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No. 53599-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Vernal G. Garvey, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge
Cause No. 17-1-01991-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor improperly shifted the burden to the defense and commented on the right to remain silent by highlighting the consistency of the testimony by the witnesses at trial, and that certain evidence was undisputed during closing argument without reference to the defendant or his choice to not testify?
2. Whether the prosecutor misstated the law of accomplice liability when, after referring to the correctly given accomplice liability instruction, he used the phrase “in for a penny in for a pound” in the context of an argument that Garvey was “working in concert” in a common enterprise with others?
3. Whether a defendant is entitled to a new trial due to prosecutorial misconduct when a curative instruction would have remedied any alleged prejudice arising from the prosecutor’s remarks, the evidence of guilt is overwhelming, and the jury was properly instructed as to the burden of proof and accomplice liability?
4. Whether Garvey can demonstrate ineffective assistance of counsel based on strategic decisions

not to object during the prosecutor's closing arguments when the choice not to object served the purpose of not drawing attention to the consistency of the witness' testimony?

5. Whether Garvey can demonstrate prejudice based on ineffective assistance of counsel when evidence of his guilt was overwhelming, the jury was properly instructed, and there was no likelihood that unobjected to arguments of the prosecutor affected the jury's verdict?

B. STATEMENT OF THE CASE.

On November 4, 2017, Harrison Nichols and his former girlfriend, Moriah Whittaker were sitting in Whittaker's vehicle when Nichols was robbed at gunpoint. RP 162-64; RP 281-82; RP 351-52.¹ A man, later identified as Jonta'h Wesley, jumped into the back seat, stuck a gun in Nichols' face, and demanded Nichols' belongings. *Id.* Nichols complied and handed over his backpack, which contained, among other items, Nichols' cell phone and debit

¹ For purposes of this brief, the sequentially paginated jury trial that occurred June 24-27, 2019, are referenced to as RP. The sentencing hearing that occurred on July 17, 2019, is referenced to as SRP consistent with the Brief of Appellant. All other transcripts referenced herein will be identified by the date, including the verdict that occurred on June 28, 2019, which is referenced herein as RP (6/28/19).

card. RP 164-65. Surveillance video from a nearby Safeway parking lot showed Wesley handing the backpack to another man, identified as Appellant, Vernal George Garvey. RP 361. Garvey is seen on the video rifling through the backpack before unsuccessfully attempting to withdraw money from an ATM using Nichols' stolen debit card. RP 364.

At trial, testimony from Wesley and Whittaker would show that Garvey was intimately involved in planning and carrying out the robbery of Nichols. Whittaker and Wesley testified that the plan to rob Nichols arose following Whittaker's receipt of a pay or vacate notice from her apartment complex. RP 259-60; RP 340-41. Garvey and Wesley were living in the apartment at the time. RP 250-51; RP 338-40. With the three of them unable to come up with enough money to pay the rent, Whittaker testified that Garvey came up with a plan: they would rob Whittaker's former fiancé Harrison Nichols. RP 259-61.

According to Wesley and Whittaker, Nichols was chosen for several reasons. First, because Whittaker knew he had money saved up. RP 262-63. Most importantly, however, Nichols, Whittaker, and Wesley testified that Garvey knew the PIN number for Nichols debit card. RP 155; RP 262-63; RP 341-42. Garvey

knew Nichols from when Nichols had briefly stayed at Whittaker's apartment, sleeping on the couch while Garvey slept in Whittaker's bedroom. RP 151-52; RP 250-51; RP 338-39. All of the witnesses testified that Garvey had once used Nichols debit card to purchase marijuana at a dispensary for Nichols. RP 155; RP 262-63; RP 342. Nichols testified that he had never given his PIN to Whittaker or Wesley. RP 183-84; RP 184-85. Both Whittaker and Wesley testified that they had no knowledge of Nichols' PIN. RP 311; RP 340.

Garvey's original plan called for Whittaker to contact Nichols and ask him for money for cigarettes. RP 263-64; RP 342-43. Because Nichols was too young to buy cigarettes, the plan was for Whittaker to get Nichols' card from him and bring it into a nearby gas station where Wesley, to whom Garvey had given Nichols PIN, would use the card to take out money from an ATM. *Id.* Whittaker would then return to Nichols with cigarettes and the card. *Id.* Both Whittaker and Wesley testified that Garvey was involved in the plan. RP 261; RP 343.

