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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28185-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY D. KOSS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ANNETTE S. PLESE

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The prosecutions [sic] arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.
2. The language of RCW 9A.52.020(1) creates an issue of statutory interpretation which must be strictly construed in favor of the criminal defendant.
3. There was insufficient evidence as a matter of law for the jury to find that a First Degree Burglary occurred.
4. The trial court violated the Defendants' Constitutional rights by not conducting proceedings in open court including jury instruction, argument, and questions received from the jurors during deliberations.
5. The court committed reversible error in failing to properly instruct the jury on the question of the defendant being on DOC as irrelevant 404(b) material.

II.

ISSUES PRESENTED

- A. WAS THERE ANY PROSECUTORIAL ERROR IN CLOSING ARGUMENTS?
- B. IS THERE ANY NEED FOR STATUTORY INTERPRETATION OF RCW 9A.52.020?
- C. HAS THE DEFENDANT SHOWN THERE WAS INSUFFICIENT EVIDENCE PRESENTED ON THE ELEMENTS OF FIRST DEGREE BURGLARY?
- D. WAS THERE ANY VIOLATIONS OF THE DEFENDANT'S RIGHT TO PUBLIC TRIAL?
- E. DID THE TRIAL COURT ERR IN FAILING TO INSTRUCT THE JURY ON AN ANSWER ELICITED FROM A DEFENSE WITNESS ON DIRECT EXAMINATION?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. THERE WERE NO COMMENTS MADE BY THE PROSECUTOR THAT WERE SO FLAGRANT AND ILL-INTENTIONED AS TO BE INCURABLE BY ANY COURT INSTRUCTION.

The defendant purports to quote some of the prosecutor's comments in closing argument and how those comments are erroneous. What is actually erroneous are the defendant's out-of-context extractions.

The defendant first quotes at RP 319. "...there are some questions that are unanswered so long as the information you have before you leads you to believe the defendant committed the crime." Brf. of App. pg. 14.

The full context of the statement reads:

As the State has indicated, the critical issue for you folks to decide is whether the defendant committed the crime of First Degree Burglary, and it's the State's responsibility to prove each and every element of the charge beyond a reasonable doubt.

Now, when you think of that concept beyond a reasonable doubt, it's not beyond all possible doubt. It's okay if there are some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed this crime.

RP 319.

The prosecutor was simply explaining the difficult concept of “beyond a reasonable doubt.” This statement was not an improper comment.

The defendant did not object to the prosecutor’s comments nor did he move for a curative instruction or a mistrial. Arguments based on a prosecutor’s comments will be rejected by an appellate court unless the comments were so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). On appeal, the defendant fails to mention this standard and does not argue either that the comments were “flagrant and ill intentioned” or that no curative instruction would have dealt with the situation.

The failure of defense counsel to object “...strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. McKenzie*, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006) (emphasis omitted) (*quoting State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

The defendant's failure to object at trial and then the failure of the defendant on appeal to argue that the comments were "flagrant and ill intentioned" shows that this defendant may be doing what the *McKenzie* court warned about: an attempt to create an issue where none exists.

B. RCW 9A.52.020(1) IS QUITE PLAIN ON ITS FACE AND THERE IS NO NEED OR JUSTIFICATION FOR STATUTORY INTERPRETATION.

The defendant argues that RCW 9A.52.020(1) "creates an issue of statutory interpretation."

The State respectfully disagrees with the defendant when he states that the facts in this case are "very similar" to those in *State v. Gilbert*, 68 Wn. App. 379, 842 P.2d 1029 (1993). The facts in *Gilbert* are not even slightly similar to this case. In *Gilbert*, the defendant and his partner were outside a residence when they confronted and assaulted a co-owner of the house. The co-owner, Mr. Mastro, had been walking by when the defendant came out of the house carrying his estranged wife's jewelry box. *Gilbert, Id.* at 380. Mr. Mastro was standing between a parked car and the residence when the confrontation/assault took place. *Id.*

Those facts are nothing like the facts in this case. In this case, there was a lone woman who answers a knock at her front door. RP 172-73. She remained inside her house the entire time. RP 173. The

defendant reached inside the doorway and punched the woman in the face. RP 174. The defendant and his partner ran across the street.

