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No. 36979-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

RICHARD ANTHONY VEDDER,

Appellant

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

NO. 18-1-01364-03

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The prosecutor did not argue that the jury must have a reason justifying reasonable doubt.
- B. The prosecutor did not shift the burden of proof by implying that the defendant must produce evidence of the envelope a forged check was mailed in.
- C. The defense attorney at trial was not ineffective for not objecting to the prosecutor's closing argument.
- D. There was sufficient evidence to convict the defendant.

II. STATEMENT OF FACTS

Substantive testimony at trial:

There was no dispute that the defendant attempted to pass a check at a Moneytree on January 29, 2018, and the check was forged. RP at 15, 36, 66-69, 82. The check was written on the account of the Franklin County Prisoners' Fund which reimburses inmates upon their release from jail for any money they had when arrested or which is deposited with the jail for the inmate's behalf. RP at 42, 61-62.

The check number on the forgery, 72893, was an actual number used by the Franklin County Prisoners' Fund, but the actual check was issued on March 16, 2018 for \$30.15 to another individual. RP at 69-70. The check the defendant attempted to pass was dated January 18, 2018

and was for \$673.54. Ex. 3. That check was also not endorsed, although a true check on the Fund will always be signed by a Deputy Corrections Officer. RP at 41, 70.

Concerning the defendant's knowledge that the check was forged, he stated that he did not create the check and did not know who did. RP at 81. He claimed that someone sent him the check in the mail but did not know who. *Id.* He also noticed that his name was misspelled and that it was not endorsed. RP at 81, 88.

Although the defendant initially claimed that he was not familiar with the Franklin County Prisoners' Fund, he acknowledged that he does have knowledge of that Fund because he was given a check from that account on March 6, 2016. RP at 85-86. That check was for \$0.41 and was given to him upon his release from the Franklin County Jail. RP at 87. The defendant admitted that he was not expecting any checks from the Franklin County Prisoners' Fund. RP at 85. The custodian of the Franklin County Prisoners' Fund testified that nothing was owed to the defendant since 2016. RP at 71. The defendant kept the check for \$0.41 issued March 6, 2016 although it was voided after 90 days. RP at 101-02. He did not keep the envelope in which the forged check was mailed. RP at 87.

Perhaps the only contradictory evidence at trial concerned the defendant's demeanor while at the Moneytree. The teller, Marina Centeno,

testified while she tried to determine if the check was valid, the defendant was very nervous, was trying to get out of the door with the check as soon as he could, and walked out pretty fast. RP at 44. The defendant testified that he was not agitated or nervous at the bank, and he did not try to speed away after he left. RP at 83-84.

Closing Arguments:

The prosecutor's closing argument totaled 16 pages of transcript, from the initial argument at RP 117-27, and the rebuttal argument at RP 136-40. There were no objections to the argument.

The defendant on appeal complains about the following highlighted sections.

Now I want to talk about reasonable doubt, because it's something we talked about a lot during jury selection and I think that it's really relevant here. Reasonable doubt is a doubt for which a reason exists. And I know that is sort of circular, but it's something that *there has to actually be a reasonable thing.*"

Now you've heard a story from Mr. Vedder. You've heard a lot of things from Mr. Vedder, but you've heard a story from Mr. Vedder about how he was just mailed a check and he just thought he could cash it. I'm going to submit to you that that is just simply not true and wildly unreasonable and unbelievable.

Mr. Vedder wants you to believe that someone out there forged a check in his name and then mailed it to him. For what purpose? What does that person have to gain from that? And that he had no idea what was going on with it. Think about it logically. Use your common sense, which we don't ask you to check at the door when you become

jurors. That is an unreasonable story that is wildly unbelievable. It literally makes no sense.

RP 121-22.

The defendant mentioned the missing envelope in his closing argument: “The prosecutor has put some emphasis on the fact that he (the defendant) didn’t save the envelope. I mean, who does, you know?” RP at 133.

In response, the prosecutor in his rebuttal closing stated this. The emphasized portion is at issue on appeal.