The first plan was foiled when Nichols texted Whittaker and told him he had already obtained cigarettes for her. RP 267; RP 345-46. Having to devise a second plan, Whittaker, Wesley, and

Garvey decided to have Whittaker convince Nichols to go to a nearby park under the guise of smoking marijuana with Whittaker. RP 268-69; RP 345-46. The plan contemplated that the marijuana would make Nichols less likely to resist, and Wesley and Garvey would commit what would appear to be a random robbery at the park. *Id.*; RP 381. Both Whittaker and Wesley testified that the marijuana was provided by Garvey. RP 269; RP 323; RP 381. To prepare for the plan, they drove to the park to drop off Wesley and Garvey. RP 269-70; RP 347. After dropping off Wesley and Garvey, Whittaker drove to Nichols' work to pick up him. RP 269-70. Once Garvey, Wesley, and Whittaker arrived at the park, Garvey handed a gun to Wesley and told him to use it in the robbery. RP 270-71; RP 351. Both Whittaker and Wesley testified that Garvey provided the gun. *Id.*

However, this plan would go awry as well. After Whittaker picked up Nichols, Nichols told Whittaker he did not want to go to the park. RP 273. As a result, Whittaker and Wesley both testified that Whittaker messaged Garvey to let them know that Whittaker and Wesley would be in a nearby parking lot instead. RP 274; RP 348.

Whittaker picked up Nichols from his work and drove to the nearby parking lot of a veterinary clinic. RP 161. A short time after Whittaker and Nichols started smoking the marijuana provided by Garvey, Wesley jumped into the back-passenger seat of the vehicle, pointed the gun that Garvey had provided at Nichols' head and demanded Nichols to hand over his belongings. RP 162-64; RP 281-82; RP 351-52. After Whittaker prompted Nichols to comply with Wesley's demands, Nichols handed over his backpack which contained Nichols' debit card among other items. RP 164; RP 165; RP 282; RP 352. He also handed over his cell phone. RP 165. Whittaker testified that Garvey had told her he was hiding in the bushes near the car when the robbery occurred. RP 283. Wesley testified that after he obtained Nichols' belongings, he and Garvey ran to a nearby Safeway. RP 353.

Wesley and the Safeway surveillance video indicated that when Wesley and Garvey arrived at Safeway, Wesley handed Nichols' backpack to Garvey. RP 353-54. RP 360-61. Garvey proceeded to rifle through the backpack until he found Nichols' debit card. *Id.* According to Wesley, Garvey attempted to use Nichols' card at a nearby ATM but was unsuccessful. RP 354-55.

Garvey was also captured trying to use the stolen debit card by the ATM's security camera. RP 364.

Following the robbery, Nichols asked Whittaker to drive to his work nearby so that he could call the police. RP 168; RP 285-86. Nichols realized that he recognized the man who robbed him and testified that he had met Wesley once before. RP 165-66. Nichols knew Wesley was a friend of Garvey's. *Id.* According to Whittaker's testimony, she texted with Garvey while the police were interviewing Nichols. RP 287-88. Garvey instructed Whittaker to delete their text message exchanges, according to Whittaker's testimony at trial. *Id.*

Later that night, Nichols was able to use a tracking application from his phone to determine that the phone had been at Safeway. RP 170-71; RP 173. He provided this information to the police. RP 173. Subsequently, Officer Uria from the Lacey police department was able to pull surveillance videos from Safeway. RP 234. Using images taken from the videos, Officer Uria created fliers showing the suspects faces that were distributed to law enforcement. RP 235-36.

Meanwhile, another officer working on the case, Officer Jessie Hadley, decided to go to Whittaker's home to talk to her

about the robbery. RP 411. When he arrived, he saw a man standing outside who looked like one of the men from the surveillance video. RP 412. However, when he made contact with Whittaker at her front door, there was a different man standing behind her who Officer Hadley also recognized from the flier. RP 415-16. Officer Hadley testified that the second man was Garvey. RP 416.

After Whittaker and Garvey were taken to the police station for questioning, Whittaker admitted to her and Garvey's involvement. RP 296; RP 425-33. Mr. Garvey was subsequently arrested, while Whittaker was let go on the promise she would attempt to locate Wesley. RP 439. In addition, Officer Hadley presented a lineup to Nichols, which included pictures of Garvey and Wesley. RP 174. Nichols identified both Wesley and Garvey. *Id.*

Garvey was charged with first-degree robbery while armed with a firearm, bail jumping, second-degree possession of stolen property, and intimidating a witness. CP 63-64. During trial, Senior Deputy Prosecuting Attorney Joseph Wheeler testified that Garvey failed to appear for a hearing after having been released on bail and notified of the subsequent required appearance. RP 548-549,

551, 558-559. The State moved to dismiss the intimidating a witness charge prior to closing arguments. RP 586. The jury found Garvey guilty of the remaining charges. RP (6/28/19) 4-5. The trial court sentenced Garvey to 41 months on the robbery plus an additional 60 months for the firearms enhancement, 17 months for the bail jumping charge, and five months for possession of stolen property. SRP 19, CP Mr. Garvey now appeals, alleging that the prosecutor improperly commented on the right to remain silent and shifted the burden of proof during closing arguments and ineffective assistance of counsel based on a failure to object to the prosecutor's closing argument. Additional facts are included in the argument section below.

