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NO. 69949-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OLLIE F. RICHARD,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The prosecutor did not improperly appeal to the jury's prejudices and simply argued reasonable inferences from the evidence. During rebuttal argument, the prosecutor argued "you depend on these people every day" and "[e]very time it rains those patrol officers are on their bicycles." In this context, did the prosecutor argue a reasonable inference from the evidence?

B. STATEMENT OF THE CASE

Mr. Ollie Richard was charged with violation of the Uniform Controlled Substances Act - possession of methamphetamine following his November 11, 2011, arrest on an outstanding warrant where methamphetamine was found on his person. CP 1-4.

At trial, the State presented the testimony of Officers Brian Sutphin, Scott Hatzenbuehler and Benjamin Archer of the Seattle Police Department, as well as forensic scientist Mark Strongman. RP 25-56. Richard testified in his defense. RP 60-67.

Officer Sutphin testified that he works as part of a bicycle squad on Capitol Hill. RP 26. Bicycle squads do not answer 911 calls but, instead, engage in proactive work. RP 26. Proactive work includes making narcotics arrests, and responding to on-view

disturbances and fights. RP 26. As a result, members of his squad get to know the Capitol Hill community very well. RP 26.

Officer Sutphin testified that just after leaving the Capitol Hill precinct on November 11, 2011, Officer Hatzenbuehler, Officer Archer, and he saw Richard walking near 11th Avenue and Pine Street in Seattle. RP 29. Officer Sutphin used his blackberry to check Richard's information and discovered that he had an outstanding warrant. RP 32.

Officer Hatzenbuehler testified that, like the other involved officers, he works as a bicycle officer as part of his normal patrol duties, and that these duties require him to ride year-round. RP 36-37. After Officer Sutphin learned of Richard's warrant, Officer Hatzenbuehler contacted Richard, placed him into custody, and apprised him of his Miranda warnings. RP 38. The warrant was verified by Officer Archer, and Officer Hatzenbuehler searched Richard incident to arrest. RP 40. During the search, he located a 1-1/2 inch by 1-1/2 inch Ziploc bag that contained a white, crystal-like substance that the officer believed to be methamphetamine. RP 41. Richard did not appear surprised when the baggie was removed from his pocket. RP 42. The Washington State Patrol

Crime Laboratory determined that the substance contained methamphetamine, and that it weighed 0.24 grams. RP 51-52.

Richard testified at trial that he did not possess any drugs. RP 64. He claimed that the only items that were removed from his pocket were keys, change, and a bus transfer. RP 64-65. Richard also testified that once he was handcuffed and searched, the officers huddled together for a moment, and then Officer Hatzenbuehler displayed the baggie containing the methamphetamine to him. RP 64-67.

During closing argument, the prosecutor asked the jury to reject Richard's claim and argued that the officers had no logical reason to plant drugs on him. RP 89.

In argument, the defense attorney contended that Richard testified ". . . with conviction, with verve, with certainty" and, as a result, was a credible witness. RP 89. With regard to the officers, the defense attorney emphasized their everyday patrol duties:

Common sense and experience? Yeah, sure. We know from common sense and experience that the officers in question were working a proactive unit - - in other words looking for thing - - looking for things to do - - and what Mr. Richard described to you, ladies and gentlemen, is proactivity on the part of the officers. They huddled. Voila, the substance appeared.

It may be disturbing but based on what we know from our common sense and experience, indeed these things happen.

RP 89.

Minutes later, during the State's rebuttal argument, the prosecutor stated:

[PROSECUTOR]: Just because Mr. Richard said that on the stand does not mean you have to accept it because you are the sole judges of the credibility of witnesses.

It is not just Officer Hatzenbuehler being accused here, it is all three officers, and I submit to you, using your common sense, your reason, your life experiences, you depend on these people every day. Every time it rains those patrol officers are on their bicycles - -

[DEFENSE]: Objection, that is improper at this point, Your Honor.

COURT: Mr. Hamilton, if you could move on?

[PROSECUTOR]: We ask you to reject that testimony. He had the drugs, he was caught, and it is drugs. It was tested by the lab and confirmed. Thank you.

