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Washington State Supreme Court

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No. 89920-7

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MICKELSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS

Court of Appeals Cause No. 43748-1-II

SUPPLEMENTAL BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the Court of Appeals erred in holding that statements made by the prosecuting attorney in closing arguments were improper but not reversible error because they were not so flagrant and ill-intentioned that a timely objection and curative instruction could not have cured any resulting prejudice.

2. Whether the Court of Appeals erred in holding that Mickelson did not receive ineffective assistance of counsel because counsel could have had tactical reasons for failing to object to remarks made by the prosecuting attorney in closing arguments.

3. Whether Court of Appeals erred in holding that the cumulative error doctrine did not require reversal in this case.

B. STATEMENT OF THE CASE.

The substantive and procedural facts of the case are summarized in the unpublished opinion of the Court of Appeals and need not be repeated here. State v. Lewis, COA No. 43658-2-II (Jan. 14, 2014). The Statement of the Case included in the Amended Petition for Review sets forth only the defendant's version of the facts.

C. ARGUMENT.

1. The Court of Appeals was correct that the prosecutor's remarks, while improper, were not so flagrant and ill-intentioned that a curative instruction would have been useless.

In his Amended Petition for Review, the petitioner, hereafter "Mickelson", argues at some length that the prosecutor's remarks of

which he complains were improper. The State does not dispute that. The Court of Appeals found them to be improper, the State did not seek review of that decision, and that is the law of the case. However, the Court of Appeals also found that the remarks were not so egregious that, had Mickelson objected and a curative instruction been given, any prejudicial effect would have been eliminated.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. “Counsel may not remain silent,

speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "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. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

a. Unfavorable characterization of the defendants.

Mickelson argues that several of the remarks made by the prosecutor in closing argument were improper statements of personal opinion or referred to facts not before the jury. Amended Petition at 4-7. The Court of Appeals found that the remarks were improper, and the State is not challenging that holding. Mickelson implies, but does not specifically argue, that the Court of Appeals

incorrectly held that the remarks were not so “flagrant and ill-intentioned” that a curative instruction would not have removed any prejudice. But the lower court explained why the remarks did not rise to that level of misconduct. They were “brief and isolated, and Lewis and Mickelson do not explain why a curative instruction could not have eliminated any prejudice resulting from them.” State v. Lewis, COA No. 43748-1-II, slip op. at 7 (Jan. 14, 2014).

This was a long and contentious trial. Counsel for Mickelson’s co-defendant said at the beginning of his closing argument, “Thank you very much for sticking with us into this sixth day of a two- to three-day trial.” RP 1412. Mickelson’s attorney gave a closing argument that took 31 pages of transcript, RP 1439-69, and contained a number of personal attacks on the prosecutor. For example, counsel predicted that on rebuttal the prosecutor would use drama, name calling, and pulling rabbits out of his hat. RP 1445. He accused the prosecutor of directing the jury’s attention away from the fact that the State had the burden of proof. RP 1449. He said the prosecutor could “jump up and down and scream all he wants,” although there is no indication that the prosecutor did in fact jump up and down or scream. RP 1464. He called the prosecutor’s use of objects in the courtroom to illustrate

the relative positions of the vehicles and the people involved, RP 1247-53, “geometric hi jinks.” RP 1469.

By the time the prosecutor made the remarks to which Mickelson objects, the jury would have been well aware of the dynamics among the trial participants. It is more likely that the jury simply disregarded the rhetoric than that it was swept away by passion or prejudice. Indeed, if the jury were as susceptible to inflammatory argument as Mickelson claims, it would have acquitted him based on the argument of his own attorney.

The Court of Appeals was correct. The prosecutor’s remarks were “brief and isolated,” and a curative instruction would have reinforced Jury Instruction No. 1, which told the jury that the lawyers’ statements were not evidence. CP 36.

Mickelson particularly notes that the “underbelly of society” remark occurred during rebuttal argument, making it the “final impressions of the defendants.” Amended Petition at 6. But if the authors of our constitution placed enough faith in jurors to reserve to them the power to convict or acquit, we must in turn have sufficient faith that jurors are intelligent and perceptive enough to understand the totality of the evidence and the arguments, to follow

the instructions of the court, and to make rational decisions. We cannot conduct trials as if jurors were impressionable children.

b. Reference to the absence of statements.

The Court of Appeals found that the prosecutor improperly referred to the defendants' silence. Mickelson claims the prosecutor's remarks were "all-encompassing," Amended Petition at 10, whereas the Court of Appeals found the statements "indirect, subtle, and brief," and "very close to being innocuous." State v. Lewis, COA No. 43748-1-II, slip op. at 11 (Jan. 14, 2014). In a later section of his petition, dealing with ineffective assistance of counsel, Mickelson asserts that the prosecutor left the jury with the perception that he "was a liar because he chose to speak with his attorney instead of the police." Amended Petition at 17. The prosecutor made no mention of Mickelson speaking to an attorney. RP 1483-84.