C. ARGUMENT.

1. Garvey's right to remain silent was not violated, and the burden of proof was not shifted to the defense by the remarks by the prosecutor during closing argument which were neither impermissible or prejudicial.

A defendant who claims prosecutorial misconduct must first establish the misconduct and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements 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." Dhaliwal, 150 Wn.2d at 578; State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Dhaliwal, 150 Wn.2d at 578. A defendant's right to remain silent and be free of self-incrimination is protected by both the federal and state constitutions. U.S. Const. amend. V; Wash. Const. art. 1, § 7. These rights are violated when a prosecutor improperly comments on a defendant's refusal to testify. State v. Ramirez, 49 Wn. App. 332, 336, 712 P.2d 726 (1987). However, Garvey has not met his burden that the prosecutor's comments were improper or prejudicial.

In cases alleging that the prosecutor improperly commented on the defendant's right to remain silent, the defense bears the burden of showing that the prosecutor's comments were both impermissible and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). An appellant must first establish that the comments were impermissible, and if they were impermissible, the court then looks to whether they were prejudicial. *Id.* at 756-61.

A. Remarks highlighting the consistency of the testimony presented at trial or stating that the evidence is undisputed are permissible.

A prosecutor does not make impermissible comments when pointing out the consistency of testimony between witnesses and lack of evidence supporting a defendant's theory of the case. A prosecutor's remarks are impermissible if (1) "the prosecutor manifestly intended the remarks to be a comment on the defendant's exercise of his right not to testify," or (2) if "the jury would naturally and necessarily interpret the statement as a comment on the defendant's silence." State v. Barry, 183 Wn.2d 297, 307, P.3d 161 (2015).

The appellant alleges the prosecutor made several improper remarks during closing argument while making arguments about the consistency of evidence and lack of evidence to support the defendant's theory of the case. The following summarizes the comments at issue.

During closing argument, the prosecutor pointed out the consistent testimony regarding Garvey's ownership of the firearms that were recovered. RP 629. The prosecutor began by stating, "[a]nd you have evidence from both Harrison and Jonta'h that's where he slept. You have no evidence that Moriah ever possessed

that gun, none. It was in her bedroom in her nightstand exactly where she said the defendant kept it.” *Id.*

Furthermore, the prosecutor stated, “[t]here is no evidence that’s been presented to you other than the firearm that Jonta’h used to rob Harrison Nichols came from the defendant. That’s the only evidence you have.” RP 635. This was made in the context of pointing out the lack of evidence to support defendant’s theory of the case. Immediately preceding this statement, the prosecutor argued, “[a]gain, I’m confident Mr. Gray will point do we really know what happened here? Somebody said something about a gun. Somebody said ‘Well, pick one.’” *Id.*

The prosecutor stated, “He provided the firearm to Jonta’h. You have no other evidence before you than that he provided the firearm that Jonta’h used to rob Harrison Nichols. You have no other evidence before you but that.” RP 648. The prosecutor stated in rebuttal, “there is no testimony that the firearms that were located in the car and in her nightstand were anybody’s but the defendant’s.” RP 672.

In addition, the prosecutor argued that the defendant was the only person who knew Nichols’ PIN number. The prosecutor stated, “But everybody said – at least Moriah and Harrison said that

they'd given it to the defendant to purchase Marijuana at the dispensary." RP 631. The prosecutor proceeded to state:

[b]ut there is no other evidence that's been presented to you that Harrison did give the defendant his debit card and his PIN number so he could go into the dispensary and legally purchase marijuana. So that's – the defendant is the only person who had that information. That's the only evidence before you. Nobody else. He'd never given it to Moriah. Definitely hadn't given it to Jonta'h.

Id. Further in the closing argument, the prosecutor stated, “[i]t doesn't matter how he knew. He knew. He was the only one that knew Harrison's PIN number to his debit card, ladies and gentlemen. There is no other evidence before you than that.” RP 648.

