

64742-3

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No. 64742-3-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

vs.

RICHARD PAUL MOORE, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the prosecutor committed misconduct in rebuttal by commenting about the defense not having provided any other explanation in response to defense counsel's argument that there were other "plausible explanations" and whether the comments caused prejudice where the judge reminded the jury that the State bore the burden of proof at the end of the prosecutor's rebuttal.

B. FACTS

1. Procedural facts

Appellant Richard Moore was charged on June 2nd with Assault in the Second Degree, in violation of RCW 9A.36.021(1)(c), and a deadly weapon enhancement, in violation of RCW 9.94A.533, for acts committed on or about June 1st, 2009. CP 52-52. The information was subsequently amended to change the mens rea element from knowingly to intentionally. CP 42-43. Moore was tried by a jury and convicted as charged. CP 23, 24. The judge sentenced him to the top of the standard range, 12 months, and imposed the mandatory 12 month deadly weapon enhancement. CP 15, 17; 5RP 8.¹

2. Substantive facts

Around midnight of May 31st, 2009 Todd Johnson heard a loud, aggressive thumping sound, like someone was kicking the door of his

¹ 5RP refers to the verbatim report of proceedings for the sentencing on Dec. 15, 2009. All of the verbatim reports of proceedings for the trial are referenced by "RP."

room. RP 120-22. Johnson had been dozing off on his bed in the room that he shared with his fiancée Joy Ball at a house on Sunset Avenue in Whatcom County. RP 120-22. After Johnson heard the thumping sound again, he got out of bed to answer the door. RP 122, 163. When he opened the door, he was surprised to see Moore standing there and asked him why he was kicking the door. RP 123. Moore asked him where the girls were, and Johnson told him that they weren't there. Moore said, "Oh, so no one's here?" Johnson told him that no one was there, and that he would appreciate it if Moore would stop kicking his door. RP 123-24, 163. Moore also asked something about where his scales were, and Johnson told Moore that he had no idea where they were. RP 125-26, 146.

All of a sudden the door was pushed towards Johnson and Johnson caught it with his forearm. RP 124, 163. Johnson went to push the door open again when Moore came around the door and without any warning stabbed Johnson in the chest. RP 124-25, 128, 138, 164. Johnson initially thought Moore had punched him, but then he saw Moore closing up an object in his hand, and when Johnson took a deep breath, he saw blood spurting out of his chest onto the floor. RP 127-29. Johnson took a step forward and Moore backed up about four steps. Johnson then backed up into his room while Moore went into his room, which was right next door

to Johnson's. RP 117, 128, 130-31, 135, 164. Johnson covered his chest with his left hand, trying to stop the bleeding. RP 128, 132.

Unbeknownst to Moore, someone else, Michelle Leininger, was in Johnson's room. Leininger had been on the back porch of the room, along with a friend of hers and Johnson's fiancée, shortly before the thumping sound at the door. RP 43, 120. Leininger's friend and the fiancée had left the room before Johnson heard the thumping sound at the door. RP 44, 121.

Leininger's friend was there to help Leininger get her belongings. RP 43, 121. Leininger had been staying in and watching Moore's room for him while he had been gone for a few days, which she had done before for him and for others who resided in the Sunset Avenue house. RP 34-36, 38. Recently, Moore had asked Leininger to be his roommate and to share the rent, which had just been raised significantly. RP 37-38. She had not told him no explicitly because she was uncomfortable and didn't want to hurt his feelings. RP 38, 40. Moore was interested in her romantically and after an incident in which she had refused his physical advances, she was uncomfortable being alone in the room with him. RP 41-42. After Moore arrived back that day, on May 31st, he told her he was leaving the house and was packing up his belongings. RP 38-39.

Leininger had heard the frantic pounding on the door as well. RP 46. Leininger assumed it was Moore at the door because of their conversation earlier that day and because her friends and she had been loud and conversations in Johnson's room could be overheard in Moore's room. RP 46-47. She motioned to Johnson to tell Moore that she wasn't there and went back to the back porch out of sight. RP 47-48, 93, 122-23, 142, 163.

After Johnson opened the door she recognized Moore's voice and heard him say "Where's Joy?" and after Johnson told Moore that she wasn't there, she heard Moore say, "Where's my weights? Where's my scales?" RP 48. She then heard a "whishing" sound like Johnson taking in a breath. Then she heard it again. RP 49. Johnson walked back towards her and told her that he needed an ambulance. RP 49, 135. When he took his hand off his chest, blood came gushing out of him. RP 49. Leininger called 911 on her cell phone. RP 50. Johnson told her he was going to go downstairs to call 911 himself because he was losing so much blood. RP 135.

