FILED
Court of Appeals
Division II
State of Washington
6/19/2018 4:03 PM

NO. 50888-5-II

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

STATE OF WASHINGTON, Respondent

v.

YVETTE YAMAUCHI, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02520-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

KELLY M. RYAN, WSBA #50215
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR 1

I. The prosecutor did not commit misconduct and there was no prejudice. 1

STATEMENT OF THE CASE 1

ARGUMENT 6

I. The prosecutor did not commit misconduct and there was no prejudice. 6

a. Yamauchi fails to prove the prosecutor committed misconduct. 7

b. Yamauchi fails to prove prejudice. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) 14
Matter of Phelps, 190 Wn.2d 155, 410 P.3d 1142 (2018) 15
Pennsylvania v. Muniz, 496 U.S. 582, 595 n. 9, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) 9
State v. Barry, 183 Wn.2d 297, 352 P.3d 161 (2015) 9
State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005) 6, 8
State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 7
State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 7
State v. Dhaliwal, 150 Wn.2d 559, 79 P.2d 432 (2003) 6, 7, 14
State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 15
State v. Furman, 122 Wn.2d 440, 858 P.2d 1092 (1993) 7
State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008) 6, 8, 12, 13
State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 7
State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) 7, 14
State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) 14, 15
State v. *Yates,* 161 Wn.2d 714, 168 P.3d 359 (2007) 14, 15

Rules

GR 14.1(1) 11
GR 14.1(a) 11

Unpublished Opinions

State v. Guenther, 199 Wn. App. 1019, Slip Op. 48946-5-II (June 6, 2017) 10, 11, 12

RESPONSE TO ASSIGNMENTS OF ERROR

I. The prosecutor did not commit misconduct and there was no prejudice.

STATEMENT OF THE CASE

The State charged Yvette Yamauchi (hereafter "Yamauchi") with one count of Burglary in the Second Degree and one count of Theft in the First Degree for an incident that occurred on September 20, 2015 in Clark County. CP 3-4. Yamauchi proceeded to trial on September 5, 2017 where the State presented testimony from several witnesses. RP 120-450.

On September 5, 2017, Vancouver Police were dispatched to a call at the Burlington Coat Factory in Vancouver, Washington. RP 121. The first officer to enter the store discovered that the safe in the cash room had been opened and that money had been taken from cash drawers that were in the safe. RP 122-23. There was also a backpack with store tags on it in the cash room near the empty drawers, and an open umbrella was sitting outside of the cash room. RP 123, 127. Over $20,000 was taken from the safe. RP 163-64.

Burlington assistant manager George Jensen testified that he received a call from the alarm company of an early opening of the store in the early hours of September 20, 2015. RP 273-74. When he arrived at the store the front doors were unlocked and the lights were on in the store. RP

274. The lights in the store come on automatically after a manager's alarm code is entered. RP 275. He inspected the store with police officers and discovered that the safe was emptied of all its cash money RP 276. Jensen testified that he had closed the store the night before and locked the safe, and that someone had to have used the safe code to have opened the safe. RP 276.

A surveillance video from the store showed a person clad in black unlock the front door of the store and go directly to the alarm panel. RP 180-81. The video also showed the person go take an umbrella from in front of the cash registers and go to the cash room. RP 182-83.

Burlington store manager Darrell Armstrong testified that Yamauchi was hired to work at the store as an assistant manager around May of 2015. RP 149-50, 158. Yamauchi worked at the store intermittently until she was terminated in August of 2015. RP 327. Armstrong testified that in September of 2015, four people had keys to the front door of the store: himself, assistant manager George Jensen, financial supervisor Sean Simpson, and Yamauchi. RP 154. Those same people had keys that opened every door in the store, including the cash room. RP 157. The store had an alarm system that Yamauchi was given the code to. RP 161. Armstrong reviewed the surveillance video and testified that the person who robbed the store was "somebody that knows us." RP 187. He

testified that the person knew right where the alarm panel was, they had keys to get into the building, they went right to where the umbrellas and backpacks were. RP 187. He also testified that the person in the video was "a short person," and that the person knew the store layout. RP 187-88.

