NO. 44208-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DERRELL MILAM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 12-1-02048-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence to prove the elements of trafficking in stolen property and possession of stolen property, including knowledge that the property was stolen.

2. Whether the prosecutor committed misconduct when he properly argued defendant's credibility in closing argument.

B. STATEMENT OF THE CASE.

1. Procedure

On May 31, 2012, the Pierce County Prosecuting Attorney (State) charged Michael Milam, defendant, with nine counts of possession of stolen property in the second degree, three counts of identity theft in the second degree, three counts of trafficking in stolen property in the first degree, one count of unlawful possession of a controlled substance, and one count of unlawful use of drug paraphernalia. CP 137-145.

The court granted defendant's request to represent himself pro se at trial. CP 14; RP (08/07/2012)[1] 20. Trial began on September 27, 2012, and on October 3, 2012, the jury found defendant guilty of all charges except

[1] The State will refer to the Verbatim Report of Proceedings by the date followed by the page number. If there are multiple sessions on one day, the State will specify if the transcript is from the morning or afternoon session.

the unlawful use of drug paraphernalia. CP 227-228; RP (09/27/2012) 2; RP (10/03/2012) 283-285. The court calculated defendant's offender score at 24. RP (11/19/2012) 329. Due to defendant's high offender score and multiple current offenses, the court imposed an exceptional sentence above the range; totaling 120 months. CP 230; 233; RP (11/19/2012) 333. This timely appeal followed. CP 245.

2. Facts

Around 11:30 p.m. on May 31, 2012, Lakewood Police Officers Andrew Hall, Shawn Noble, and Jeremy James were patrolling the 9100 block of South Tacoma Way looking for individuals who might be engaged in prostitution, drug transactions, or other criminal behavior. RP (10/01/2012) 128-129; 164-165. Officer Hall was in plain clothes and driving an unmarked car. RP (10/01/2012) 127-128. Officers Noble and James were in marked patrol cars and acted as surveillance and backup for Officer Hall. RP (10/01/2012) 131; 164.

Officer Hall observed a woman walking along South Tacoma Way, an area that is known for prostitution activities. RP (10/01/2012) 129. Officer Hall also observed a man following the woman approximately 20 yards behind her. RP (10/01/2012) 129. Officer Hall testified that he

thought the man might be either a pimp or a "John" (prostitute's customer) and decided to park in a nearby parking lot to observe the pair. RP (10/01/2012) 130.

As the officer pulled into the parking lot, defendant began to walk toward the officer's car and made hand gestures in attempt to gain the officer's attention. RP (10/01/2012) 130. Officer Hall pulled out of the parking lot and made contact with the other officers before setting up a surveillance in an adjacent parking lot. RP (10/01/2012) 131-132. The officer noticed that defendant was attempting to get the attention of other cars passing by. RP (10/01/2012) 132. Officer Hall stated that in his experience this usually indicates that the person is attempting to sell or solicit something. RP (10/1/2012) 132.

With the other officers watching nearby and awaiting his signal, Officer Hall drove back into the original lot where defendant had approached him. RP (10/01/2012) 133. Defendant again attempted to contact the officer, by yelling "Hey, can you help me?" RP (10/01/2012) 133. Officer Hall responded by saying "What's up?" RP (10/01/2012) 133. Defendant came over to the car and said "I got what you need." RP (10/01/2012) 133. Defendant then pulled out a large stack of credit cards, social security cards, and driver's licenses and fanned them out to show Officer Hall. RP (10/01/2012) 133. Defendant then said " I have what you

need." RP (10/01/2012) 133-134. After Office Hall indicated he was interested, defendant walked around to the passenger's side of the car and entered the vehicle. RP (10/01/2012) 133-134.