When Johnson went downstairs to call 911, Leininger remained hiding in a corner because she didn't know where Moore was, although

she thought she had heard someone go down the stairs. RP 51-52, 136. She covered herself with boxes and then waited until the SWAT team came to get her. RP 51.

Meanwhile Johnson had been taken to the emergency room where he was treated for a critical chest wound to the right anterior chest. RP 62, 89. It appeared to the treating physician to be a knife wound with a clean, not jagged edge. RP 63. It was a very deep wound, at least 4 inches deep, caused by a knife with a blade greater than three inches long. RP 63. The knife penetrated Johnson's lung, causing it to collapse. RP 65. The wound was life threatening and, untreated, could have caused Johnson's death within an hour, or could have caused Johnson's immediate death if the knife had been inserted into a slightly different place. RP 64-65. Johnson was in the hospital for two weeks and continued to require medication to alleviate anxiety and panic attacks at the time of trial. RP 137.

Moore never told Johnson why he stabbed him. RP 138. Johnson didn't know why Moore stabbed him and explained that he had already told Moore that he didn't have his scales. RP 125, 147. Moore had appeared to be somewhat upset about the rent being increased. RP 148. In fact, another resident of the house testified that in the days before the

incident Moore had been acting differently, angry about the rent increase. RP 106-07. On the day of the incident Moore appeared more angry about it. RP 107.

Moore was observed by an officer around 1:30 a.m. walking southbound on Northwest Avenue in the general vicinity of Sunset Avenue. RP 19-20, 28, 180. Since Moore fit the general description of the assault incident at Sunset Avenue, the officer contacted him. RP 20. Moore was nervous, but gave the officer his name when requested. RP 21. When the officer realized that the name was the same as the name suspected of being involved in the assault incident, the officer ordered Moore to lay down and detained him until another officer arrived to take him into custody. RP 21-22. No knives were found on Moore, and the knife used in the incident was never found. RP 22, 176, 179. While the officer didn't see Moore discard anything, the area between Sunset Avenue and the intersection was land with some housing along it, and the roads had ditches. RP 30-31. Moore had been seen carrying a knife around with him before. RP 40, 102-03.

C. ARGUMENT

- 1. The prosecutor did not commit misconduct in responding to defense counsel’s argument nor did the comments result in prejudice because the judge reminded the jury that the State bore the burden of proof.**

Moore contends that the prosecutor committed misconduct in closing argument by making statements that he alleges shifted the burden of proof. The prosecutor’s comments came in rebuttal and were a direct response to defense counsel’s comments in closing that there other plausible explanations for what happened. The judge “noted” the objection and as soon as the prosecutor finished rebuttal argument, the judge reminded the jury that the State bore the burden of proof. Even if the comments were improper, no prejudice resulted from them.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury’s verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court’s ruling on the matter because the “trial court is in the best position to most effectively determine if

prosecutorial misconduct prejudiced a defendant's right to a fair trial.”
State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*,
523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841,
147 P.3d 1201 (2006) (court gives deference to the trial court’s ruling on
motion for mistrial “because the trial court is in the best position to
evaluate whether the prosecutor’s comment prejudiced the defendant”).²

Absent an objection, a claim of misconduct is waived unless it is
so flagrant or ill intentioned that it creates an incurable prejudice. State v.
Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell,
125 Wn.2d 24, 28, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129
(1995). Misconduct does not create an incurable prejudice unless: (1)
there is a substantial likelihood that it affected the jury’s verdict, and (2) a
properly timed curative instruction could not have prevented the potential
prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995),
cert. denied, 516 U.S. 1121 (1996).