Burlington loss prevention employee Brenton Smith testified that he was responsible for accounting for all the keys to the store after the burglary. RP 250-51. He was able to account for all of the keys except Yamauchi's. RP 251. He also testified to the heights of the other potential key holders, and they were five foot six, five foot three, six feet, and six feet. RP 252.

Yamauchi's apartment manager, Donna Stelling, testified that Yamauchi's rent payments were almost always late and not on time. RP 279. In August of 2015, Stelling had given Yamauchi a 72-hour eviction notice because of Yamauchi's failure to pay rent. RP 280. That eviction process was still in effect in late September of 2015. RP 280. Yamauchi had an outstanding rent balance of $6,035. RP 283. On September 23, 2015, Yamauchi paid Stelling $7,640 in cash for her September and October rent. RP 284.

Vancouver Police Detective Michael Day was the primary investigating officer on this case. RP 331. He reviewed the surveillance video from the store and noted the suspect in the video was the same

height as the security stanchions that the suspect walked through. RP 333, 360. He measured the security stanchions with a tape measurer and they were five feet tall. RP 333. Detective Day narrowed his investigation to focus on Yamauchi, because she was the only person that fit all the characteristics of having keys, access codes, and being the correct stature. RP 334. Detective Day ruled out other potential suspects who had keys to the store because they were too tall. RP 347. On cross examination, Detective Day reiterated that he focused on Yamauchi because she had the access code, the key, "the height," intimate knowledge of the building, and she went from not being able to pay rent and getting evicted to all of a sudden having money to pay without an explanation for where it came from. RP 363. He also testified that the most direct evidence of Yamauchi being the burglar was her height. RP 364.

Detective Day testified that he spoke with Yamauchi as part of his investigation on December 19, 2015. RP 336. Yamauchi told Detective Day that she had access codes to the store and a universal key to open all the doors in the store. RP 336. Yamauchi was asked about her whereabouts at the time of the burglary, and she said "I was most likely home in my room hanging out." RP 337. She also told him that she had gone to Las Vegas on September 21, 2015 to September 23, 2015 where she said she won $5,000. RP 340.

Yamauchi testified at trial and walked to the witness stand and took a seat at the stand. RP 401. She testified that she had perjured herself on her Oregon food stamps application. RP 434-35. She testified that she won $5,000 worth of tickets at slot machines after starting with $175. RP 436-38.

During closing argument, the prosecutor argued that "[i]t was an inside job and that left a very, very small group of potential suspects. And only one of those suspects kicks all those boxes. The Defendant. Same height – only five feet. Same as the burglar." CP 476. Yamauchi's attorney objected for facts not in evidence, but the trial court overruled. CP 476. The trial court then reminded the jury that "statements by counsel if not supported by evidence, disregard it. If it is supported give it such weight as you think appropriate." CP 476.

Later in the closing argument, the prosecutor argued that "[w]e have one of very few people with a manager's code – the Defendant. One person in the store is exactly five feet tall – the Defendant." CP 485. This was also objected to as facts not in evidence, and the trial court overruled the objection. CP 485.

The jury returned verdicts of guilty on both counts, and answered "yes" on the special verdict form that the Theft in the First Degree charge

was a major economic offense. RP 537; CP 34-36. This timely appeal follows.

ARGUMENT

I. The prosecutor did not commit misconduct and there was no prejudice.

Yamauchi claims that the prosecutor committed misconduct during closing argument when he argued facts that were not admitted into evidence. She further argues that there is a substantial likelihood the prosecutor's statements affected the jury's verdict. However, the prosecutor did not commit misconduct because he did not argue facts that were not in evidence. The prosecutor argued inferences supported by the admitted evidence. Yamauchi also fails to show how she was prejudiced by these statements. Yamauchi's claim fails.