Officer Hall then asked the defendant if he had cards that matched, meaning if he had credit cards and driver's licenses in the same name. (10/01/2012) 136. Defendant replied "Fuck yeah. I got what you need." RP (10/01/2012) 136. The officer asked how much defendant wanted for the cards and defendant replied "30-50." RP (10/01/2012) 136. Defendant then asked that they go elsewhere to complete the transaction so that no one could see them. RP (10/01/2012) 136. As Officer Hall was pulling out of the parking lot he gave a pre-determined signal to the other officers to arrest them, indicating that a crime had occurred. RP (10/01/2012) 137.

Officers James and Noble then activated their lights to pull Officer Hall over. RP (10/01/2012) 139. Officer Noble drove up behind him and Officer James came in from the front to pen them in. RP (10/01/2012) 139.

In order to protect Officer Hall's true identity and preserve his role as a "street criminal," Officer James pretended to detain him at the front of the car while Officer Noble detained the defendant at the back of the car. RP (10/01/2012). Officer Noble conducted an initial weapons search and found a small glass pipe in defendant's pocket. RP (10/01/2012) 142. After

obtaining further information from Officer Hall, Officer Noble then placed defendant under arrest and conducted a thorough search of his pockets. RP (10/01/2012) 141. Officer Noble discovered the credit cards, drivers licenses, and social security cards on defendant. RP (10/01/2012) 141.

Defendant was then taken to the police station for questioning. RP (10/02/2012; Morning Session) 39; Exh. 18. During questioning, police took a videotaped statement from defendant which was later admitted as evidence and played in front of the jury. Exh. 18. Defendant admitted that he was trying to sell the items, and that he knew what he was doing was wrong. Exh. 18. Defendant also admitted that he got the cards from a man and woman he met at a near by gas station and traded the cards for marijuana. Exh. 18. When Officer James asked in the interview if defendant thought the couple he obtained the cards from had stolen them, the defendant replied "I know they did." Exh. 18.

Following the interview, defendant was transferred to the Pierce County Jail. RP (10/02/2012; Morning Session) 56. During booking, the police found marijuana rolled into one of defendant's socks. RP (10/02/2012; Morning Session) 58.

The credit cards, debit cards, driver's license, and social security cards belonged to Carol Bautista and her husband, son, and step son. RP (10/02/2012; Afternoon Session) 203. Bautista's wallet was stolen from

her office at Pacific Lutheran University on the morning of May 31, 2012, and had contained the cards later found on defendant. RP (10/02/2012; Afternoon Session) 202-203.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL OF THE ELEMENTS OF TRAFFICKING IN STOLEN PROPERTY AND POSESSION OF STOLEN PROPERTY, INCLUDING KNOWLEDGE THAT THE PROPERTY WAS STOLEN.

The State bears the burden of proving each and every element of a criminal offense beyond a reasonable doubt. ***State v. Bennett***, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The applicable standard of review 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. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Thomas,*** 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, the State charged defendant with three counts of trafficking in stolen property and nine counts of possession of stolen property. CP 137-145. The statute defines trafficking in stolen property as "a person who knowingly initiates, organizes, plans...the theft of property for sale... or who knowingly traffics in stolen property." RCW 9A.82.050(1). The statute defines possession of stolen property as:

> (1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.
>
> (2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.
>
> (3) *When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons,* or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, *he or she is presumed to know that they are stolen.*

RCW 9A.56.140(1)-(3) (emphasis added). *See* ***State v. Hayes***, 164 Wn. App. 459, 478, 262 P.3d 538 (2011); ***State v. Estill***, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)(finding prior similar statute valid).

On appeal, defendant only challenges one element; that the State failed to meet its burden of proof on both of these charges because it failed to establish that defendant knew the cards were stolen. Brief of Appellant at 9. However, during the videotaped interview that was conducted at the police station the night of the arrest, defendant acknowledges several times that he knew the cards were stolen. Exh. 18.

