

FILED

JAN 13 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 297659-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MICHAEL JOSEPH RICE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 297659

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Crime:

Sometime before 4:07 a.m. on April 7, 2009, two men kicked open Debra Vargas's apartment door. (RP¹ 215-16). One had a gun; the other had a metal rod. (EX. 1-transcript at 1; CP 70). They put a pillow over Ms. Vargas's head². The men stole Ms. Vargas's laptop and other computer equipment, a DVD player, and her van. (RP 125, 127, 216).

The police found a metal rod on the floor outside the kitchen in Ms. Vargas's apartment. (RP 227).

The police found a "Bride of Chucky" doll" under Ms. Vargas's landing. (RP 235-36). That doll, along with two other "Chucky" dolls, was stolen from her niece, Christina Morales, who lives in a nearby apartment complex and who collected such dolls. (RP 109, 112).

The van was found in Portland, Oregon, along with two Chucky dolls and a computer tower. (RP 157).

¹ Unless otherwise stated, "RP" refers to the trial transcript of February 14-16, 2011.

² This is a fact that was excluded from the trial pursuant to co-defendant Campbell's motion. Campbell moved to suppress the 911 call. The Court suppressed portions of the 911 call, including the statement that "they made us cover our head with pillows." Defendant Rice did not join this motion.

Witnesses Cecilia Circo and Jerami Wilson link the defendants to the crime scene, the van, the weapons, the theft of the Chucky dolls, and reveal the motive for the robbery.

About a week before the robbery, Defendant Rice had asked his long-time acquaintance, Jerami Wilson, for help in stealing items from Ms. Vargas. (RP 134, 139). Mr. Wilson was house-sitting for his then girlfriend, Ms. Morales, at 1416 W. 15th Ave. #A in Kennewick on April 6, 2009. (RP 133-34, 204). Ms. Morales lived in the four-plex next to Ms. Vargas, who lived at 1500 W. 15th #B, Kennewick, Washington. (RP 200).

Defendants Campbell and Rice came to the Morales apartment on the night of April 6, 2009. (RP 135). Cecilia Circo was also at the Morales apartment, and in her mind Campbell and Rice were “looking to take stuff.” (RP 135, 178). Campbell had a gun. (RP 137, 177 - reported by Wilson and Circo). Rice had a metal pipe -- the metal pipe which the police found in the Vargas apartment. (RP 137-38, 243).

Wilson eventually went to sleep in the Morales apartment. (RP 144). When Wilson awoke, the defendants Rice and Campbell and Ms. Circo were gone, and Ms. Morales's Chucky dolls were missing. (RP 143, 145).

Ms. Circo stated Campbell put the gun in her face and abducted her in the van, with Rice driving it. (RP 177). The defendants took the van and Ms. Circo to Portland. (RP 177). On the drive, they discussed how they committed the robbery. (RP 180).

Rice's previous use of the van and Campbell's possession of a Chucky doll further tie Rice and Campbell to the crimes.

The van had a safety switch; people who had borrowed the van previously would have known about the switch. (RP 110-11). Defendant Rice had previously driven the van. (RP 112, 297).

Ms. Circo had seen Campbell with a Chucky doll. (RP 179). That Chucky doll was found in Ms. Vargas's van when it was located in Portland. (RP 159).

A third witness who heard Rice and Campbell talking about the robbery, Stacy Felkel, does not appear at the trial.

The State had personally served Stacy Felkel, who lived in Washougal. (RP 154). Further, the State had paid for a bus ticket for her transportation from Washougal to Kennewick for her testimony. (RP 154). The State anticipated that she would testify that the defendants in her presence talked about their doing a home-invasion robbery. (RP 103). However, she did not appear for the trial.

The defendants make contradictory statements about their involvement in the robbery.

Defendant Campbell did not testify, but did speak with the Detective. (RP 241-42). Defendant Rice did not speak with the police, but he did testify. (RP 290-97).