A prosecutor’s comments in closing must be viewed in context of
the entire closing argument, the issues in the case, the evidence presented
and the jury instructions given. Russell, 125 Wn.2d at 85-86. A

² Moore suggests that a constitutional harmless error analysis should be applied in this context. However, the court in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) declined to apply that test and applied the test requiring a showing of prejudice in a case where the defendant argued, and the appellate court found, that the prosecutor “sought to undermine the State’s burden of proof beyond a reasonable doubt.” *Id.* at 26 n.3, 26-27.

prosecutor enjoys wide latitude in expressing reasonable inferences from the evidence and is entitled to respond to arguments of defense counsel. Gregory, 158 Wn.2d at 841, 842. “The State is permitted to comment upon the quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by the defense does not necessarily suggest that the burden of proof rests with the defense.” *Id.* at 860. A prosecutor’s remarks, even if improper, are not grounds for reversal if they were provoked by the defense as long as the remarks did not go beyond that which was necessary to respond to the defense argument, did not bring matters before the jury that were not in the record, and were not so prejudicial that a curative instruction could not be effective. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), *rev. denied*, 156 Wn.2d 1004 (2006); State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Johnson asserts that the prosecutor committed misconduct by shifting the burden of proof to the defense when he argued that if there were other plausible theories or explanations, the defense had not provided any. After arguing that there were reasons to question Johnson’s and Leininger’s testimony and that no physical evidence tied Moore to the crime, defense counsel argued and ended her closing with:

... Are you sure? **Or is there another plausible explanation?** Is there a question? Is there that uncertainty? I submit to you that there is uncertainty. **There are other plausible explanations.** You have every reason to doubt and I ask that you find him not guilty.

RP 213-16 (emphasis added).

The prosecutor responded to that argument by opening his rebuttal with:

If there are other plausible theories of the defense, the one person that could present those to you is unable to; that's the defense counsel. Because what she says is that you must be certain, although the instruction never mentions the word 'certainty.' She never provided an alternative to that the Defendant did what he's charged with doing.

RP 217. Defense counsel objected that the State was shifting the burden, and the judge stated that the objection was "noted." The prosecutor then responded to defense counsel's argument that there wasn't enough evidence, and encouraged the jury to look at the questions raised by defense counsel, resolve the facts and measure what they determined happened against the burden of proof. RP 217-18. His next comment regarding other explanations, "Is there an alternative explanation even though none has been presented," was said in the context of inviting the jury to ask questions and determine if there were other explanations. He reiterated that after the jury determined what happened to measure it against the burden of proof and then went on to discuss what beyond a reasonable doubt means. RP 218-19. The jury had already been

instructed that the State carried the burden of proof beyond a reasonable doubt. CP 30 (Inst. 3), RP 193. At the end of the prosecutor's rebuttal, which was not very long, the judge reminded the jury:

I'll remind the jury that Instruction Number 3 does state in the first paragraph, "the Defendant has no burden of proving a reasonable doubt exists. As to these elements, the proof lays with the prosecutor." Be sure to read the instructions carefully ...

RP 221.

The prosecutor's comments were not misconduct because they responded directly to defense counsel's assertion that there were other plausible explanations, without identifying any. The prosecutor was not arguing that defense bore the burden of producing any evidence or proving anything, just that they had asserted that there were other plausible explanations, but had offered none. Moreover, the judge's direction to the jury regarding the State's burden of proof laid out in instruction number 3 cured any prejudice that resulted from the prosecutor's comments. While the judge did not interrupt the comments to remind the jury of the State's burden as the judge did in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009), or did not explicitly sustain the objection, the comments here were not as egregious as those in Warren, the prosecutor's conduct was not flagrant. As the Warren court

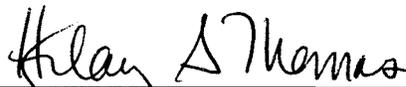
found, a judge's instruction regarding the State's burden can cure prejudice from comments regarding the burden of proof.

Moore asserts that the prosecutor's comments here were similar to those in State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990). They are not, the comments in Cleveland suggested that the defense had a burden to produce evidence, where the prosecutor's comments here simply responded to defense argument that there were other plausible explanations as to what happened. *Id.* at 648. However, even there the appellate court found that the comments were not prejudicial, and specifically harmless beyond a reasonable doubt, where the instructions made it clear that the State bore the burden of proof beyond a reasonable doubt and where it was unlikely that the jury would have been persuaded by the improper argument. *Id.* at 648-49. As there is no substantial likelihood that the prosecutor's comments affected the verdict here, particularly given the judge's admonition to the jury, no prejudice has been shown.

D. CONCLUSION

The State respectfully requests that this court affirm Moore's convictions for Assault in the Second Degree and the deadly weapon enhancement.

Respectfully submitted this 13th day of August, 2010.

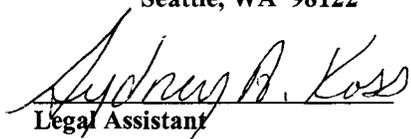


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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Jennifer Sweigert, addressed as follows:

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 08/16/2010
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