Mickelson does not, again, explain why an instruction would not have cured any prejudice. Even if he were correct in characterizing the statements as "all-encompassing," which the State does not concede, a rational jury would certainly heed an instruction from the court to disregard any improper implications. But the fact is that the Court of Appeals was correct. The

prosecutor was arguing to impeach the testimony of the defendants, not to imply that they were guilty because they had not made statements to the police. Mickelson did speak to the police; he said something different from what he said on the witness stand. RP 179-81, 1273. In the overall context of the trial and the closing arguments, the prosecutor's statements were subtle and brief. Because Mickelson cannot show prejudice, there is no reversible error.

2. Mickelson has not shown that his counsel was ineffective for failing to object to the prosecutor's argument. The standard of review does not take into consideration whether or not a defendant has a higher burden on appeal.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial

strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687; Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The competency of his counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

Mickelson argues his counsel was ineffective for failing to object to several portions of the prosecutor's closing argument. Mickelson cites to State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), for the proposition that he must show an absence of legitimate strategic or tactical reasons for the failure to object, that an objection would have been sustained, and that if it had been sustained the outcome of the trial would have been different. The court in Saunders was addressing counsel's failure to object to the admission of evidence. The test when there is a claim of prosecutorial misconduct on closing argument is similar—whether a curative instruction, which the defense did not request, would have cured the error. State v. Davis, 175 Wn.2d 287, 331, 290 P.3d 43 (2012).

Failure to object during argument will rarely support a claim on ineffective assistance of counsel. "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necochea, 986 F.2d 1273, 1281 (1993), *citing to* Strickland, 466 U.S. at 689. The Court of Appeals did not find the prosecutor's

statements so egregious as to be reversible misconduct, and it is a fair inference that defense counsel did not either. In addition, the jury is instructed that the arguments are not evidence and that it is to decide the case based upon the evidence. Unless the evidence indicates otherwise, jurors are presumed to be impartial and to obey their instructions to decide on the evidence before them. State v. Latham, 100 Wn. 59, 67, 667 P.2d 56 (1983). Mickelson offers no reason to depart from this presumption; he merely argues that the jury must have been improperly influenced.

a. Characterization of the defendants.

Mickelson argues that the Court of Appeals erred in finding that the prosecutor's unfavorable characterizations of the defendants was not so flagrant that it could not have been cured by an instruction. State v. Lewis, COA No. 43748-1-II, slip op. at 7 (Jan. 14, 2014). He claims that there could have been no strategic reason for failing to object.

First, Mickelson overstates the prosecutor's remarks. He argues that "the prosecutor painted Mickelson as an unemployed drunken degenerate belonging to the 'underbelly of society' who is prone to fighting." Amended Petition at 7. The prosecutor did not use the words "drunken degenerate" or "prone to fighting." His

exact language is at RP 1477-78. And, as the Court of Appeals noted, there was evidence to back up the argument that the people involved drank, fought, and had no jobs. State v. Lewis, COA No. 43748-1-II, slip op. at 5 (Jan. 14, 2014).

Second, apart from the fact that the comments may not have seemed any more egregious to defense counsel than they did to the Court of Appeals, defense counsel surely was aware that his own closing argument contained personal attacks on the prosecutor and the victim. RP 1445-47, 1449, 1456, 1459, 1462, 1464-65, 1469. Objecting to the prosecutor's statements would only draw attention to the fact that counsel was trying to prevent the prosecutor from responding to that scathing argument. In addition, objecting would only highlight the terms Mickelson now objects to. The jurors had been instructed that what the attorneys said was not evidence. CP 36. Asking the jurors to disregard the State argument might make them wonder why they should not disregard his argument as well.

Mickelson's counsel did object once during the prosecutor's rebuttal argument, on the grounds that he referred to matters not in evidence. RP 1476. It is a fair inference that if he did not object to other portions of the argument he had some reason not to. The

mere fact that he may have had a tactical reason to refrain from objecting is not enough; the strategy must be reasonable. State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). But counsel's performance is entitled to great deference. Strickland, 466 U.S. at 689. This is reasonable because the defense attorney will always know more about the case and the dynamics of the courtroom than appear in the written transcript. On this record, it cannot be said that Mickelson's counsel had no reasonable strategy in mind.

Mickelson argues that he was prejudiced because, given that his attorney did not object, he now has a heightened burden of proof on appeal—that an objection and curative instruction would have been useless. Amended Petition at 19. But the standard for finding prejudice is whether the outcome of the trial would have been different. It is not whether the defendant has a more difficult burden of proof on appeal. When a reviewing court assesses prejudice, it presumes that the jury obeyed the law and was not arbitrary, whimsical, capricious, or engaged in jury nullification. Grier, 171 Wn.2d at 34. Mickelson has not overcome the presumption that the jury here followed its instructions and decided the case on the basis of the facts and the law, not the

characterizations by any party during closing arguments. CP 35-54.

b. Comment on silence.