Later in the argument, the prosecutor summed up the evidence by stating, “[a]gain, you have no evidence of anything other than that.” RP 636. The prosecutor proceeded to argue, “[t]here is no other evidence in front of you, except the defendant provided both the gun and the marijuana.” *Id.*

The prosecutor also addressed the change of plans during the execution of the robbery. The prosecutor argued that the defendant and Moriah were communicating about the change of plan. The prosecutor pointed out “the only evidence presented to

you was that the victim – or that Moriah and the defendant were communicating. Probably why he said ‘Get rid of your texts’ later.” RP 637.

The prosecutor also pointed out that certain facts were not really in dispute. The prosecutor stated, “[t]here is no question that on November 4th of 2017 in the state of Washington, Harrison Nichols was robbed at gunpoint. That’s – there’s no evidence to suggest anything but that.” RP 638.

Furthermore, the prosecutor proceeded to discuss the evidence presented on the deal received by Whittaker for her testimony. In that argument, the prosecutor stated “[t]here were no deals from the state prior to her providing that statement, ladies and gentlemen. There is no evidence to suggest anything otherwise to you, none, because there was none. That’s the point.” RP 640-641.

The prosecutor, in the course of his argument, brought up the surveillance video. The prosecutor preemptively argued that:

[a]nd we have no doubt. Jonta’h robs Harrison Nichols on November 4th, 2017, about 9:45. There was no question. He runs away and he meets up with the defendant at Safeway. Now, this is going to get interesting. How are they going to explain that? The defendant just happened to be on a jog at the same time and ran across his buddy at Safeway in November at 9:50. No. Because you saw the video.

And we'll show it again. I have the defendant and the backpack. I did my part.

RP 642.

The prosecutor stated, “[w]e know that Harrison is eventually robbed by the gun given to him by the defendant. It’s the only evidence before you. There’s no other evidence before you. That he runs away and meets with the defendant and they go to Safeway.” RP 645. The prosecutor also argued that Garvey was the only connection that Wesley had to the situation that led to the robbery. The prosecutor stated, “ [h]e brought Jonta’h to the apartment. You have no evidence of anything other than that.” RP 647-48.

Washington courts have held that prosecutors may “state that certain evidence is not denied, without reference to who could have denied it” and to “comment that evidence is undisputed.” State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009) (citation omitted):

Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it and, if that results in an inference unfavorable to the accused, he must accept the burden . . . because the choice to testify or not was wholly his.

State v. Ashby, 77 Wn.2d 33, 37, 459 P.2d 403 (1969) (quoting State v. Litzenberger, 140 Wash. 308, 311, 248 P. 799 (1926)). Additionally, prosecutors are given wide latitude in closing arguments to argue reasonable inferences from the evidence and are entitled to point out a lack of evidence supporting the defendant's case. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) State v. Killingsworth, 166 Wn. App. 283, 292-93, 269 P.3d 1064 (2012); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). "[T]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct and does not shift the burden of proof to the defense." State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).

Comments on consistency of testimony are not flagrant, prejudicial, or ill-intentioned misconduct. State v. Morris, 150 Wn. App. 927, 931-32, 210 P.3d 1025 (2009). (holding "it is no more improper for the prosecutor to comment on the consistency of the testimony of the . . . witnesses who testified in the State's case-in-chief than it was for defense counsel to point out the inconsistencies in that same testimony."). It is not prosecutorial misconduct for a prosecutor to state that evidence is undisputed. *Id.* at 931.

Garvey's argument that the prosecutor's remarks that there was "no evidence" were intended to be comments on his failure to testify are without merit. In context, the comments were noting the consistency of the testimony provided by Nichols, Whittaker, and Wesley. The standard that Garvey must meet is whether "the prosecutor *manifestly intended the remarks to be a comment on the defendant's exercise of his right not to testify.*" Barry, 183 Wn.2d at 307. (emphasis added).

Garvey has pointed to nothing in the record that shows the prosecutor "manifestly intended" the remarks to be comments on the defendant's failure to testify. Nowhere did the prosecutor explicitly refer to the defendant's failure to testify, nor did he directly state or imply that the defendant had failed to rebut the state's case. Instead, the prosecutor's comments properly sought to draw the jury's attention to the consistency of the testimony between Nichols, Wesley, and Whittaker, and to the fact that certain evidence was undisputed.

The prosecutor pointed out the consistency in the testimony that the only evidence in the record indicated that Garvey provided the gun and marijuana and was the only one who knew Nichols' PIN number. There was no testimony that the gun belonged to

another person or that anyone else had the PIN number to access the funds in the bank account other than Garvey. Nichols, Whittaker and Wesley testified consistently on these points and the prosecutor's remarks were pointing out that consistency.