So he actually has more knowledge than a regular person would in this situation if they had just been mailed this check. If that’s actually what happened. He knows that he was only given that check in person He knows it was signed and he knows the last time he was entitled to money from them was in March of 2016, nearly two years prior. *And I bring this up that he brought the check in here today to submit his evidence not to say that people have to keep checks or people have to keep these sorts of things; but isn’t it very convenient that Mr. Vedder has that check today? He kept it for \$.41. But the envelope? Just gone. The envelope doesn’t exist.*

And we talked about that unreasonable story that he told, that unbelievable story that when you think about it and you dig into it, makes no sense. Why is someone forging checks to Mr. Vedder and mailing them to him? Why is someone trying to give Mr. Vedder money that they’re going to get no benefit for this? Why would they be putting the time in to forge that check?

And the reason that Mr. Vedder doesn’t have that envelope today but he has the check that he kept for apparently three years is because the envelope doesn’t exist. The check wasn’t mailed to him. He came up here and told you a story, he tried to hedge it by saying he had no prior

knowledge of the Franklin County Prisoners' Fund; and then he had to immediately admit, no, I testified wrong about that. I told something that was untrue, incorrect---I lied.

RP 137-38.

Two additional statements in the prosecutor's closing argument should also be cited: "We do have to prove that he knew it was forged, and the evidence here shows that beyond a reasonable doubt." RP at 138. "And the State has shown that (the defendant's knowledge the check was forged) beyond a reasonable doubt" RP at 140.

III. ARGUMENT

A. There was no prosecutorial misconduct, both because the prosecutor's closing argument was proper and because the comments in question were not prejudicial.

1. Standard on review:

For a prosecutor's comments to rise to the level of misconduct, they must be both improper and prejudicial. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016). When an improper argument is alleged, the defendant bears the burden of establishing the impropriety of the comments as well as the prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A prosecutor's improper comments become prejudicial if there is a substantial likelihood that the comments affected the jury's verdict. *Sundberg*, 185 Wn.2d at 152. Failure to object to a closing argument constitutes a waiver unless the comment is so flagrant

and ill-intentioned that it causes an enduring and resulting prejudice that cannot be neutralized by an admonition to the jury. *Russell*, 125 Wn.2d at 86.

2. The defendant has not established that the prosecutor's closing argument was improper, much less flagrant and ill-intentioned.

a. The comment regarding the failure of the defendant to produce the envelope was proper.

If a defendant testifies, his theory is not immunized from attack; to the contrary, evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. *State v. Vassar*, 188 Wn. App. 251, 261, 352 P.3d 856 (2015). For example, in *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), in a drug delivery case the defendant testified that slips of paper with names and numbers the police found in his apartment were not drug ledgers, but a list of people he loaned money to and who owed him gambling debts. The prosecutor properly argued that if that were true the defendant would have called those individuals to testify. In *State v. Sundberg*, a drug possession case in which the defendant argued unwitting possession, the defendant testified that he allowed the co-worker to use his work overalls, where the drugs were found. *Sundberg*, 185 Wn.2d. The court held that where the defendant testifies about an exculpatory theory or defense that could have

been corroborated, the prosecution is allowed to call attention to the defendant's failure to offer corroborative evidence. *Id.* at 153.

The defendant testified the check was mailed in a plain white envelope, but added the envelope was big and formal. RP at 80. The only thing he mentioned that was inside the envelope was the check, yet he said the envelope was unusually thick. RP at 80-81. The defendant stated he was not expecting any money from the Franklin County Prisoners' Fund. The prosecutor properly asked what happened to that envelope. The prosecutor's point in contrasting the \$0.41 check that the defendant held onto for over two years and the supposed envelope is clear: if the defendant was so much of a pack-rat that he held onto a worthless check for over two years, why did he not keep the envelope that had a mysterious \$673.54? The prosecution does not improperly shift the burden of proof by calling attention to the defendant's failure to offer corroborative evidence of his defense. *Sundberg*, 185 Wn.2d at 156.

Further, the defendant's citation on this point is to the prosecutor's rebuttal argument. Note that the defense attorney in closing argument mentioned the missing envelope, asking who would keep an envelope. RP at 133. The prosecutor's short comment on RP at 137-38 was in answer. Who would keep an envelope? The type of person who would keep a voided check for over two years. The remarks of the prosecutor are not

grounds for reversal if they are in reply to the defense attorney's arguments. *Russell*, 125 Wn.2d at 86.

i) The prosecutor did not use a “fill in the blank” argument about reasonable doubt.