Defendant Rice's testimony: Mr. Rice testified that he went to Ms. Morales's apartment at Ms. Circo's invitation. (RP 290). Rice left the apartment at 9:30 – 10:00 p.m., because he had an old grudge against Jerami Wilson. (RP 291). Rice testified that he hardly knew Ms. Circo or Mr. Campbell, having met them a couple days prior. (RP 297-98).

Co-defendant Campbell's Version: *First Version:* On April 19, 2009, Detective Davis asked Campbell if he was in the Tri-Cities around the 7th of April. (RP 241). Campbell initially told Detective Davis, "I've been in Portland for two or three weeks" so could not have done a robbery in Kennewick. (RP 241).

Campbell's *Second Version:* When further questioned by Detective Davis, Campbell said that he was with Jerami Wilson, Cecilia Circo, and Michael Rice at Ms. Morales's apartment. (RP 242). Campbell said Jerami Wilson fell asleep at the apartment, and that Ms. Circo and Mr. Rice were in a bedroom and he left the apartment. (RP 242).

Mr. Rice's version is contradicted by landlord, Roy Cochlin, who stated he saw the defendants on the property going back and forth between Ms. Morales's apartment and Ms. Vargas's apartment at about 11:30 p.m. (RP 205).

Ms. Vargas passed away while the case was pending.

Unfortunately, Debra Vargas died on October 7, 2010. (RP 117). The trial was held on February 14-16, 2010. After guilty verdicts, this appeal followed. (CP 59-62, 81-82).

ARGUMENT

1 . RESPONSE TO DEFENDANT'S FIRST ARGUMENT
(“THE STATE’S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS.” Defendant’s brief, 7).

- A. The standard on review is whether, in the light most favorable to the State, a rational fact finder could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).**

- B. In the light most favorable to the State, there was sufficient evidence to find the defendant(s) guilty.**

The defendant's summary of the facts on page eight of his brief omits the facts that the defendant specifically talked about stealing Ms. Vargas's laptop, that the metal pipe he had at the Morales apartment was found at the Vargas apartment, that he and Campbell abducted Ms. Circo

in the stolen van, and that he and Campbell talked about the robbery as they fled the area. (RP 138, 140, 180, 227).

In the light most favorable to the State, the evidence is that the defendant planned to steal various items from Ms. Vargas, he went to a neighboring apartment on the night of April 6, 2009, armed with a metal rod and looking to steal things, went into Ms. Vargas's apartment, dropped the metal rod in her apartment, stole her computer and van, and drove the van to Portland while boasting of the crime to his companions.

This is not a close case.

2. RESPONSE TO DEFENDANT'S SECOND ARGUMENT

(“THE PROSECUTOR IMPROPERLY COMMENTED ON MR. RICE'S RIGHT TO A JURY TRIAL AND TO CONFRONT WITNESSES.” Defendant’s brief, 10).

A. The Standard on Review and Burden of Proof:

Since the defendant did not object to the prosecutor's argument, he must show conduct so flagrant and ill intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury to justify a new trial. *State v. Dixon*, 150 Wn. App. 46, 207 P.3d 459 (2009), and *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

B. The argument was neither flagrant or ill-intentioned, nor was it prejudicial.

1. *The argument was neither flagrant or ill-intentioned, nor was it prejudicial.*

The defendant does not cite any authority in support of his proposition that the prosecutor's comments were improper. In fact, the defendant's argument overlooks the standard role of the jury, to resolve a dispute. The State has charged the defendant; the defendant has plead "not guilty." That is why a jury is impaneled. Indeed, a prosecutor's basic request to a jury is to hold the defendant accountable; seeking a conviction is to request that the jury hold the defendant accountable for his/her actions.

Further, the defendant fails to explain how the comment "they (the defendants) are never going to admit (they committed the crimes)" impacts their right to "confront witnesses" or right to a "jury trial." The defendants did deny committing the crimes. That had nothing to do with the exercise of their right to a jury trial and to confront witnesses. The defendant's argument does not make sense.

2. *There was no prejudice.*

In any event, the defendant does not explain how the prosecutor's argument resulted in prejudice which could not have been cured by an instruction or objection.