It is difficult to imagine a more disparate set of circumstances than those adhering in the *Gilbert* case and those facts in this case. It is also relevant that the first degree burglary statute was modified in 1995. Laws of 1995, ch. 129 (initiative no. 159), § 9.

The defendant tries to create an issue of jury unanimity by claiming that there was conflicting testimony about where the assault took place. Brf. of App. pg. 16. The victim testified she was punched in the face while standing in her house. RP 173. The defendant denied striking the victim and claimed he never went inside the victim's house. RP 282, 83. It would be impossible for a juror to be confused with those facts.

There could be no issue of jury unanimity. Either the victim stood in the house and was punched in the face, or the defendant "pushed" the flailing victim. The jury obviously chose to believe the victim.

The defendant tries to interweave an argument about the language of RCW 9A.52.020.

The defendant states on appeal, "...but it was uncontested that the men immediately fled from the building." It is most certainly contested that the men fled from the victim's residence. According to the defendant's testimony, he was never in the building. RP 282-83. It is not

clear what point the defendant is attempting to make. If the men fled, as the victim maintains, then perhaps the defendant argues that the defendant's assault does not fall within the ambit of RCW 9A.52.020(1). It seems that the defendant is convinced that *Gilbert* somehow applies and assaulting while fleeing would not be a First Degree Burglary. Obviously, the State maintains that this is tortured logic and the attempt to weave selected parts of *Gilbert* into this case is futile.

There is nothing in this case that indicates an issue with unanimity and the defendant's issue lacks merit.

C. THERE WAS AMPLE AND SUCCINCT EVIDENCE PROVING EACH ELEMENT OF THE CHARGE.

The defendant asserts that the evidence was insufficient to support the jury's verdict.

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The First Degree Burglary statute is one long sentence:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020.

If the testimony of the victim is examined using the factors that it is absolutely true and any inference from that testimony are resolved in favor of the State, there is ample evidence.

The victim testified she never left the house. RP 173. The defendant punched her in the face. RP 174. The only way the defendant's fist could contact the victim's face would be for part of the defendant to enter the victim's residence. As far as the "intent" element, this case

collapses several elements into a very small time frame. The defendant had to form the intent to assault the victim while his fist was entering the house. Seconds later, there was an assault by the defendant on the victim's face. Since it is unlikely in the extreme that a stranger would come to the door of the victim's residence and accidentally reach inside the doorway and punch the victim, a rational juror could conclude that all of the elements of the crime were present, including "intent."

D. THERE WERE NO VIOLATIONS OF THE
DEFENDANT'S RIGHTS TO PUBLIC TRIAL.

The defendant argues that a judge's comment that "trial counsel and the judge met in chambers" regarding jury instructions constituted a violation of *Bone-Club*¹ and its recent progeny. The defendant would also like this court to expand the "closed courtroom" analyses to include instances where the jury has a question for the trial court.

The courts have made it abundantly clear that the defendant and the public have a right to an "open trial. The defendant is claiming a violation based on the fact that the record indicates the trial court and the counsel "met in chambers" and then the counsel and trial court went on the record and established whether or not there were any objections or exceptions to the instructions as proposed by the trial court.

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

The record reflects a meeting in chambers between the attorneys and the trial court. RP 271. It does not appear that there was a court reporter present and certainly no testimony was taken. The record states that the attorneys were given copies of the proposed jury instructions. Apparently, the defense counsel had a quibble with one of the instructions. RP 271. There is no indication that any sort of decisions or rulings were made. This position is supported by the fact that the trial judge went on the record in open court and asked the parties if there were any objections or exceptions to the instructions. There were no exceptions or objections. RP 271. The trial court mentioned that it was removing the language “or an accomplice,” from the jury instruction defining First Degree Burglary. RP 271. Logically, the removal of the “accomplice” language is the defense-desired change mentioned by the court earlier.

At this point, the trial court then told the parties how it was going to number the instructions. RP 271.

The record does not show that the defendant was present for the “in chambers” instruction conference.