The defendant argues that the following is an improper “fill in the blank” argument: “Reasonable doubt is a doubt for which a reason exists. And I know that is sort of circular, but it’s something that there has to actually be a reasonable thing.” RP at 121. The prosecutor did not tell the jury that it had to provide a reason to acquit the defendant. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) noted that was the problem with “fill in the blank” arguments. The prosecutor did not imply that the jury had to find the defendant guilty unless it could come up with a reason not to, which is the problem the court in *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) noted.

Appellate courts review a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. *Id.* at 430. Here, the context of the prosecutor's argument was concerning the defendant's testimony that he received a check out of the blue, from an unknown source for \$673.54 without knowing anything more about it. After the above quote, he spent the remainder of his closing argument essentially

talking about the unreasonableness of the defendant's testimony. The jury was properly instructed that the prosecution had the burden of proof and that the State's argument should be disregarded if it conflicts with the law as given in the instructions. CP 55, 58.

The cases cited by the defendant involve the prosecutor explicitly using some form of the phrase: "In order to find the defendant not guilty, you have to ask yourselves or you'd have to say, 'I doubt the defendant is guilty and my reason is blank.' A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank." *Emery*, 174 Wn.2d at 750-51.

The defendant cites *Anderson* for the proposition that it is improper to argue a reasonable doubt is "*something real, with a reason to it*" and then compares that to the prosecutor's comment here. However, *Anderson* did not hold that comment was improper. The *Anderson* court held the following was proper to argue that a reasonable doubt is one for which a reason exists. The prosecutor did not cross a line by arguing, "A reasonable doubt arising from the evidence would be if the store employees came in here and said, 'That isn't the guy.'" *Anderson*, 153 Wn. App. at 430.

The prosecutor here was only pointing out that the defendant's testimony was not reasonable. He also told the jury that the State had the

burden of proof. RP at 137, 139. He never came close to a “fill in the blank” argument.

b. Most cases hold that a “fill in the blank” argument is not flagrant or ill-intentioned and that the closing argument will not be reviewed unless there was an objection at trial.

The defendant cites *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) as holding that a “fill in the blank” on reasonable doubt was flagrant and ill-intentioned. However, the court in *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) noted that while the *Johnson* case implied that a “fill in the blank” argument was per se flagrant and ill-intentioned, such an argument is not. The defendant still must demonstrate prejudice. In *Walker*, the prosecutor made a number of errors including arguing the jury must “fill in the blank,” must “speak the truth,” that reasonable doubt is comparable to everyday decision making and misstating the law on defense of others. The *Walker* court reversed the conviction based on the cumulative effect of these errors. *Id.* at 739.

The *Emery* case, a Supreme Court case decided after *Johnson*, is also helpful on this point. *Emery* held that while a “fill in the blank” argument subtly shifts the burden to the defendant; such an argument is not flagrant or ill-intentioned. *Emery*, 174 Wn.2d at 760, 764. The *Anderson* court was in agreement that such an argument is improper, but

unless there was an objection the argument would not be reviewed because it was not flagrant or ill-intentioned. *Anderson*, 153 Wn. App. at 430.

Other cases have reversed based on multiple problems with the prosecutor's argument, not just a "fill in the blank" argument. For example, in *State v. Venegas*, 155 Wn. App. 507, 525, 228 P.3d 813 (2010) the prosecutor argued not only that the jury had to "fill in the blank" on why there is reasonable doubt, but that the defendant's presumption of innocence was eroded every time there was evidence of guilt, which is incorrect because the presumption of innocence is maintained throughout the trial.

The prosecutor did not use a "fill in the blank" argument in closing. However, the lack of an objection means that this court should not review the prosecutor's closing argument.

3. The defendant was not prejudiced by these arguments.

The defendant was not convicted because of a few lines in prosecutor's closing argument. The evidence against the defendant included that he went to a Moneytree trying to pass a check. The check was for a large amount, \$673.54. By his own admission, the defendant was familiar with the payor, the Franklin County Prisoners' Fund. He knew he

was owed nothing by that Fund. His name was misspelled on the check and the check was not endorsed. These are the facts that prove a reasonable person would have known the check was a forgery and that the defendant specifically knew it was a forgery.