During the interview, which was played in court and admitted as evidence, defendant described how he obtained the cards from a "black guy and a white girl" who traded the cards for marijuana. Exh. 18. At one point in the interview, Officer James summarized defendant's version of the story and stated "You're in possession of a bunch of *stolen* credit cards; you got them from someone you don't know who traded them for some weed," to which defendant replied "I guess so, right, yeah and that's how I ended up with the things (cards)."(emphasis added) Exh. 18. Later on, Officer James again tried to confirm defendant's version of the events by asking "So you tried to sell him (undercover officer) *stolen* credit cards, he said yeah, you said $40?" and defendant replied "Yeah...that's all I ever wanted 'cuz I don't want no trouble I'm not gonna lie." (emphasis added)

Exh. 18. Later defendant stated "I started thinking this is not the thing for me to be doing..." to which Officer James asked "not a good idea to hold *stolen* stuff?" and defendant again replied "yeah." (emphasis added) Exh. 18.

Finally, the officer asked defendant if he "think[s] they *stole* them" referring to the pair defendant claims to have gotten the cards from, to which defendant replied "I *know* they did." (emphasis added) Exh. 18. The officer follows up on this statement by saying "so he said he *stole* them" and defendant said "yeah, he just *stole* them." (emphasis added) Exh. 18.

Defendant confirmed several times that the cards are in fact stolen. Defendant also admitted that he knew the couple who he obtained the cards from had stolen them.

Additionally, under RCW 9A.56.140, if a person has in his possession or under his control two or more stolen access devices, he is presumed to know that they are stolen. Therefore, even if defendant had claimed that he did not know that the cards were stolen, the fact that he was in possession of such a large quantity is enough to satisfy the "knowing" requirement of the statutes.

The State proved all of the elements of trafficking in stolen property and possession of stolen property. The circumstantial evidence of how defendant clandestinely approached and displayed the cards to officer Hall, the large number of cards in his possession, and the direct evidence of defendant's videotaped confession are all conclusive evidence that defendant knew the cards in his possession were stolen.

2. THE PROSECUTOR PROPERLY ARGUED DEFENDANT'S CREDIBILITY IN HIS CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct carries the burden of proving that (1) the prosecutor's conduct was improper, and (2) that it prejudiced the defense. ***State v. Dhaliwhal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews a prosecutor's alleged misconduct "[in] the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *Id.* The jury is "presumed to follow the instruction that counsel's arguments are not evidence." ***State v. Warren***, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

Defendant has a duty to object to a prosecutor's allegedly improper argument at the time it is made. ***State v. Emery***, 174 Wn.2d 741, 761-762, 278 P.3d 653 (2012). Objections are required to prevent counsel from making additional improper remarks as well as prevent potential abuse of the appellate process. *Id.*

Where a defendant fails to object to alleged misconduct, he waives any resulting error unless the conduct is flagrant, ill-intentioned, and so prejudicial that any resulting prejudice could not have been neutralized by a curative instruction. ***Dhaliwhal***, 150 Wn.2d at 578 (holding that reversal is not required where the error could have been obviated by an instruction that the defense did not request). When a defendant fails to object to a prosecutor's remarks, it "strongly suggests" that it did not appear critically prejudicial to the defense. ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011) (quoting ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). Misconduct only requires a new trial when there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Copeland***, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. ***State v. Thorgerson,*** 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

a. The closing argument was proper.

When considering the context of the prosecutor's closing argument in this case, it is apparent that he properly commented upon defendant's theory of the case. While defendant did not testify at trial, his version of the events was presented to the jury through the videotaped interview that was admitted as evidence. In his closing argument, defendant argued that he was "set up" and "never committed one crime." RP (10/03/2012) 268;

270; 272; 273. In response, the prosecutor argued that the evidence refuted his argument. The prosecutor properly commented on the credibility of defendant's theory of the case.

The prosecutor prefaced his argument by highlighting that the State had the burden of proof; telling the jury that defendant carried no burden at all:

> ...[B]ecause it's the State's burden to prove to you each and every element of all of these crimes, I just want to take a few minutes to go through them."