3. RESPONSE TO DEFENDANT'S THIRD ARGUMENT.

(“THE PROSECUTOR'S OPENING STATEMENT CONTAINING MULTIPLE DETAILS HE COULD NOT PROVE, CONSTITUTES PROSECUTORIAL MISCONDUCT.” Defendant’s brief, 12)

A. Standard on Review and Burden of Proof

The defendant did not object to the prosecutor's opening statement. Therefore, as stated above, on appeal, the defendant must show that the opening statement contained misconduct which was flagrant and ill-intentioned and that the resulting prejudice could not have been cured by an objection or cautionary instruction. *State v. Magers*, 164 Wn.2d 174, 189, 191 P.3d 126 (2008).

B. The defendant has not met this burden.

The defendant means two details when he refers to “multiple details (the prosecutor) could not prove.” First, the defendant suggests that the prosecutor improperly stated that the evidence would show that the culprits put a pillow over Ms. Vargas’s head to prevent her from identifying them and put a gun to her head. Second, the defendant suggests that it was improper to refer to the testimony of Stacy Felkel because “the prosecutor knew that Ms. Felkel was a reluctant witness.”

1. *Neither statement involved flagrant or ill-intentioned misconduct.*

Pillow over Ms. Vargas's head and gun pointed at her:

The deputy prosecutor³ did not misstate any fact. Ms. Vargas did tell the 911 operator that the men who kicked open her door did put a gun to her head and did have her put a pillow over her head. However, that 911 call was the subject of a pre-trial hearing which excluded that portion of the call. The deputy prosecutor should not have made these statements.

However, they were not flagrant or ill-intentioned. The State respectfully argues that the mistake was just that, a mistake.

State's failure to produce Stacy Felkel

Here, the State did not make a mistake. During an opening statement, a prosecutor may state what the State's evidence is expected to show. *State v. Brown*, 132 Wn.2d 529, 563, 940 P.2d 546 (1997). The prosecuting attorney's office had been in touch with Ms. Felkel, had arranged for her to be personally served with a subpoena, and had purchased a bus ticket for her transportation from Washougal to

³ It is difficult to know whether to refer to yourself in the third person. While this sentence is in the third person, it is important to say that I, Terry J. Bloor, representing the State at trial and on appeal, mistakenly referred to facts which I could not present at trial.

Kennewick, Washington. The State fully expected Ms. Felkel to testify when giving the opening statement.

2. *Neither statement resulted in a substantial likelihood that the statements affected the jury's verdict.*

Regarding the statements about the culprits pointing a gun at Ms. Vargas and putting a pillow over her head, the issue was “whodunit,” not whether the defendants committed the offense but it was less serious than charged. Both defendants, Campbell, through his statement to Detective Davis, and Rice directly, denied kicking in Ms. Vargas’s door, denied being in her apartment, denied having weapons, denied using the weapons in a robbery of Ms. Vargas, denied stealing anything from Ms. Vargas, and denied taking her van. The fact that Ms. Vargas stated that the robbers put a gun to her head added nothing to the case.

Regarding the statement about Ms. Felkel’s expected testimony, the jury was properly instructed that counsel's remarks were not evidence, that they must decide the case based on the evidence produced in court. There is no reason to believe the jury did not follow those instructions.

4. **RESPONSE TO DEFENDANT'S ARGUMENT NUMBER FOUR**
(“THE CUMULATIVE EFFECT OF REPETITIVE ERROR WAS SO FLAGRANT THAT NO INSTRUCTION CAN ERASE THE ERROR.” Defendant’s brief, 14)

As argued above, there were no repetitive errors, so there is no cumulative effect of such errors. Nevertheless, it may be helpful to contrast the defendant's claimed errors in this case with those in *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976), on which he relies.