COURT: Thank you.

RP 90-91. The defendant was thereafter convicted of violation of the Uniform Controlled Substances Act – possession of methamphetamine. CP 42.

C. ARGUMENT

1. THE PROSECUTOR'S COMMENTS WERE NOT PROSECUTORIAL MISCONDUCT BECAUSE THEY WERE NOT PREJUDICIAL IN CONTEXT AND HIS ARGUMENT PROPERLY FOCUSED ON THE LAW AND THE EVIDENCE IN THE CASE.

In this case, there is no indication that the prosecutor vouched for the credibility of the witnesses as he simply argued reasonable inferences from facts introduced into evidence. It is improper for the prosecution to seek a conviction by appealing to the passions and prejudices of the jury. State v. Berube, 171 Wn. App. 103, 118-19, 286 P.3d 402 (2012). To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's statement was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). To be prejudicial, there must be a substantial likelihood that the misconduct affected the jury's verdict. State v. Davis, 175 Wn.2d 287, 331, 290 P.3d 43 (2012). When analyzing prejudice, the court does "not look to the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

a. The Prosecutor's Statements That "You Depend On Those People Every Day" And "Every Time It Rains Those Patrol Officers Are On Their Bicycles" Were Reasonable Inferences From The Evidence, Not An Improper Appeal To The Passions And Prejudices Of The Jury.

The prosecutor did not improperly appeal to the passions and prejudices of the jury. Instead, his statements invited the jury to draw reasonable inferences about the credibility of the arresting officers based on their testimony during trial.

Prosecutors have a duty to seek verdicts that are free from appeals to passion or prejudice. State v. Rafay, 169 Wn. App. 734, 829, 285 P.3d 83 (2012). For example, the law prohibits arguments which appeal to jurors' fears of criminal groups, or invoke racial, ethnic, or religious prejudice as a reason to convict. State v. Prado, 144 Wn. App. 277, 253, 181 P.3d 901 (2008).

However, prosecutors also possess wide latitude to draw reasonable inferences from the evidence admitted at trial. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). The prosecutor's freedom to argue inferences from the evidence includes the ability to comment on reasons that the jury should find a witness credible or not credible. State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Moreover, common sense

arguments do not constitute attempts to introduce facts not in evidence. State v. Barrow, 60 Wn. App. 869, 874, 809 P.2d 209 (1991).

Drawing attention to the nature of a person's occupation when arguing the credibility of that witness is not an attempt to invoke prejudices as a reason to convict or introduce facts not in evidence. The prosecutor merely stated, "... you depend on these people every day. Every time it rains those patrol officers are on their bicycles - -" RP 91. These statements are common sense arguments that relate to witness credibility. Moreover, credibility was the sole issue addressed by these statements. The prosecutor neither argued nor implied that the defendant was more culpable for the crime because of the officers' working conditions or relationship with the public. As a result, since the statements did not appeal to the prejudices or passions of the jury, they cannot be held improper.

b. The Prosecutor's Statements Were Direct Rebuttals To Issues Raised By Defense Counsel During His Closing Argument.

The rebuttal arguments of the prosecutor were a direct response to arguments raised by defense counsel in his closing

argument. In general, the prosecution is afforded wide latitude to draw reasonable inferences from the evidence to support or undermine the credibility of testifying witnesses. State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). This is especially so when the prosecutor is rebutting an issue raised by the defense in his closing argument. Id. Specifically, “[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts, and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction could be ineffective.” State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

During his closing argument, the defense argued that the common sense and experience of the jurors should tell them that law enforcement officers conspire to plant drugs on otherwise innocent people. RP 89. The rebuttal argument of the prosecutor, which discussed the demands placed on law enforcement, and their role in the legal system, was a direct response to defense counsel’s arguments. The prosecutor asserted that the jury should consider the defense attorney’s claim that the officers were simply “looking for something to do” and that “these things happen” in light

of the common sense conclusion that people depend on law enforcement officers every day. RP 90-91. Like the defense attorney, the prosecutor specifically urged the jurors to rely on their common sense, reason, and life experiences when evaluating the actions and motives of the law enforcement officers. RP 89, 91. Given the latitude granted to the prosecution when directly responding to the arguments of defense, there is no basis for the Court to conclude that the prosecutor's statements were improper.

c. The Prosecutor's Statements Urged The Jurors To Follow The Jury Instructions.

