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OCT 13, 2011
Court of Appeals
Division III
State of Washington

No. 293831

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

KOREY NATHANIEL WARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL E. SCHWAB, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in sealing certain discovery materials, and not disclosing them to the defense?
2. Whether there was sufficient evidence to support the convictions for second degree arson on Counts III, IV, V, and VII?
3. Whether the trial court erred in admitting rebuttal testimony from a State's witness regarding defendant Korey Ward's involvement in an uncharged arson?
4. Did the prosecutor commit misconduct in his closing arguments by shifting the burden of proof to the defense?
5. Did the court err in delegating the determination whether crime-related treatment or counseling was necessary to a community corrections officer?
6. Should the judgment and sentence be modified to state the correct former community custody statute in effect at the time the crimes were committed?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The assignment of error as to the discovery materials is moot, as the requested materials were provided to the defense prior to trial.

2. As testimony was presented that Mr. Ward was not only aware of the plan to start fires, but actively participated in the offenses both as a principal and as an accomplice, sufficient evidence supported the convictions.

3. The court did not err in admitting the rebuttal testimony, as it was offered to rebut a material assertion made by Mr. Ward during his testimony.

4. There was no prosecutorial misconduct, as the prosecutor's arguments simply highlighted that portions of the State's case-in-chief were uncontroverted by the testimony of the defendant and defense experts..

5. The State concedes that the judgment and sentence should be modified to either order crime-related treatment, or in the alternative, strike the provision from the community custody order.

6. The State concedes that the judgment and sentence should be modified to reference the correct community custody statute.

II. STATEMENT OF THE CASE

The Appellant's Statement of the Case is accurate, and incorporated here pursuant to RAP 10.3(b). The State, however, supplements that narrative with the following.

As related in the opening brief, the court conducted an in-camera review of several police reports in order to determine whether those reports contained relevant information. **(2-10-10 RP 22-25)** As a result of that review, the court determined that YPD report number 07-15085, and three related interview transcripts, were irrelevant and would be placed under seal. **(CP 310-12)** Defense counsel moved to unseal the documents, as they pertained directly to the arson charged in Count IV, involving a fire started at 4607 Scenic Drive on August 26, 2007. **(CP 326-27)**

At the next court hearing after the motion was filed, there was a discussion between counsel, and the judge who would preside over the trial, about several discovery issues. Counsel related that they had met the day prior in an effort to ensure that the defense had all the reports in the possession of the State, as well as to identify which information could not be provided. **(3-30-10 RP 1056-64)**

At a subsequent pretrial hearing, defense counsel reported to the court that he had now seen for the first time the Scenic Drive fire reports,

as well as the related transcripts. **(4-12-10 RP 1078-79)** The record contains no further discussion or motions regarding these reports.

Scott Lagerquist, a rebuttal witness for the State, testified that the first fire involving Mr. Ward and Mr. Heilman that he was aware of occurred in Naches. The defense objected to the testimony, as it involved uncharged conduct. **(14 RP 3178-79)** Mr. Ward had previously taken the stand, and denied any involvement in setting fires. **(14 RP 3151-52)**

The trial court later elaborated on its reason for overruling the objection to Mr. Lagerquist's testimony, namely that it was in response to the defendant's testimony. **(15 RP 3215-16)** After much discussion, defense counsel declined to ask the court for a limiting instruction as to the Naches fire, since in counsel's opinion, the instruction would tend to draw more attention to the incident. **(15 RP 3215-17)**

Mr. Heilman testified that both he and Mr. Ward set the fire which was the basis for Count VI, which occurred on August 26, 2007, the same offense date as Counts III, IV and V. **(6 RP 1955; CP 519-522)**

III. ARGUMENT

1. As the reports and transcripts pertaining to case number 07-15085 were provided to the defense prior to trial, the assignment of error as to the court's order to seal is moot.

As indicated in the Statement of Facts, while another judge had previously sealed the police reports which referenced the Scenic Drive fire, the defense was ultimately provided the discovery, in advance of the second trial. No issue remains, then, as to the order to seal the discovery materials. An assignment of error is moot if there is no remedy that the reviewing court can provide the appellant. State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

2. Sufficient evidence supports the convictions on Counts III, IV, V and VII.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, there was testimony from Mr. Heilman that Mr.Ward was driving the motor vehicle, providing transportation to each of the fires charged in Counts III, IV, and VII, that Ward knew what was going on with respect to Counts III and IV, and may have provided the lighter used by Mr. Heilman to start the fire related to Count VII. **(6 RP 1951-60)**

Mr. Protsman testified that Mr. Ward was driving at the time of the incident giving rise to Count V, but denied that Ward knew that Protsman was there to start a fire. **(5 RP 1780-82)**

It is significant that Mr. Heilman testified that with respect to all of the fires, Mr. Ward was an active participant in identifying locations at which to start the fires. **(6 RP 1951-52)**

Also, Ward does not challenge the sufficiency of the evidence as to Count VI. There, Mr. Heilman testified that both he and Ward started the fire, which was on the same night as the events charged in Counts III, IV, and V: August 26, 2007. Given the number of fires set on that same evening, and the active participation of Ward in providing transportation, selecting targets, and setting at least one fire himself, a rational trier of fact could conclude that he acted as either a principal or an accomplice as to all the counts in question. RCW 9A.08.020(3)(a).