Prosecutors have "wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008) (citing *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). Any allegedly improper statements by the State in closing arguments "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)).

In order to prove improper conduct on the part of a prosecutor, a petitioner must first establish that the prosecutor's conduct was improper, and second, that it had a prejudicial effect. *Dhaliwal*, 150 Wn.2d at 578 (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Id.* (quoting *Pirtle*, 127 Wn.2d at 672).

a. Yamauchi fails to prove the prosecutor committed misconduct.

Yamauchi has failed to establish the prosecutor's arguments during closing were improper because the arguments were supported by properly admitted evidence. The prosecutor arguing that Yamauchi was five feet tall was a reasonable inference from the record. That record included testimony from Detective Day that: he measured the height of the stanchion to be five feet and the suspect in the video was the same height

as the stanchion; his investigation focused on Yamauchi, in part, because of her stature; he ruled out other taller suspects; he investigated Yamauchi because she had the height; and Yamauchi's height was the most direct evidence of her involvement. RP 333-34, 347, 363-64. Loss prevention employee Brenton Smith testified to the heights of the other employees that also had keys to the store, and they were all at least five foot three: taller than Yamauchi and the suspect in the video. RP 251-52. Store manager Darrell Armstrong testified the person in the video was a short person. RP 187. This direct evidence of height was presented with other evidence of Yamauchi's motive, opportunity, and ability to commit the crime. This shows that when the prosecutor argued that Yamauchi was five feet tall it was a reasonable inference drawn from the admitted evidence. *Jones*, 144 Wn. App. at 290 (citing *Boehning*, 127 Wn. App. at 519). This argument was supported by the record and was not misconduct.

Furthermore, the argument that Yamauchi was five feet tall was supported by the juror's ability to observe Yamauchi's height in trial. Yamauchi testified at the trial, where she had to stand up from counsel table, walk to the bar to be sworn in, and sit down in the witness stand. RP 401. The jury could easily and readily determine for themselves how tall Yamauchi was, so the prosecutor's statement that she was five feet tall

could be evaluated by the jury in the context of the admitted evidence and their in court observation of Yamauchi.

The cases cited by Yamauchi for why the jury considering Yamauchi's height was improper are wholly inapplicable to the jury considering Yamauchi's height during trial. In *State v. Barry*, 183 Wn.2d 297, 309-10, 352 P.3d 161 (2015), the Court held that a prosecutor referring to a defendant's demeanor during trial did not violate the Fifth Amendment right against self-incrimination because demeanor is not inherently testimonial. The Court stated that "comments based on courtroom observation of a defendant's demeanor do not infringe on the defendant's Fifth amendment rights." *Id.* at 310 (internal quotations omitted). The Court did caution that certain nonverbal conduct can be testimonial whenever that conduct reflects the actor's communication or thoughts to another. *Id.* at 310-11 (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 595 n. 9, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990)). This shows that courtroom observations by jurors of defendants are not inherently improper, barring some aspect of their demeanor being testimonial.

The jurors in this case could properly consider their observations of Yamauchi's height during their deliberations. Normally, a person's posture, body language, or other aspects of their outward manner do not implicate testimonial evidence. *Id.* at 311. This shows that Yamauchi's

height was not testimonial and proper for the jury to consider in context of all the evidence. Furthermore, not only did Yamauchi waive her right to remain silent when she testified, but the prosecutor's two arguments never referenced any courtroom observations of Yamauchi. RP 400-01, 476, 485. This was not an improper comment on Yamauchi's right to remain silent, a right which she waived by testifying, so any consideration by the jury of the defendant's demeanor, namely her height, was proper. This observation supported the prosecutor's arguments and further undermines Yamauchi's misconduct claim. Furthermore, Yamauchi's height is not the type of nonverbal conduct that would reflect her thoughts or communications to another. Yamauchi standing and walking to the bar and then witness box is not a statement at all. She communicated nothing at that time; jurors are free to observe physical attributes of the witnesses and defendants presented to them, such as height, skin color, weight, hair length, etc. Therefore, the jury's observation of Yamauchi's height adds support in the record for the prosecutor's argument that she was five feet tall.

