No. 93502-5
COA No. 73262-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY BENTLEY, JR.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chad Allred

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Gary Bentley, Jr. asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Gary Bentley, Jr.*, No. 73262-5-I (July 25, 2016). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

The State bears the burden of proving each element of the charged offenses beyond a reasonable doubt. Where the prosecutor implies in closing argument that the defendant bears the burden of providing favorable or exculpatory evidence, the prosecutor commits misconduct. Here the prosecutor did just that, implying that Mr. Bentley bore the burden of proving he did not burglarize the victim's residence and take his vehicle where Mr. Bentley was not charged with burglary. Is a significant question of law under the United States and Washington Constitutions presented where the prosecutor's misconduct

suggested Mr. Bentley bore burden of disproving he did not burglarize the house, thus denying a fair trial?

D. STATEMENT OF THE CASE

Gustavo Pena was leaving on a trip out of the country. 11/13/2014RP 86. As he sat in his South Seattle home awaiting the taxicab that would take him to the airport, Mr. Pena saw a person sitting in the park across the street smoking a cigar and looking directly at his house. 11/13/2014RP 84-85. Mr. Pena could not see anyone else in the park. 11/13/2014RP 84. Concerned about this person looking at his house, but also concerned about missing his flight, Mr. Pena left the house. 11/13/2014RP 86. Mr. Pena later learned that his house was burglarized after he left and his 2006 Land Rover was one of the items which had been taken. 11/13/2014RP 87-88.

Approximately three days after Mr. Pena had left on his trip, William Juell was driving southbound on State Route 509 in Burien when he came upon a Land Rover stalled in the middle of the road and being pushed to the side by two men, one of which was later identified as appellant, Gary Bentley. 11/17/2014RP 6. The Land Rover had run out of gas, so Mr. Juell assisted the two men in getting gas. 11/17/2014RP 7.

About this time, a passing King County deputy saw the Land Rover, realized it was the stolen car, and radioed to other deputies regarding its location. 11/13/2014RP 49. Deputy Christopher Dearth answered the call, pulled up behind Mr. Juell's car and spoke briefly with him. 11/13/2014RP 50-51. While he waited for other deputies to arrive, Deputy Dearth engaged Mr. Bentley and a man later identified as his uncle, Russell Bentley, in a casual conversation. 11/13/2014RP 56-57. Once an additional deputy arrived, Deputy Dearth attempted to handcuff Mr. Bentley and a struggle ensued between Mr. Bentley and Deputies Dearth and Broderson. 11/13/2014RP 62, 11/17/2014RP 27-32.

Mr. Bentley was ultimately arrested and charged with two counts of third degree assault and one count of possession of a stolen vehicle. CP 1-2. During the examination of Mr. Pena at trial, the State sought to question him about some human hair left behind on his bathroom sink, allegedly from an African-American person, inferring that Mr. Bentley, who is African-American, was the person who burglarized the house. 11/13/2014RP 94-95. Mr. Pena had been unable to identify Mr. Bentley in a photograph lineup. 11/13/2014RP 95. Mr. Bentley objected, noting he was not charged with burglary and the

evidence and the State's argument were far too attenuated.

11/13/2014RP 95. The trial court sustained the objection:

> I'm going to sustain the objection. I don't see that the photographs that were testimony regarding the hair [sic], that this witness has sufficient knowledge. If there is any probative value at all, it's very minor, and I think any minor probative value is outweighed by confusion of the issues and prejudicial effect under ER 403.

11/13/2014RP 95-96.

