NO. 45260-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL DON OLMSTED, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00226-4

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

On the evening of January 31, 2013, Amy Yeager was at home with her boyfriend, Michael Olmstead, listening to music and having a few drinks. RP 266. Amy was not drunk. RP 266. At some point, Amy went to bed but was awoken by Olmstead. RP 268. He wanted her to make a phone call, but she wanted to stay asleep. RP 268. Olmstead said he was leaving and Amy, from a position on her stomach, kicked her feet upward to get the covers off her feet to get up. RP 268. Although she does not recall making contact with Olmstead, he claimed she kicked him "in the balls." RP 268. Amy described her movement as having donkey kicked the blankets off her feet. RP 269. Amy vaguely remembered standing up, and Olmstead began punching her in the face. RP 270. The punches were closed fist. RP 270. Olmstead leveled at least ten blows on her head and face. RP 270. She tried to ward off the blows with her hands and yelled at

him to stop. RP 270-71. Olmstead hit Amy so hard that she urinated in her pants. RP 270.

Amy did not intentionally kick Olmstead. RP 273. She would have been too scared to do that, even if they were in an argument, given his "snapping personality." RP 273. Olmstead had assaulted Amy on at least four prior occasions. RP 271-73.

Olmstead briefly stopped punching Amy and she walked over to the built-in cabinets to retrieve clean pants. RP 274. She felt a coldness on her face and discovered that her face was bloody. RP 274. As she reached for clean pants, Olmstead began punching her in the face again. RP 275. He leveled at least five more blows on her face. RP 275. Her nose was swollen by this point and she could not breathe well. RP 276. She announced that she was going to the hospital, and Olmstead punched her several more times. RP 276. Amy thought that she may not make it out of the house. RP 277. Amy went to the bathroom to look at her face and wipe it off. RP 279. Olmstead came up behind her, calmer, and continually said "you kicked me in the balls," as if to justify his behavior. RP 279. During his rage, Olmstead broke a mirror and threw a television into the bathroom. RP 280. He also threw a pair of pliers at Amy and broke a blood vessel in her hand. RP 282.

She left for the house and began walking to the hospital. RP 281-83. After a few blocks she realized he was following her. RP 284. He began yelling at her to give him her phone. RP 284. He was screaming so loud she could hear him from two blocks away. RP 285. She began walking faster and hid behind a dumpster. RP 285. But he followed her all the way until she reached the hospital. RP 286. She was afraid to use her phone because he would see. RP 286. Olmstead was not walking with a limp while stalking Amy to the hospital. RP 287.

Dr. Carolyn Martin, and emergency room physician, treated Amy that night. RP 122. Dr. Martin found that Amy had been hit multiple times in the face, so hard that she lost control of her bladder. RP 126. Amy had swelling and bruises on both sides of her jaw, forehead, and underneath both eyes. RP 126. Dr. Martin opined that the injuries could not have been caused by a single blow, based on the distribution of injuries, the facial planes, and how blood flows. RP 128. Amy's forehead alone must have sustained four or five blows. RP 128. Dr. Martin also opined that the earlier bruises appear, the more significant the soft-tissue injury. RP 129-30.

Lukas McNett lives at 3909 Washington Street in Vancouver. RP 155. He got off work sometime between 12:30 a.m. and 2:30 a.m. on February 1, 2013. When he arrived home, he sat in his car in front of his

house social networking on his phone. RP 155. He saw a shadowy figure walking down the block about thirty feet away, and he locked his door out of habit. RP 157. The man reached his car and began passing it, but the next thing he knew the man was at his window yelling at him. RP 158. The man cuffed his hands against the window and yelled "What are you fucking looking at?" RP 158, 163. He also yelled "Do you have a fucking problem with me?" RP 158. Mr. McNett had never seen the man before and called 911. RP 158. The man who screamed at Mr. McNett that night was Olmstead. RP 164. Mr. McNett had never seen someone that angry. RP 164. Olmstead was "raging," according to Mr. McNett, and his eyebrows were at an angle. RP 164.

Olmstead was convicted of assault in the second degree, domestic violence. CP 47. This timely appeal followed.

C. **ARGUMENT**

I. THERE WAS NO PROSECUTORIAL MISCONDUCT

This Court reviews a prosecutor's allegedly improper statements during closing, considering "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where the statements now complained of were not objected to

below, the appellant must demonstrate that the remarks were "so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice." *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994), citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Olmstead did not object to the State's argument below. Because Olmstead did not object below, reversal is authorized only if he can both prove the (1) existence of prosecutorial misconduct, (2) that it was material to the outcome of the trial, and (3) that it could not have been obviated by a curative instruction, and (4) that it was flagrant and ill-intentioned. RAP 2.5; *State v. Suarez-Bravo*, 72 Wn.App. 359, 366-67, 864 P.2d 426 (1994).

1. Trivializing the burden of proof

Olmstead claims that the prosecutor trivialized the burden of proof when she said "Proof beyond a reasonable doubt doesn't mean proof beyond any doubt. It's a reasonable doubt, one you can sleep with." This claim is meritless.