RP (10/03/2012) 248. Part of the prosecutor's argument used language from jury instruction number one:

> ...[T]he parties' statements here that I'm making aren't evidence right now. This is argument. The evidence is the testimony that you heard from the police officers...It is also all of the exhibits that have been admitted to you. This is the law, *and any remarks, statements or arguments not supported by the evidence or the law you should just disregard.*

RP (10/03/2012) 249; CP 151 (emphasis added). After he highlighted the burden in the case, the prosecutor referred to defendant's videotaped statement to the officers and pointed out reasons to the jury to why defendant might be discredited:

> Again and again he tells the officers on the video, "I'm not going to lie to you. I'm not lying to you." But you also hear him tell lie after lie. He says that Officer Hall bought him a beer, and then he says, "No, that never happened." He says Officer Hall told him to hold on to all of these credit cards. Then he says, "No, that's not true. I had all these credit cards."

RP (10/03/2012) 263. It was only in this context where the prosecutor pointed out that nothing else-except the defendant's claims- supported defendant's argument:

> The only thing that you need to decide is whether the State has proven all of the elements of all of the crimes that have been alleged against Mr. Milam. And I would just lastly point out that even in all of his argument, nowhere has he ever denied having all of those things in his possession. He says he was set up, that the officer's [sic] not here, all of this other stuff. But not once has he said those were not in his pocket and "I did not try to sell them to a police officer."

RP (10/03/2012) 279-280. When presented in this light, the prosecutor's conduct was not improper because he pointed to evidence from trial to explain why defendant's theory of the case and argument were not credible. In closing argument, a prosecutor may comment on a witness' veracity as long as personal opinion is not expressed and the comments are not intended to incite the passion of the jury. ***State v. Sith***, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). Thus, it was not improper for the prosecutor to point out weaknesses in defendant's argument.

Defendant fails to show prosecutorial misconduct because he makes no showing that the prosecutor's statements were flagrant or ill-intentioned. Instead, each of the prosecutor's statements was proper in the context of the trial.

b. Improper argument could have been cured by instruction.

Even if the argument was improper, there is nothing the prosecutor said here that the trial court could not have mitigated with a curative instruction, if only defendant had requested it. For example, similar to the defendant in ***Warren***, defendant here might have asked the trial court to highlight or re- read the applicable jury instruction. *See* ***Warren***, 165 Wn.2d at 24–25 (finding that the trial court cured by reading the instruction on reasonable doubt where the prosecutor repeatedly defined reasonable doubt improperly). Here, defendant neither objected at the closing argument, nor asked for a curative instruction. RP (10/03/2012) 247-280.

c. Defendant fails to show prejudice.

Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. ***In re Glasmann,*** 175 Wn.2d 696, 678, 286 P.3d 673 (2012). Defendant bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced defendant. ***State v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

Defendant fails to show that there was "substantial likelihood" that the prosecutor's conduct affected the jury's decision regarding defendant's guilt. ***Gregory,*** 158 Wn.2d 759 at 841. As pointed out in section one, two police officers testified that defendant tried to sell an undercover police officer stolen identification and access cards. Defendant confessed on videotape that he knew the cards were stolen, and RCW 9A.56.140(3) permitted the jury to presume that defendant knew the cards were stolen. In light of this, defendant cannot show that two sentences at the tail end of the prosecutor's closing argument were prejudicial. The jury convicted defendant based on the overwhelming evidence presented at trial, not on the prosecutor's two line remark at closing argument. The prosecutor's statements did not create an "enduring prejudice" against defendant's right to a fair trial.

D. CONCLUSION.

The State proved all of the elements of trafficking in stolen property and possession of stolen property beyond a reasonable doubt by presenting evidence to demonstrate that defendant knew the items were stolen. Furthermore, the prosecutor did not commit misconduct in his

closing where he was entitled to argue why the jury should believe the State's witnesses over the defendant. The State respectfully requests this Court to affirm defendant's conviction.

DATED: June 26, 2013.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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