When a defendant chooses not to testify, a prosecutor can still point out the consistency of evidence and the lack of evidence. Like in Ashby, as long as the prosecutor does not say where the evidence would come from, the prosecutor can argue about the consistency of evidence and lack of evidence, and if that creates an unfavorable inference, it was the defendant's choice not to testify.

Appellant's argument that the prosecutor's comments were "ill-intentioned" is based solely on how many times the prosecutor stated, "there is no evidence". But focusing solely on the number of comments in isolation ignores how those comments were used in the context of the total argument. The context demonstrates a clear intention to argue the consistency of the witnesses and lack of evidence to support the Garvey's theory. The prosecutor based his remarks on the evidence that was presented into the record for the jury to consider. Although it is improper for a prosecutor to imply that the defendant has a duty to present evidence or to suggest to the jury that the defendant's silence is an admission of guilt, a

prosecutor may properly comment on the strength of its own evidence. State v. Cleveland, 58 Wn. App. 634, 647-648, 794 P.2d 546 (1990); State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

The prosecutor did not manifestly intend his comments to be a comment on the defendant's right to remain silent. Therefore, the prosecutor's remarks about the consistency of the evidence were appropriate. In fact, the prosecutor made no comments on Garvey's invocation of his right to remain silent.

Additionally, a prosecutor commenting on the consistency of the evidence and lack of evidence supporting the defendant's theory of the case does not naturally and necessarily draw the jury's attention to Defendant's right to remain silent. Garvey relies on State v. Fiallo-Lopez, 78 Wn. App. 717, 719-20, 899 P.2d 1294 (1995) to argue that the comments here "naturally and necessarily" drew attention to Garvey's silence, because only Garvey could have provided the "explanations" sought by the State. Appellant's Opening Br. at 25.

But, in Fiallo-Lopez, the prosecutor not only stated that there was "no evidence to explain why Fiallo-Lopez was present at the restaurant and at Safeway precisely when Lima and Cooper were

there for the drug transaction,” but also explicitly “argued that there was no attempt by the defendant to rebut the prosecution’s evidence regarding his involvement in the drug deal.” Fiallo-Lopez, 78 Wn. App. at 729. It was the entire argument, taken together, that compelled a finding of prosecutorial misconduct, not the prosecutor’s “no evidence” comment alone. *Id.* (finding misconduct because “the State’s *argument* highlighted the defendant’s silence.”) (emphasis added). A prosecutor may comment on the absence of evidence on a particular issue if persons other than the accused could have testified to that issue. State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995); *rev’d on other grounds*, In re Pers. Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2000).

Garvey has pointed to nothing in the record showing the prosecutor commented on the failure of the defendant specifically to rebut the state’s evidence. Nowhere did the prosecutor make explicit or implicit reference to the defendant’s choice not to testify, nor did he imply that the defendant has any duty to rebut the state’s case. Unlike in Fialo-Lopez, the prosecutor did not specifically comment on the Defendant’s right to remain silent.

The prosecutor simply asserted that certain facts were undenied without making any reference to Garvey’s failure to deny

them. The law is clear that such statements, by themselves, do not constitute misconduct, even if they result in an “unfavorable inference” for the defendant. Ashby, 77 Wn.2d at 38 (A prosecutor “may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it and, if that results in an inference unfavorable to the accused, he must accept the burden . . . because the choice to testify or not was wholly his.”) (citation omitted).” Whittaker could have said that she provided the marijuana or gun, or that Wesley did. The prosecutor’s arguments that no evidence existed other than that Garvey provided the marijuana and guns, merely furthered the State’s argument that the witnesses were consistent.

The prosecutor’s brief statement, “how are they going to explain that? The defendant just happened to be on a jog at the same time and ran across his buddy?” was a comment on the lack of evidence to support the defense theory. During opening statements, defense counsel highlighted the places that Garvey wasn’t, stating, “Mr. Garvey wasn’t in the vehicle, didn’t set him up, wasn’t in the vehicle, didn’t point a gun at anybody.” RP 146. The prosecutor was merely emphasizing the fact that Garvey was seen on video rifling through Nichols’ belongings and attempting to use

Nichols' debit card immediately after the robbery was inconsistent with the theory of the case provided by the defense.

The prosecutor repeatedly directed the jury back to the evidence in the record and asked the jury to look only at that evidence. By taking this argument out of context, Garvey additionally argues that the prosecutor misstated the law regarding the beyond a reasonable doubt burden of proof. Brief of Appellant, at 31. Quoting part of the jury instruction by stating, “[a] doubt for which a reason exists”, is not misconduct. RP 654. Garvey argues that reading part of the jury instruction added fuel to the misconduct. Brief of Appellant, at 31. However, the jury instructions are the law the jury must follow and are used during closing argument to explain the case to the jury. The prosecutor's comment did not in any way suggest that Garvey had a duty to demonstrate doubt. His comment was directly related to his argument that the evidence presented left no doubt of Garvey's involvement. RP 654.