Mickelson maintains that there was no conceivable reason for failing to object when the prosecutor referred to the fact that Mickelson had not made a statement at the time of the arrest. Amended Petition at 16-17. The Court of Appeals found that although the comments did impermissibly refer to silence, the prosecutor did not argue that the defendants' silence was evidence of their guilt, but rather that their testimony should not be believed because they invented it for trial. State v. Lewis, COA No. 43748-1-II, slip op. at 10 (Jan. 14, 2014). In fact, when Mickelson was arrested, he denied that he had been present at the scene of the assault, that he knew the victim, or that he had left his residence at all that night. RP 179-81, 236.

The gist of the prosecutor's argument was that Mickelson was saying something different on the witness stand than he had said at the time of his arrest, rather than that he had invoked his right to remain silent. Defense counsel would understandably not want to object and call the jury's attention to the fact that his client was indeed contradicting what he told the police before. As the

Court of Appeals noted, “this argument was akin to using silence for impeachment purposes.” State v. Lewis, COA No. 43748-1-II, slip op. at 10 (Jan. 14, 2014). Counsel would not want to highlight that impeachment.

Once again, Mickelson does not identify how he was prejudiced, apart from the fact that he was convicted. He merely claims that the prejudice is self evident. Amended Petition at 18. But he has the burden to show that if a curative instruction had been sought and given, the outcome of the trial would have been different. The evidence against Mickelson was very strong, and it is most unlikely that the result of the trial would have been different.

c. False choice argument.

Mickelson argues that his attorney was ineffective for failing to object when the prosecutor told the jury it had to choose between believing the victim or the defendants. Amended Petition at 17. Mickelson did not raise this issue on direct appeal; his co-defendant Lewis did.

The Court of Appeals held that this portion of the prosecutor's argument was improper but not so flagrant as to be reversible error. State v. Lewis, COA No. 43748-1-II, slip op. at 12 (Jan. 14, 2014). In the overall context of the argument and the

instructions, the remark was, as the Court of Appeals noted, “brief and subtle and was not the focus of the prosecutor’s argument.” Id. at 14. It was, in fact, so brief and subtle that defense counsel may not even have noticed it. Even if he did, it is reasonable to infer that he did not find it so egregious as to warrant an objection. In the Court of Appeals, Lewis did not explain why a curative instruction would not have been effective, nor does Mickelson in his petition for review.

The jury was properly instructed as to the burden of proof.

CP 41. The presumption is that it followed the instructions.

3. Error does not become cumulative merely because it occurs in rebuttal argument. Mickelson does not provide any basis for finding cumulative error.

The cumulative error doctrine “is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Lindsay, 171 Wn. App. 808, 838, 288 P.3d 641 (2012). Further, if no prejudicial error occurred, even cumulative error does not deprive

the defendant of a fair trial. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005).

Mickelson argues that there must have been prejudice resulting from the prosecutor's improper arguments because they occurred during rebuttal argument. Amended Petition at 13. But the State gets a rebuttal because it has the burden of proof; it has the opportunity to respond to defense arguments. Once again, both our state and federal constitutions give great responsibility to juries. The authors of those constitutions would not have done so if they considered jurors to be as gullible and easily swayed as Mickelson presumes that they are. Unless the evidence indicates otherwise, jurors are presumed to be impartial and to obey their instructions to decide on the evidence before them. State v. Latham, 100 Wn.2d at 67. There is nothing in this record to cause concern that the jury convicted Mickelson on anything but the evidence. He points to nothing but his conviction as evidence of prejudice.

The Court of Appeals found that "even taken together, the improper arguments are not of sufficient magnitude to deny Lewis and Mickelson a fair trial." State v. Lewis, COA No. 43748-1-II, slip op. at 17 (Jan. 14, 2014). Mickelson offers no evidence that he did

not receive a fair trial; he only argues that the jury must have been prejudiced against him. The Court of Appeals was correct that cumulative error does not require reversal of Mickelson's conviction.

D. CONCLUSION.

The State has not challenged the holding of the Court of Appeals that certain of the prosecutor's remarks in closing argument were improper. However, that court also held that Mickelson did not preserve the issue by objecting at trial, and therefore he must prove that they were so flagrant and ill-intentioned that a curative instruction would not have removed any prejudice. He failed to carry that burden in the lower court, and he fails to do so here. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 26th day of June, 2014.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Supplemental Brief on the date below as follows:

VIA US MAIL

TO: SUSAN L. CARLSON
SUPREME COURT DEPUTY CLERK
SUPREME COURT OF THE STATE OF WASHINGTON
TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

--AND--

TRACY V. MUNGER, ATTORNEY FOR APPELLANT
724 S. YAKIMA AVE, SUITE 100
TACOMA, WA 98405

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of June, 2014, at Olympia, Washington.



Chong McAfee