B. The defense attorney was not ineffective for failing to object to these statements in the prosecutor’s closing argument.

1. Standard on review:

A defendant claiming ineffective assistance must show that his trial counsel’s performance was objectively deficient and resulted in prejudice. *Emery*, 174 Wn.2d at 755. Prejudice is shown where there is a reasonable probability the defendant would have been acquitted but for the deficient performance. A performance is deficient if there are no legitimate trial tactics that would support it. *Id.*

Concerning legitimate trial tactics, courts have noted that it is unusual for attorneys to object to closing arguments absent egregious statements and a decision not to object is within the wide range of permissible legal conduct. *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004).

2. The defendant cannot establish either prong.

The State incorporates the above argument. The prosecutor did not use a “fill in the blank” argument regarding reasonable doubt. The

prosecutor was justified to ask the defendant about the lack of supporting evidence for his testimony. The defendant would have probably been convicted whether or not the prosecutor made these comments. They were not at the heart of the prosecutor's closing argument or the evidence.

In addition, the defense attorney should be given wide latitude for not objecting to a colleague's closing argument. Attorneys do not usually object; the defense attorney legitimately may have thought that an objection, even if sustained, would have been viewed poorly by the jury. The defense attorney could also have believed that he could answer the prosecutor's arguments in his own closing argument.

C. There is sufficient evidence for a rational jury to convict the defendant.

1. Standard on review:

To determine whether the evidence was sufficient to convict, an appellate court reviews the evidence in the light most favorable to the State to determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

2. There was sufficient evidence for a rational jury to convict.

In the light most favorable to the State, the defendant was familiar with the Franklin County Prisoners' Fund. RP at 86. He knew he was

owed nothing by that Fund. RP at 85. Yet, he tried to cash a check made out to him for a large amount, \$673.54, from that account. RP at 86. That check was forged. RP at 66-69. As the bank teller at Moneytree was trying to ascertain if the check was valid, the defendant became very nervous and was trying to get out of the business with the check as soon as possible. RP at 44. The defendant's credibility with the jury was damaged because he initially denied knowing anything about the Franklin County Prisoner's Fund then admitted having that knowledge, because he had a crime of dishonesty, and because his story about receiving a check in the mail from an unknown source did not make sense. RP at 80, 85-86, 88-89.

Whether the defendant wanted to admit it or not, the jury could reasonably believe he knew the check was forged. The jury could also reasonably conclude that a reasonable person in the defendant's position would have known the check was forged.

The defendant argues that the jury's verdict was not reasonable for three reasons. First, the bank teller could not confirm the check was a forgery. Actually, the bank teller, Ms. Centeno, noticed the check was not endorsed, discovered the phone numbers on the check were disconnected, found it did not go through a scanner, and did not cash the check because it was not good. RP at 35, 41, 43. Further, the defendant knew that

something was amiss with the check because his name was misspelled on it. RP at 81.

Second, the defendant argues that the evidence was equivocal and that if the defendant conspired to create a forged check, he would have used his own name. True, but the defendant was not charged with conspiracy to make the check; he was charged with having “possessed, offered, disposed of or put off as true a written instrument.”

Third, the defendant argues that a third person could have used the defendant as a patsy to test a forgery operation by putting the check in his mailbox, counting on him to cash it and then seeing whether the forgery would pass off as authentic. This illustrates the one question the defendant could never explain: why would someone mail him this check? If person X mailed the defendant the check, how would X know that the defendant would cash it? The defendant knew he was owed nothing by the Franklin County Prisoners’ Fund; why think he would try to cash the check rather than call the Fund and say, “Why did you send me \$673.54?” How would X ever track the defendant to see if he did cash the check and how would X know if there were any problems? The jury would not have to engage in such speculation in deliberations. The evidence was overwhelming that the defendant knowingly tried to cash a forged check.

IV. CONCLUSION

The conviction should be affirmed.

RESPECTFULLY SUBMITTED on May 1, 2020.

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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 May 1, 2020.


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BENTON COUNTY PROSECUTOR'S OFFICE

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