Garvey has failed to demonstrate that the prosecutor manifestly intended his comments to be a comment on the right to remain silent or that the remarks naturally and necessarily would draw the jury's attention to the right to remain silent. The prosecutor

did not comment on the right to remain silent and did not imply that Garvey had a burden to produce evidence.

B. Garvey cannot establish that he was prejudiced by the prosecutor's allegedly impermissible comments.

In prosecutorial misconduct claims involving improper statements by a prosecutor, the court analyzes prejudice under one of two standards of review. Emery, 174 Wn.2d at 760. If the defendant objected to the comments at trial, the defendant must show that the improper comments had a substantial likelihood of affecting the jury's verdict. *Id.* If the defendant failed to object at trial, he or she is considered to have waived any error and a court will only review the comments if they were so flagrant and ill-intentioned that they could not have been remedied by a curative instruction. *Id.* at 760-61. Where, as is the case here, a defendant fails to object to the allegedly improper comments, the defendant bears the burden of showing 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." *Id.* at 761 (quotations and citations omitted).

Under the heightened standard applied when a defendant fails to object, “[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.”). The 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 trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Garvey did not object to the prosecutor’s arguments or request a curative instruction. The lack of objection or a motion for a mistrial would strongly suggest to a court that the argument did not appear critically prejudicial. It is not whether there was any prejudice, but whether the prejudice is so prejudicial that an instruction would not have cured the issue. The alleged prejudice based on the prosecutor’s remarks could have been cured by simply referring the jury back to the properly given jury instructions. “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." Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

The trial court properly instructed the jury that the burden of proving each offense rested with the state, that the defendant was not required to testify, and that the jury could not infer guilt from the defendant's choice not to testify. RP 607-08; CP 122, 124. Instruction number four reads as follows: "The state is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements." RP 607; CP 122. In addition, instruction number six instructed the jury that "[t]he defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in anyway." RP 608; CP 124.

The prosecutor repeatedly reminded the jury that statements during closing arguments did not constitute evidence. RP 619 ("The judge said I know at least once what we say is not evidence"; "Again, nothing that we say is evidence."); RP 620 ("Again, you are only to consider the evidence that was presented in court, nothing else, only the evidence that was here").

Juries are presumed to follow the court's instructions. Emery, 174 Wn.2d at 766. If there was an objection, an admonition by the judge instructing the jurors to refer back to the jury instructions and to follow the law given to them, would have cured any perceived prejudice. Accordingly, a curative instruction could have been used if Garvey would have objected.

Garvey also cannot demonstrate that the arguments of the prosecutor had a substantial likelihood of affecting the verdict. A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The concern is less with what was said or done than with the effect likely to result from what was said or done:

Reviewing 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. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?"

State v. Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932). When determining whether statements by a prosecutor during closing argument prejudiced a defendant, the Court considers the evidence

of guilt presented at trial. State v. Crawford, 21 Wn. App. 146, 152-53, 584 P.2d 442 (1978) (finding evidence of guilt to be so overwhelming that alleged improper comments “could hardly have contributed to defendant’s conviction by giving emphasis to that which was already apparent without them”).

In the present case, the evidence of Mr. Garvey’s guilt was overwhelming and apparent. At trial, Nichols, Whittaker, and Wesley testified that only Garvey knew the PIN number of Nichols’ debit card. RP 155; RP 262; RP 342. Whittaker and Wesley testified Garvey was intimately involved with the planning of the robbery, and that the gun used in the robbery was provided by Garvey. RP 261; RP 343; RP 270-71; RP 323-24; RP 351-52. Surveillance video from Safeway captured Wesley handing Nichols’ backpack to Garvey and showed Garvey attempting to use Nichols’ card to withdraw money from an ATM. RP 358-67.

Even if this Court finds the prosecutor’s comments were improper, there is no prejudice when the evidence “was so overwhelming that the comments could hardly have contributed to the defendant’s conviction by giving further emphasis to that which was already apparent.” Crawford, 21 Wn. App. at 152. All of the witnesses testified consistently about Garvey’s involvement and the

prosecutor's comments did nothing more than emphasize that which was already apparent.

The evidence of Garvey's guilt was overwhelming, and he has pointed to nothing in the record that indicates the jury did not follow the trial court's instructions. As a result, he has failed to establish that the allegedly improper comments had any likelihood of affecting the jury's verdict. Therefore, the state respectfully asks the court to uphold the convictions.

