

29543-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHAUN L. ROCKSTROM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

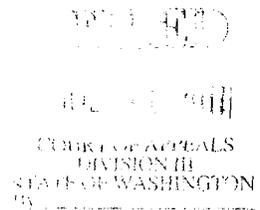
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated due process.
2. The trial court erred in imposing an exceptional sentence.

II.

ISSUES PRESENTED

- A. DID THE PROSECUTOR COMMIT PROSECUTORIAL MISCONDUCT?
- B. DID THE TRIAL COURT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON AN OFFENDER SCORE OF 17?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the facts only, as contained in the defendant's Statement of the Case.

IV.

ARGUMENT

A. THE DEFENDANT CANNOT SHOW THAT THE PROSECUTOR'S STATEMENTS AFFECTED THE OUTCOME OF THE TRIAL.

The defendant claims the prosecutor committed misconduct in comments made during closing and rebuttal closing arguments. The prosecutor's statements, of which the defendant now complains, were slight variations on the idea that the victim had a legal right to recover the property stolen by the defendant. In the first statement by the prosecutor, he stated, "The employee Jason Haynes followed him [defendant] out, as he has a legal right to do if he sees someone stealing his property from the store – or the store that he works at." RP 172. On the second occasion in closing, the prosecutor stated, "When Jason Haynes went outside, he had a legal right to take that property back." RP 178. On the third occasion the prosecutor stated, "He was resisting the defendant taking that property, which he had a legal right to do." RP 179.

In rebuttal closing, the prosecutor made the comment "That is your right. [to take back property] That is lawful. So Jason Haynes was acting lawfully." RP 194.

The defendant did not object to the comments of the prosecutor and did not request a curative instruction. The jury was instructed that the

comments of counsel were not the law. Instruction No. 2 states in part: “The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” CP 41

Thus, all the speculation put forth by the defendant on damage caused by the prosecutor’s statements requires supposition that the jury did not follow the instructions given by the trial court. The defendant has put forth no evidence that the jury, in fact, disregarded the instructions.

The State agrees that the comments were not supported by the jury instructions given by the trial court. However, the defendant made no objection to the comments by the prosecutor. The failure to object generally acts as a waiver of the issue unless the comments were so flagrant and ill-intentioned that no curative instruction could cure the fault. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

The defendant concedes that shopkeepers may detain suspected shoplifters. Brf. of App. pg. 7-8. The State agrees. *State v. Miller*, 103 Wn.2d 792, 698 P.2d 554 (1985), *State v. Gonzales*, 24 Wn. App. 437, 604 P.2d 168 (1979), *State v. Johnston*, 85 Wn. App. 549, 554, 933 P.2d 448 (1997), RCW 9A.16.080, RCW 4.24.220. The defendant attempts to use previously mentioned law as some sort of sword by raising the point that a shopkeeper cannot use force to stop a shoplifter unless the

crime is of felony proportions. The defendant makes the assumption that the defendant could not have absconded with a felony amount of video recordings. This is speculation on the part of the defendant. There was nothing in the record regarding the actual value of the property. As the defendant notes, there was no evidence that the defendant could have carried \$750 worth of DVDs. On the other hand, the record does not say the defendant could not have taken \$750 worth of DVDs.

In any event, the issue raised by the defendant involves the use of force by the shopkeeper. Since the shopkeeper in this case used no force at all, and did not detain the defendant, the issue of “felony amount” is beside the point. The bottom line is that the comments of the prosecutor regarding the legality of recovering stolen property were not supported by the jury instructions. However, it cannot be said (on the basis of the entire record) that the comments were ill-intentioned. Nor can it be said the comments were “flagrant.” In actuality, the comments of the prosecutor were correct. They simply were not supported by the instructions. “The jury is presumed to follow the instructions of the court.” *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The jury instructions told the jury to ignore any remark by counsel not supported by the law given by the trial court.

The defendant has not shown any possible harm from the comments of the prosecutor.

The Court in *Gentry* stated:

Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be 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. Gentry, 125 Wn.2d at 640.

Reversal is required only if "...there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

B. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE BASED ON THE OFFENDER SCORE ALONE.

It is well settled law in Washington that an exceptional sentence can be imposed on the grounds of "clearly too lenient" but only if there are multiple current offenses. The idea is that with a high offender score and multiple offenses, a defendant could end up with a "free crime." *State v. Holt*, 63 Wn. App. 226, 817 P.2d 425 (1991).

In this case there was only one conviction: second degree robbery. The trial court imposed an exceptional sentence on the grounds that the

defendant's criminal history score of 17 resulted in a standard range that was clearly too lenient. The State concedes this was error and the defendant should be resentenced.

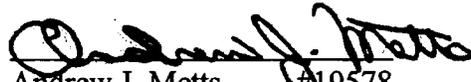
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed and the case remanded for resentencing.

Dated this 1st day of July, 2011.

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