutor drawing reasonable inferences from the facts and evidence that were presented to the jury during the course of the trial, namely the written order to appear and clerk's minutes. As stated above, the State presented sufficient evidence to support the Appellant's conviction for bail jumping. The closing argument was a recitation of those facts and evidence and how they applied to the law.

3. THE APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted

¹ The Appellant's brief misquotes the prosecutor's argument when stating "...you need a lawyer to appear in court..." Appellant's Brief at 10. The record is clear that the prosecutor stated "...you need to appear here in court..."

from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn. App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d, 538(1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Jury*, 19 Wn. App. at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989) (citing *State v. Sardinia*, 42

Wn. App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)).

The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Visitacion*, 55 Wn. App. at 173.

The Appellant has not established that he received ineffective assistance of counsel. As detailed above, there was no prosecutorial misconduct. Thus, there was no basis to object. Therefore, the Appellant’s trial counsel did not fail to exercise customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. Instead, the Appellant’s trial counsel recognized that there was no issue to preserve.

V. CONCLUSION

The State presented sufficient evidence to support the Appellant’s conviction for bail jumping. The State did not commit prosecutorial misconduct during closing arguments. The Appellant did not receive ineffective assistance of counsel. The State requests this Court affirm the Appellant’s conviction.

Respectfully submitted this 2 day of February, 2018.



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CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 2nd, 2018.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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