Either party may argue the law to the jury; however, any such argument must be confined to law as set forth in the instructions given by the court. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 757 (1984). In this case, all of the prosecutor's statements followed the instructions provided by the court and urged jurors to use their common sense when evaluating the testimony of the officers:

Just because Mr. Richard said that on the stand does not mean *you* have to accept it because *you are the sole judges of the credibility of witnesses*. It is not just Officer Hatzenbuehler being accused here, it is all three officers, and I submit to *you*, using *your* common sense, *your* reason, *your* life experiences,

you depend on these people every day. Every time it rains those patrol officers are on their bicycles - -

RP 90-91 (emphasis added). The prosecutor was urging the jurors to use their common sense and experience to evaluate credibility and consider whether the evidence supported Mr. Richard's story or an improper motive by the officers. The prosecutor's statements simply followed the parameters outlined by this instruction and pressed to use their common sense and experience when evaluating the testimony of the officers, just as defense counsel had done moments before. Since the comments of the prosecutor fell squarely within the confines of the jury instructions, there is no basis for the Court to find that his statements were improper.

2. **EVEN IF THE PROSECUTOR'S COMMENTS WERE IMPROPER, THEY DO NOT RISE TO THE LEVEL OF INCURABLE PREJUDICE BECAUSE DEFENSE COUNSEL PROMPTLY OBJECTED, THE PROSECUTOR DID NOT ADDRESS THE TOPIC AGAIN, AND THE DEFENSE DECLINED TO REQUEST A CURATIVE INSTRUCTION.**

Finally, even if this Court determines that the prosecutor's argument was improper, neither statement, whether viewed collectively or individually, could cause incurable prejudice. In order for prejudice to be found, the defense bears the burden of

showing that there was a substantial likelihood that the misconduct affected the jury's verdict. State v. Ish, 170 Wn.2d 189, 200, 241 P.3d 389 (2010). Moreover, even if a prejudicial comment was made, reversal is not required if the error could have been obviated by a curative instruction that the defense failed to request. State v. Russell, 125 Wn.2d at 85 (1994). Immediately after the comments were made, the defense attorney promptly objected to the prosecutor's statement and, though the trial court did not make a ruling on the objection, the prosecutor was asked to move on – which he did. RP 91. Moreover, while the defense had the opportunity to request that a curative instruction be provided to the jury, none was made. RP 91-93. Even so, the court's instructions to the jury specifically indicated that “. . . the lawyers' statements are not evidence” and that the arguments were intended to help the jurors understand the evidence and apply the law. RP 78; CP 13. The jurors were also instructed that they were the sole judges of credibility, and that they could consider any other factors that affect their evaluation or belief of witness or their evaluation of the testimony. RP 77-78; CP 12-13.

Given the brevity of the prosecutor's statements, the jury instructions alone would have been sufficient to cure any potential

prejudice. Additionally, the fact that the defense attorney declined to request a curative instruction further evidences the minimal impact the statements had on the outcome of the trial. As such, there is no basis for the Court to conclude that the statements of the prosecutor, even if found improper, were incurably prejudicial.

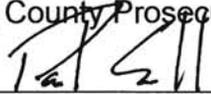
D. CONCLUSION

Because the prosecutor's comments were neither flagrant nor incurably prejudicial, because both parties' arguments properly focused on the law and evidence at trial, and because the jury was properly instructed, the prosecutor's comments do not constitute prosecutorial misconduct and did not deprive Richard of his right to a fair trial, nor did they change the outcome of the case. For the foregoing reasons, the State respectfully requests the Court to affirm Richard's conviction.

DATED this 15th day of August, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. OLLIE F. RICHARD, Cause No. 69949-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name

Done in Seattle, Washington

8/15/13
Date