Olmstead relies entirely on the inapposite *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2011), in which the prosecutor's remarks were found to be improper where he compared the determination of proof beyond a reasonable doubt to the decision whether to have Cheerios for breakfast or to change lanes on the freeway. *Anderson* 424-

25. In the three brief paragraphs Boswell devotes to this claim, he does not explain how the prosecutor's remark in this case in any way resembles the misconduct in Anderson or trivialized the burden. He simply says "the prosecutor improperly equated reasonable doubt to an everyday decision you can rest assured is right and can consequently sleep well after making." Brief of Appellant at 12. One is left to ask, how did the prosecutor's remark do this? What is the everyday decision that mirrored this decision, according to the prosecutor? This portion of Olmstead's brief is entirely devoid of argument. Moreover, the remark of the prosecutor did not minimize or trivialize the State's burden. If anything, it emphasized the seriousness of it. There was no "misconduct" in this remark.

2. Improper characterization/embellishment

The remarks complained of in this section of Olmstead's brief are all reasonable inferences drawn from the evidence, and they were not objected to at trial. Olmstead complains that the prosecutor either mischaracterized or embellished the evidence when she said that Olmstead "tried to attack an innocent person in a car." Brief of Appellant at 13. But the prosecutor's comment was a fair argument. Olmstead came up to Lukas McNett's window, angrily yelling "what the fuck are you looking at?" And "do you have a fucking problem with me?" He cuffed his hands

against McNett's window to try and see inside. McNett testified he had never seen someone so angry, and that Olmstead was in a rage. RP 158-64. Olmstead has not shown there was misconduct. The prosecutor enjoys "wide latitude" in making arguments to the jury, and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The prosecutor's remarks were proper.

3. Personal opinion of credibility

Finally, Olmstead claims that the prosecutor expressed a personal opinion on Ms. Yeager's credibility when she said "[s]he was being honest. She was under oath." RP 547. The prosecutor did not express a personal opinion.

> The State may not assert its personal opinion as to the defendant's guilt or a witness's credibility. But a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. "[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case." *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2005) (quoting *State v. Armstrong*, 37 Wash. 51, 54–55, 79 P. 490 (1905)). To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, we view the challenged comments in context and look for "clear and unmistakable" expressions of personal opinion. *McKenzie* at 53–54

State v. Lindsay, 171 Wn.App. 808, 831-32, 288 P.3d 641 (2012), as amended (Feb. 8, 2013), *reversed on other grounds*, 180 Wn. 2d 423, 326 P.3d 125 (2014) (some internal citations omitted).

Here, there was no clear and unmistakable expression of personal opinion. During this portion of closing argument, the prosecutor was responding to Olmstead's claim that Ms. Yeager had been wildly inconsistent in her statements about the assault. The prosecutor argued that Ms. Yeager had, in fact, been consistent and candid in her statements, with the exception of the fact that she could not recall having said she kicked the defendant. RP 547. The brief, fleeting reference to Ms. Yeager's oath was flagrant and ill-intentioned misconduct that could not be obviated by a curative instruction.

Olmstead cites no authority for the proposition that a jury cannot be reminded of a witness' oath. Every witness takes an oath in the jury's presence to tell the truth. The jury was instructed that it was the sole judge of the credibility of witnesses. CP 25.

None of the remarks Olmstead complains of constitute misconduct. Even if they were improper, they were not flagrant and ill-intentioned, nor has Olmstead shown that they could not have been neutralized by a curative instruction. This assignment of error should be rejected.

II. OLMSTEAD'S PUBLIC TRIAL RIGHT WAS NOT VIOLATED WHEN THE TRIAL COURT TOOK PEREMPTORY CHALLENGES AT THE BAR.

Olmstead claims that the trial court closed the courtroom when it allowed the attorneys to note their peremptory strikes at the bar, rather than saying them out loud. Olmstead's claim is meritless.

This case is governed by two recent opinions from the Court of Appeals. In *State v. Dunn*, 180 Wn.App. 570, 574-574, 321 P.3d 1283 (2014), this Court held that the trial court did not violate the defendant's public trial right when the attorneys exercised peremptory challenges during a sidebar. In *State v. Love*, 176 Wn.App. 911, 920, 309 P.3d 1209 (2013), Division III of this Court held that under the experience and logic test, the trial court does not close the courtroom by hearing for cause challenges at sidebar. This Court should adhere to these two decisions and reject Olmstead's claim that the trial court improperly closed the courtroom.

III. OLMSTEAD WAS NOT ENTITLED TO HAVE A JURY DETERMINE WHETHER HE HAD TWO OR MORE PRIOR STRIKE CONVICTIONS.

Olmstead claims that he had a right to have a jury determine the existence of his two prior strike convictions. Olmstead is wrong. The Supreme Court held, in *State v. Witherspoon*, 329 P.3d 888 (2014):

> [I]t is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

State v. Witherspoon, 329 P.3d 888, 897.

Witherspoon forecloses this meritless claim.

D. **CONCLUSION**

Olmstead's judgment and sentence should be affirmed.

DATED this 10th day of September, 2014.

Respectfully submitted:

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September 10, 2014 - 11:06 AM

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