The “in chambers” jury instruction conference was a purely legal, administrative type meeting. No rulings were made and no testimony taken. The defendant’s argument that this brief discussion violated his right to a public trial is an attempt to extend *Bone-Club* and its progeny to

absurd lengths. Interestingly, the defendant on appeal claims the conference was a “critical phase” of the trial and the outcome of the instructions “...involves critical issues....” Brf. of App. pg 22. Yet, when the instruction issue was placed on the record, the defendant had no objections or exceptions. The posturing on appeal is contrary to the actual facts in the record which show that, in fact, the selection of the jury instructions in this case were not an issue.

The majority of cases in this area of the law deal with various permutations of *voir dire* or hearings conducted outside an open courtroom. *Bone-Club, supra*; *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009).

There is no Washington case holding that an in chambers distribution of jury instructions constituted a violation of the defendant’s right to a public trial. The defendant cites no case supporting the argument that a ministerial conference can be elevated to the level of a public trial violation. The defendant is correct that the trial court did not conduct a *Bone-Club* inquiry because there was no closing of the courtroom.

The defendant asserts that the trial court's responses to two jury questions violated his right to a public trial. In the first question, the jury asked for a player in order to play a recording they had already heard. The second question was what "on DOC" meant.

In this case, the defendant cannot show that any decisions were made outside an open courtroom. There is nothing in the transcript regarding either of the jury questions. However, even assuming the trial court did not ask for argument from counsel, any errors were clearly harmless. The trial court simply instructed the jury to re-read their jury instructions. It is difficult to see how the defendant was prejudiced by the trial court telling the jury to do what they were supposed to do in the first place.

The either/or scenario in this case is that the trial court returned an answer to the jury's questions without consulting counsel. In that case, no hearing took place and there could not be a violation of the defendant's right to public trial. The second scenario would be that the trial court asked counsel for argument on the topic of the jury questions. In that case, if the defendant wants to speculate that a hearing took place, then the State speculates that the hearing took place in an open courtroom.

In any scenario, the defendant cannot show prejudice from the trial court's answer to the jury saying "re-read the instructions."

E. THE TESTIMONY WHICH THE DEFENDANT CLAIMS SHOULD HAVE HAD A LIMITING INSTRUCTION WAS ELICITED FROM A DEFENSE WITNESS ON DIRECT EXAMINATION BY DEFENSE COUNSEL.

The defendant asserts that the trial court erred by not issuing a limiting instruction regarding Mr. Drake's comments about the defendant running because the defendant was "on DOC."

The defendant leaves out one very important factor: Mr. Drake, who made the comment about the defendant being "on DOC" was a *defense witness*. The attorney who asked the question that elicited the supposedly offensive comment was the *defense counsel*.

The question from defense counsel was: "Yeah, he [defendant] ran with me. He wasn't, you know, we were both freaking out. He was on DOC at the time, and we didn't want to be anything involved in that, so." RP 240.

On cross-examination, the prosecutor asked, "And was it your testimony because something about DOC?" RP 252. The response was, "Yeah." RP 252. After a lengthy sidebar, the trial continued with the prosecutor asking no further questions in that area.

The defendant on appeal claims the trial court should have instructed the jury to disregard the “irrelevant” testimony about DOC. This is a peculiar position for the defendant to take because he is the one who elicited the testimony about DOC. The defendant argues from the perspective of ER 404(b) that there was an error of constitutional magnitude.

“[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The defendant argued strenuously at trial and then again on appeal that the “DOC” comment was irrelevant. The “DOC” comment was hardly irrelevant. The “DOC” reference explained why the defendant departed with some haste. Such an interpretation is not speculation, it is the gist of the testimony of Mr. Drake.

It is difficult to understand why the defendant thinks he can ask his witness a question, get an answer he does not like and then claim error on appeal. The State does not accept that there was any error, but if there was, the *defendant* caused the error. He should not be allowed to complain now.

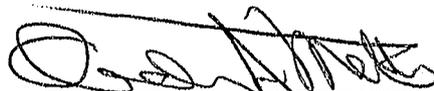
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 17th day of March, 2010.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

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Attorney for Respondent