3. The court did not err in allowing the testimony of Mr. Lagerquist, as it was in rebuttal to a material assertion made by Ward.

Ward argues on appeal that the court erred in allowing Mr. Lagerquist's testimony, as it was impermissible evidence of prior misconduct under ER 404(b). He is incorrect.

As noted above, the defendant chose to take the stand and denied any involvement in starting any fires. Once that door had been opened by the defendant, the State was entitled to rebut the testimony. Indeed, prior misconduct may be admissible for the purpose of rebutting any material assertion by the defendant, even if the evidence does not fit within the

traditional categories of ER 404(b), such as motive, intent, or identity. Tegland, Courtroom Handbook on Washington Evidence, Ch. 5, p. 232 (2006).

The reason for the exception is that it would be "basically unfair to allow a defendant to raise a defense and not allow the State an opportunity to impeach it, solely because the impeachment shows prejudicial details concerning defendant's participation in another crime." State v. Gakin, 24 Wn. App. 681, 685, 603 P.2d 380 (1979). Under those circumstances, such evidence is highly probative, and "should be deemed to substantially outweigh the danger of unfair prejudice." Id., at 686; ER 403. *See, also*, State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997); State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).

The court did not err in overruling the objection at the time Mr. Lagerquist was testifying, and appropriately offered to give a limiting instruction if the defense so requested. The issue raised on appeal is without merit.

4. There was no prosecutorial misconduct as the prosecutor highlighted which evidence had remained uncontroverted by the testimony of the defendant and his witnesses.

In order to prevail on a claim of prosecutorial misconduct, a defendant bears the burden of proof in showing both improper conduct by

the prosecutor and prejudicial effect. State v. Munguia, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001), *cited in* State v. O'Donnell, 142 Wn. App. 314, 327, 174 P.3d 1205 (2007). Prosecutorial misconduct requires a new trial only if the misconduct was prejudicial to the defendant. Misconduct is prejudicial when there is a 'substantial likelihood' that the misconduct affected the jury's verdict. O'Donnell, 142 Wn. App. at 328, *citing* State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *disapproved on other grounds by* State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991), *citing* In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

It is entirely proper for the State to argue that its evidence is unrefuted, even though such argument may allude to the absence of a defense, but a prosecutor may not suggest that a defendant is obligated to call witnesses to prove his innocence. Traweek, 43 Wn. App. at 107, *citing* State v. Crawford, 21 Wn. App. 146, 584 P.2d 442 (1978).

Ward's reliance on the cases cited is misplaced, however. In State v. Fleming, 83 Wn. App. 209, 212, 921 P.2d 1076 (1996), neither of the two co-defendants testified at trial. The prosecutor's suggestion to the

jury that the defendants might be expected to explain why there would be a reasonable doubt as to guilt was held to be misconduct. Id., at 214-16.

Further, in State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010), the Court of Appeals held that the defendant had not demonstrated that the prosecutor's rebuttal closing arguments were improper, when the prosecutor alluded to experts having read numerous police reports in other cases, and that it was not uncommon for a child to delay reporting sexual abuse. Id., at 595-96.

Significantly, the court in Corbett also held that the appellant could not demonstrate that prejudice could have followed from improper arguments, when the court gave a verbal instruction that the lawyer's remarks, statements and arguments were not evidence, and that any remark not supported by the law or the facts must be disregarded. Id. At 596. Indeed, "[w]e presume a jury follows the court's instructions. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Here, the defendant did testify at trial, and he did present a defense, calling among other witnesses a private investigator, as well as a fire investigator. In part, the private investigator testified that the team devoted over 1000 hours to investigating the case, generating nearly 1000 e-mails to and from defense counsel. **(XI RP 2621-22)**

It was this testimony the prosecutor was referencing in his closing argument when he suggested that the jury had not heard any evidence that the defendant was anywhere else when the fires were started. **(15 RP 3300-01)** This was not a suggestion that the defendant had any burden of proof in proving his innocence, or that he should have called other witnesses. It was, instead, tantamount to saying that the State's evidence was still uncontroverted even after the testimony of the defendant and his other witnesses had been presented to the jury.

Given the context of the total argument, the issues in the case, and the evidence addressed in the argument, the argument was not improper. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Further, even if the remarks were improper, Ward has not demonstrated any prejudice that may have affected the jury's verdicts. As mentioned, the trial court appropriately gave a verbal instruction to the jury in light of the objection. **(15 RP 3301)**

5. The State concedes the remaining assignments of error.

The State concedes that the judgment and sentence should be amended or clarified to reference the correct community custody statute in effect in 2007, as well as clarify whether the court is ordering any crime-

related treatment or counseling, without reference to a determination by a community corrections officer. Former RCW 9.94A.715; 9.94A.700.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm Ward's convictions, but remand for modification of the judgment.

Respectfully submitted this 12th day of October, 2011.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and on the Appellant Korey Ward, by depositing a copy in the U.S. Mail.

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Dated at Yakima WA this 12th day of
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