Despite this ruling, in closing argument, the prosecutor again attempted to link Mr. Bentley to the burglary:

> He [Mr. Pena] was preparing to go on vacation on August 26. it [sic] was hot out, he had the doors open, and he was going to call a cab or an Uber to take him to the airport when he noticed a person across the street who seemed to be intently watching his home and his comings and goings, and you'll remember that was a park and the person sitting on the bench and there wasn't anybody out that day, there wasn't a game going on, and the person, instead of facing the way you'd watch a game, was instead turned around watching his house, and this caught his attention. Why? Because he knew he was about to be leaving his house with suitcases and going away for a while. And you remember he said, "I watched the person, I looked at them a number of times because I was a little concerned." *And he described an African American male with a balding head, a goatee and no shirt, somewhat muscular build. A person not unlike the defendant*. Now it's true that Mr. Pena could not pick him individually out when he got back three or four weeks later . . .

11/17/2014RP 105-06 (emphasis added). Mr. Bentley immediately objected and referenced the court's prior ruling. 11/17/2014RP 106. The court overruled the objection:

> It's overruled for purposes of closing argument. You're going to have your chance to make your counter argument.

11/17/2014RP 106.

Following the completion of the jury trial, Mr. Bentley was convicted as charged. CP 44-46.

The Court of Appeals found the prosecutor did not commit misconduct thus affirming Mr. Bentley's conviction and sentence. Decision at 6-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Contrary to the Court of Appeals' decision, prosecutorial misconduct in closing argument violated Mr. Bentley's right to due process and a fair trial.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch,* 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied,* 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of

fairness to a criminal defendant." *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday,* 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case,* 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in

the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger,* 295 U.S. at 88.

Where the defendant objects to the misconduct, the defendant need only show that there was a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

The State always bears the burden of proving each and every element of the charged offenses. U.S. Const. amend XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Argument by the prosecution that shifts this burden of proof onto the defendant constitutes misconduct. *State v. Thorgerson*, 172 Wn.2d 438, 466, 258 P.3d 43 (2011); *State v. Gregory,* 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). Any argument by the State which implies that the defendant has a duty to present favorable evidence is improper.

State v. Barrow, 60 Wn.App. 869, 872, 809 P.2d 209 (1991); *State v. Cleveland,* 58 Wn.App. 634, 648, 794 P.2d 546 (1990).

During the trial, the court refused to allow any testimony suggesting Mr. Bentley had burglarized Mr. Pena's residence and taken his car, primarily because Mr. Bentley was not charged with burglary. 11/13/2014RP 52-54. Despite this admonition by the court, in closing argument, the prosecutor implied that Mr. Bentley had committed the burglary, an offense for which he was not charged and for which the trial court had barred testimony. 11/17/2014RP 105-06. The prosecutor's argument therefore shifted the burden of proof to Mr. Bentley to prove that he did *not* commit the burglary. This argument was plainly misconduct.

The Court of Appeals chastised Mr. Bentley for not objecting to testimony that a man was watching Mr. Pena's house, then only objecting to the testimony regarding Mr. Bentley's facial hair. Decision at 6 fn.3. This misses the point. The fact that someone was seen watching Mr. Pena's house was ambiguous, but it did not implicate Mr. Bentley. Once the testimony regarding the man having facial hair similar to Mr. Bentley's, the prosecutor had made the improper

connection triggering Mr. Bentley's obligation to disprove he burglarized the house.

Implicating Mr. Bentley in the burglary was improper given the trial court's ruling. Once the improper connection was made, Mr. Bentley's only recourse was to disprove he was involved in the burglary, or face the prospect the jury would conclude that, since he burglarized the house, he necessarily took the Land Rover, thus diminishing the State's burden of proof.

In addition, the error was compounded when the trial court suggested that Mr. Bentley could present a counter argument to the State's impermissible argument, putting forth the favorable or exculpatory evidence that he was not constitutionally required to present in the first place.

This Court must accept review to find the prosecutor's actions here were misconduct, and reverse Mr. Bentley's conviction.

F. CONCLUSION

For the reasons stated, Mr. Bentley asks this Court to accept review and reverse his conviction.