The prosecutor's arguments in this case are similar to proper arguments made in the unpublished *State v. Guenther*, 199 Wn. App. 1019, Slip Op. 48946-5-II (June 6, 2017), which this Court may consider

as nonbinding persuasive authority under GR 14.1(1).[1] In *Guenther*, this Court held that a prosecutor did not commit misconduct during closing argument because the prosecutor did not argue facts not in evidence. *Id.* at 6. The defendant in *Guenther* was convicted of first degree trafficking in stolen property for cutting down a maple tree in order to sell the tree to a mill that cuts wood into musical instruments. *Id.* at 1. During closing, the prosecutor argued that the defendant told a witness that he (the defendant) wanted to sell the wood to the mill, however there was no such testimony from the witness. *Id.* at 6. On appeal, the defendant argued that this was prosecutorial misconduct because the facts argued were not in evidence. *Id.* This Court disagreed and held that the prosecutor's argument was a reasonable inference from the record and not improper argument, because there had been testimony that the defendant told the witness that the tree might have value as "music wood" and if so he wanted to sell it. *Id.* There was also testimony that the mill purchased this type of wood. *Id.* This Court's reasoning from *Guenther* is directly applicable to this case, because while there was no verbatim testimony that the defendant in *Guenther* wanted to sell the wood to the mill, nor that Yamauchi was five feet tall, both arguments by the prosecutors were reasonable inferences

[1] GR 14.1(a) states in part, "...unpublished opinions of the Court of Appeals filed on or after March 1, 2014, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

supported by the record. Therefore, the arguments in this case do not constitute prosecutorial misconduct.

The defendant in *Guenther* made another prosecutorial misconduct claim when the prosecutor argued during closing that the defendant told an officer he was going to sell the stump because it was figured wood and he was going to use the rest of the wood as firewood. *Id.* There was no such testimony during trial, but this Court held it was not misconduct, because there was testimony that the defendant told the officer he was going to try to sell the figured portion of the tree and cut the rest into firewood. *Id.* There was other evidence that the stump is where the figured portion was located. *Id.* The prosecutor's argument was held to be a reasonable argument based on the evidence as a whole and not improper. *Id.* Again, this is the exact same situation in Yamauchi's case. The prosecutor here argued Yamauchi was five feet tall, which was supported by the evidence as a whole. This was a reasonable inference and a fair argument to make based on the totality of the testimony presented to the jury. It was not improper and Yamauchi fails to meet her burden.

Yamauchi's claimed prosecutorial misconduct is markedly different from *Jones* where this Court upheld a prosecutorial misconduct claim. In *Jones*, this Court held that a prosecutor impermissibly bolstered the credibility of an officer and an informant during closing argument. 144

Wn. App. at 292. In *Jones*, the prosecutor argued multiple facts that were not in evidence, including that: officers would suffer professional repercussions if their informants were untrustworthy; officers would stop using an informant if they doubted his sobriety or trustworthiness; and that officers use the same informants because they are reliable and trustworthy, they don't steal money from police, and when they say something happens, it happens. *Id.* at 293-94. The actual testimony at trial was simply that an officer described an informant's role and history, making no mention about his reliability or trustworthiness. *Id.* at 294. This Court held that the prosecutor's statements amounted to misconduct, because they bolstered credibility on highly prejudicial facts that were not in evidence. *Id.* The difference between the arguments in *Jones* and this case are substantial. In *Jones*, the "facts" argued by the prosecutor were completely absent from the record, unlike this case where the prosecutor's argument that Yamauchi was five feet tall was supported by the record and the jury's observation of Yamauchi. The statements made by the prosecutor in Yamauchi had nothing to do with credibility of witnesses and the prosecutor in no way introduced facts not in evidence in order to prove his witnesses more credible as the prosecutor did in *Jones.* The holding in *Jones* is inapposite; the disparity in the actions of the prosecutor in *Jones* compared to the actions of the prosecutor in Yamauchi's case

show *Jones'* lack of applicability to this case. The prosecutor here did not argue facts not in evidence and did not commit misconduct.