2. The prosecutor correctly stated the law on accomplice liability and Garvey has failed to show prejudice.

Accomplice liability requires actual knowledge on the part of the accomplice that the principals were engaging in the crime charged. State v. Shipp, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980). For accomplice liability to attach, the accomplice "must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." State v. Cronin, 142 Wn.2d 568, 578-79, P.3d 713 (2000).

Garvey contends that the prosecutor misstated the law on accomplice liability by arguing that "when the three are acting in concert, in for a penny, in for a pound, you are responsible for what the other person does as long as you're acting in concert." To

support this contention, Garvey cites to Cronin, and implies that the Court rejected the prosecutor's comments that the principle of accomplice liability was found in the phrase "in for a penny, in for a pound." This misstates the holding of Cronin. The Court in Cronin did not hold that the prosecutor misstated the law. It held that the law was misstated by the jury instructions which allowed for a finding of accomplice liability even if the accomplice had no knowledge that the principals were engaged in the specific crime charged. *Id.* at 579.

The prosecutor correctly stated the law on accomplice liability. Additionally, the trial court properly informed the jury that the defendant must have knowledge of the crime alleged. CP 26. When explaining accomplice liability during closing argument, the prosecutor displayed the jury instructions on a courtroom screen, and read from them verbatim, stating:

It's up there on the screen if you want to follow. The language is 'a person is an accomplice in the commission of a crime if with knowledge that it will promote or facilitate the commission of the crime he either . . . solicits, commands, encourages or requests another person to commit the crime or . . . aids or agrees to aid another person in planning or committing the crime.

RP 627. Later in closing, the prosecutor further explained:

There's nuances to stories, sure. There's varying degrees of who did what, sure. But when you break down the elements of robbery, when the three are acting in concert, in for a penny, in for a pound, you are responsible for what the other person does as long as you're acting in concert. The three were acting in concert all day long and finally stumbled, I would argue, into a plan that was successful in at least getting Harrison's card. It wasn't successful in draining his bank account thankfully, but they finally did what they set out to do.

RP 654-55. In the context of the prosecutor's argument, it is clear that the prosecutor's use of the phrase "in for a penny, in for a pound" was referring to a scenario in which people are acting in concert. When people are acting in concert, each person knows what the other is doing and, each person is working towards a common goal. For people to be acting in concert, it follows that everyone must have knowledge of what the others are doing. Especially in a situation, such as here, where it was the defendant's plan that they were executing.

While Cronin does criticize the use of the phrase, "in for a penny, in for a pound," the statement in that case was coupled with the erroneous statement that the defendant "merely needed to aid or agree to aid in the commission of the assaultive behavior that unravels into that fatal stabbing." Cronin, 142 Wn.2d at 577. The Court noted that the erroneous jury instruction "relieved the State of

the burden of having to prove beyond a reasonable doubt that Cronin knew he was facilitating the crime of murder,” and found that the error was not harmless. *Id.* at 582. Unlike in this case, the prosecutor’s argument in that case magnified an instructional error.

In State v. Mulanax, No. 68467-1-II; 2014 Wash.App. LEXIS 370, 2014 WL 645164,² Division I of this Court noted, “though we have characterized the in for a penny explanation as discredited, these remarks are not the type of comments that the Washington State Supreme Court has found to be inflammatory.” *Id.* at 19, citing, Emery, 174 Wn.2d at 763; State v. Monday, 171 Wn.2d 667, 678-679, 257 P.3d 551 (2011). The Mulanax Court stated that the prosecutor in that case used the “in for a penny” reference along with a specific and correct application of the law of accomplice liability, and therefore rejected the claim of prosecutorial misconduct. at 20-21.

Taken in context, the prosecutor’s use of the phrase, “in for a penny, in for a pound,” did not amount to a misstatement of the law of accomplice liability. The prosecutor indicated the correct law and the use of the phrase was in the context of the prosecutor’s

² Unpublished Opinion offered not as precedential authority but for whatever weight this Court deems appropriate. GR 14.1

argument that the jury should “hold Mr. Garvey accountable for his architecting this entire escapade.” RP 655. The statement did not invite the jury to convict Garvey on a lower standard of accomplice liability.

If the prosecutor had improperly stated the law, Garvey would still bear the burden of showing that “the statements were so prejudicial that a curative instruction would have been ineffective.” State v. Barajas, 143 Wn. App. 24, 38, 177 P.3d 106 (2007).