<i>State v. Torres</i>	<i>State v. Rice</i>
<p>Prosecutor referred to defendants as Mexicans or Mexican-Americans. <i>Id.</i> at 257.</p> <p>“Here, to some extent the opening statement became a narrative which recounted the story of the alleged crime in a manner which prompted the trial judge to say, 'It does constitute almost testimony by the prosecutor who is not under oath.’” <i>Id.</i> at 258</p> <p>“During the presentation of evidence, the prosecutor persisted despite warnings in asking leading questions during the examination of the victim.” <i>Id.</i> at 258.</p> <p>“During cross-examination of a witness for the defense, the prosecutor asked the witness whether the defendants had testified at the preliminary hearing. . . . This was a comment upon the defendants’ exercise of the privilege against self-incrimination and was improper.” <i>Id.</i> at 259.</p>	<p>The prosecutor stated the culprits pointed a gun at the victim and put a pillow over the victim’s head. (The comment was true, but should not have been made because it had been ruled inadmissible.)</p> <p>The prosecutor referred to the expected testimony of Stacy Felkel.</p>

State v. Torres

In the closing argument, the prosecutor stated: “Now, where is his wife to testify for him? Now, he has exactly the same subpoena powers as the State, and he could have forced her to come in and testify. Now, as you recall, he testified that she has left him over this very incident.”

Id. at 259.

The Court stated, “The majority of jurisdictions hold that it is improper in criminal cases for the prosecution to comment on the exercise by one spouse of the privilege not to have the other spouse testify as a witness.”

Id. at 260.

In rebuttal the following exchange occurred:

“(Prosecutor): Now, (defense counsel) in his argument indicated that you were going to determine whether or not his client would be at liberty or not and you were going to determine the punishment. Well, the fact of the matter isn't that at all. You are the triers of the fact. You have to determine what happened and when it happened. Punishment, if any, in this case will be determined by Judge Stephens. He has heard all this testimony, all the background. He will see additional reports from counsel and from the probation officer, and from everybody else.

(Defense counsel): Your Honor, I object. This is highly suggestive argument.

State v. Rice

State v. Torres

(Prosecutor): Counsel opened it up, your Honor.

(Defense Counsel): I would agree, your Honor, and I would state for the record that she has misstated the remark of (defense counsel), your Honor. At no time did he infer the jury was to have anything to do with-

(THE COURT): All right. We don't need any additional argument on this.

(Defense Counsel): Fine.

(Prosecutor): Thank you, your Honor.

Judge Stephens will have total discretion as to what happens to these defendants after you make your determination and render your verdict in the matter. He has a lot of alternative available to him.

(Defense counsel): Your Honor, I thought we had closed this area.

(Defense counsel): Your Honor, it's of no moment to the jury -

(Prosecutor): Your Honor, counsel opened it up.

(THE COURT): Let's proceed with your closing argument.

(Prosecutor): Thank you, your Honor.

Judge Stephens has a lot of

State v. Rice

<u><i>State v. Torres</i></u>	<u><i>State v. Rice</i></u>
<p>alternatives open to him and he can choose anything from a deferred sentence on this -</p> <p>(All counsel): Your Honor, objection. <i>Id.</i> at 261-62.</p> <p>The Court of Appeals stated this exchange was indicative of the prosecutor's penchant for persisting in pursuing matters not properly before the jury. Further, the Court stated the argument was inappropriate because it suggested to the jury that it does not matter if the verdict is wrong because the judge may correct its effect. <i>Id.</i> at 262.</p>	

There is a huge difference between the case herein and *Torres*.

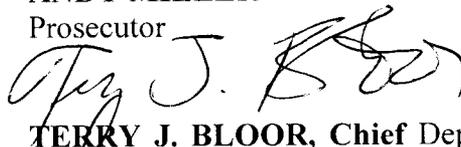
CONCLUSION

The defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of January 2012.

ANDY MILLER

Prosecutor



TERRY J. BLOOR, Chief Deputy

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

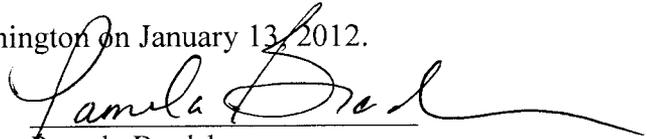
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Signed at Kennewick, Washington on January 13, 2012.


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