Yamauchi has failed to meet her burden that the prosecutor's arguments were improper. The arguments were reasonable inferences supported by the evidence, and therefore were not prosecutorial misconduct. Her claim fails.

b. Yamauchi fails to prove prejudice.

Yamauchi also fails to prove that the prosecutor's arguments, assuming they were improper, resulted in prejudice. To prove prejudice, Yamauchi must establish "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Dhaliwal*, 150 Wn.2d at 578 (quoting *Pirtle*, 127 Wn.2d at 672). When analyzing alleged prejudicial comments, the comments must not be viewed in isolation "but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing State v. *Yates,* 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). However, prejudice is not a question of whether or not there is sufficient evidence to uphold a verdict. *In re Glasmann,* 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

One factor on whether or not there was prejudice is if a jury instruction could have cured any alleged misconduct. *Matter of Phelps*, 190 Wn.2d 155, 171-72, 410 P.3d 1142 (2018) (citing *State v. Emery*, 174 Wn.2d 741, 762-65, 278 P.3d 653 (2012); *Warren*, 165 Wn.2d at 29-30). Here, the jurors were instructed that the prosecutor's statements were not evidence. RP 463. After Yamauchi's first objection was overruled, the trial court reminded the jury that "statements by counsel if not supported by evidence, disregard it. If it is supported give it such weight as you think appropriate." CP 476. Jurors are presumed to follow the court's instructions, so the jury in this case is presumed to have followed these instructions from the court. *Phelps*, 190 Wn.2d at 172 (internal citations omitted). Therefore, assuming the prosecutor's argument that Yamauchi was five feet tall was improper, the instructions to the jury cured any possible misconduct. Yamauchi cannot show there was a substantial likelihood these statements affected the jury's verdict. Her clam fails.

Yamauchi also cannot show prejudice when viewing the alleged improper statements in the context of the total argument, the issues in the case, and the evidence presented by the jury. *Warren*, 165 Wn.2d at 28 (citing *Yates,* 161 Wn.2d at 774). Similarly to why the prosecutor's arguments are not misconduct, they are not prejudicial, because they are supported by the evidence presented to the jury. Detective Day testified

multiple times that he suspected Yamauchi was the burglar because of her height, and that he ruled out other suspects because they were too tall. RP 334, 347, 363-64. When the prosecutor argued that Yamauchi was five feet tall, it was not improper in the context of the total argument, because that argument, as supported by the admitted evidence, was that a small person who worked at Burlington committed the robbery. Therefore, when the prosecutor took the logical step and argued Yamauchi was five feet tall, even if it was improper, it was not prejudicial in the context of the entire argument and the evidence presented to the jury. Combining this with the trial court's instructions to the jury, Yamauchi fails to prove prejudice. Her claim fails.

CONCLUSION

The State respectfully requests this Court affirm Yamauchi's conviction.

DATED this 19th day of June, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:

KELLY M. RYAN, WSBA #50215
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

June 19, 2018 - 4:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50888-5
Appellate Court Case Title:	State of Washington, Respondent v. Yvette Yamauchi, Appellant
Superior Court Case Number:	15-1-02520-1

The following documents have been uploaded:

- 508885_Briefs_20180619160140D2910761_4619.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief - Respondent.pdf

A copy of the uploaded files will be sent to:

- tom@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov
Filing on Behalf of: Kelly Michael Ryan - Email: kelly.ryan@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 5686

Note: The Filing Id is 20180619160140D2910761