The alleged improper statement was so brief and isolated that an admonition from the trial court reminding the jury of the accomplice liability standard would have easily remedied any possible prejudice. The jury had already been properly instructed on accomplice liability by the trial court. Instruction number 8 read, in part, “a person is an accomplice in the commission of a crime if with the knowledge that it will promote or facilitate the commission of *the crime* he either, number one, solicits, commands, encourages or requests another person to commit *the crime*, or number two, aids or agrees to aid another person in planning or committing *the crime*.” RP 609; CP 26 (emphasis added). The prosecutor repeated this instruction nearly verbatim in his closing argument. With an objection, the court could have cured any

perceived prejudice by reminding the jury of the Court's instruction on accomplice liability and that the prosecutor's remarks are not evidence.

The prosecutor correctly stated the law on accomplice liability and even if he had not, the comments were so brief and isolated that they could easily have been remedied by a curative instruction. In addition, the jury was properly instructed. The court's instruction was repeated by the prosecutor verbatim during closing argument and evidence of the defendant's guilt was overwhelming. Accordingly, the prosecutor did not misstate the law on accomplice liability and there was no prejudice.

3. Garvey cannot establish ineffective assistance of counsel where counsel's failure to object served a strategic purpose.

To establish ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is defined as one which falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Courts do not need to consider both prongs of the test if the defendant fails to prove either one. Strickland, 466 U.S. at 697. There is a strong presumption that

counsel's performance was reasonable and the defense bears the burden of rebutting this presumption by establishing there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d .at 335.

Where a defendant claims ineffective assistance of counsel based on counsel's failure to object, the defendant must prove the decision not to object was not a legitimate trial tactic. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996). "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). "The decision whether to object is a classic example of trial tactics and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

Here, defense counsel had a strategic purpose for not objecting to the prosecutor's comments. Central to the defense's closing argument were the inconsistencies in the testimony of Wesley and Whittaker, while the prosecutor sought to focus the jury

on the parts of their testimony that were consistent. RP 657-658. Objecting to the prosecutor's comments would have drawn attention to the prosecutor's argument, further highlighting the consistent testimony between the witnesses, particularly regarding Garvey's role in planning the robbery and providing the gun used in the crime. Therefore, there was a legitimate trial strategy to not objecting.

Additionally, there was no prejudice by not objecting. Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996):

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. A reasonable probability is a probability sufficient to question or undermine the confidence in the final

disposition. State v. Stowe, 71 Wn. App. 182, 188, 858 P.2d 267 (1993).

Here, the jury was properly instructed as to the state bearing the burden of proof, the defendant's right to not testify, and accomplice liability. The evidence of Garvey's guilt was so overwhelming that a reasonable jury would have found Garvey guilty even in the absence of any alleged ineffective assistance of counsel. The prosecutor's remarks about the consistency of the evidence did not misstate the evidence. The prosecutor's comments merely highlighted what was already apparent by testimony of the witnesses. All the witnesses testified consistently to Garvey's involvement and video surveillance showed him participating shortly after the robbery and attempting to use Nichols' debit card at an ATM. The prosecutor pointing out the consistency of the testimony does not create a sufficient probability to undermine the confidence in the final disposition.

The prosecutor's comments during closing argument that there was "no evidence" to support facts contrary to those testified to by the witnesses at trial were not improper. Failing to object to permissible comments on the evidence is not ineffective assistance of counsel. Even if defense counsel should have objected, given

the overwhelming evidence and proper jury instructions, there is no likelihood that an objection would have resulted in a different outcome. Accordingly, the state asks the court to uphold the convictions.

D. CONCLUSION.

The arguments of the prosecuting attorney did not amount to a comment on the right to remain silent or an impermissible shifting of the burden to the defense. The use of the phrase, “in for a penny, in for a pound,” may have been inartful, but did not invite the jury to convict Garvey on a lesser standard of accomplice liability than required. This is especially true given the proper instruction on accomplice liability and the prosecutor’s reliance upon it during his closing argument. In the total context of the argument, none of the challenged statements were improper. Even if this Court finds some of the statements were improper, they were not objected to and were not so flagrant or ill-intentioned that they could not have been cured by a jury instruction. In fact, the jury instructions given would have cured any alleged error. Given the overwhelming evidence, there is no likelihood that the arguments of the prosecutor, if found to be improper, affected the verdict.

The decision to not object to the State's closing argument was clearly strategic and given the overwhelming evidence and proper jury instructions, Garvey cannot demonstrate either prong of the Strickland test for ineffective assistance of counsel. The State respectfully requests that this Court affirm Garvey's convictions and sentence in their entirety.

Respectfully submitted this 10th day of August, 2020.



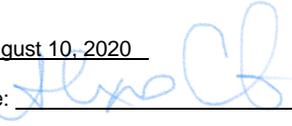
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I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 10, 2020

Signature:  _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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