DATED this 19th day of August 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GARY DARYLL BENTLEY, JR., Appellant.	)	No. 73262-5-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2016

APPELWICK, J. — Bentley appeals his conviction for assault in the third degree and possession of a stolen vehicle. He contends the prosecutor engaged in misconduct by making improper comments during closing argument. We affirm.

FACTS

On August 26, 2014, Gustavo Pena was preparing to leave his Seattle home for a vacation. His house is across the street from a baseball playfield. He noticed a person sitting across from his house on the bleachers of the baseball field looking straight at his house. Pena was concerned, because the bleachers did not face his house and the person was looking attentively at his house anyway. Pena observed the individual for 20 to 30 minutes. He noticed that the individual was an African American man, between the age of 30 to 40, with a shaved or bald head, and a goatee.

Pena was concerned about the man, but needed to leave his house to catch his flight. Pena left his house with two large suitcases and got into a taxicab. The man was still sitting across the street from Pena's house when he left. Two days

later, while he was in Columbia, Pena received a call from a neighbor and learned that his home had been burglarized. Pena's neighbor also informed him that his 2006 Land Rover[1] was missing from his driveway. Pena kept a set of spare car keys in his house.

On August 29, 2014, Deputy Christopher Dearth was on patrol. He learned that an older Land Rover had been reported stolen. Toward the end of Deputy Dearth's shift another officer broadcasted that he saw a vehicle matching the description of the stolen vehicle parked on the side of a road. Deputy Dearth went to investigate.

When he arrived, Deputy Dearth confirmed that the Land Rover was the vehicle that had been reported as stolen. William Juell was sitting in a truck behind the Land Rover. Gary Bentley was getting into the driver's seat of the Land Rover and Russell Bentley[2] was standing outside on the passenger side of the Land Rover. Juell had stopped to help Russell and Bentley, because he saw the Land Rover stalled in the middle of the road. The vehicle had run out of gas, and Juell took them to get gas.

Deputy Dearth briefly spoke to Juell. Then, Deputy Dearth engaged Russell and Bentley in casual conversation. Deputy Dearth wanted to wait until additional backup arrived before confronting the men about the stolen vehicle. After

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[1] The vehicle is referred to as both a Land Rover and a Range Rover throughout the record. Because Pena identified his vehicle as a Land Rover and because there is no contention that the vehicle in question is not Pena's, we refer to the vehicle as a Land Rover.

[2] Russell is Gary's uncle. We refer to Russell by his first name for the sake of clarity. No disrespect is intended.

additional officers arrived, Deputy Dearth announced that Bentley and Russell were under arrest, because the car was stolen. Deputy Dearth attempted to handcuff Bentley. A struggle ensued and Bentley struck Deputy Dearth and another officer. The officers were eventually able to take Bentley into custody.

The King County Sheriff's Office notified Pena that his vehicle had been located. Pena returned from Columbia on September 9 and went to the SeaTac Police Department to retrieve his car. A detective showed Pena a photo lineup of six pictures. He asked Pena if he could identify the man who was watching his house the day he left for his trip. Pena could not identify him.

On September 4, 2014, the State charged Bentley with two counts of assault in the third degree for assaulting two police officers and with possession of a stolen vehicle. Pena testified at trial. Pena testified to the physical description of the man who had been watching his house on the day he left for his vacation. Later during his testimony, the State asked Pena if he found "something" in his house when he returned home. Pena indicated that he did find something in his house. Bentley immediately objected, asserting that the line of questioning was irrelevant. The trial court asked the State where the line of questioning was headed. The State responded that facial hair had been found at the house. Outside of the presence of the jury, the State explained that facial hair was found in the bathroom sink in Pena's house and that it could be from an African American individual. The State explained that this was relevant because the hair could

belong to the African American person Pena saw watching his house. Bentley's counsel responded:

> [H]e's not being charged with burglary. I don't like the entire line of inquiry into the burglary. I know that there was a burglary, that's how the vehicle was presumably stolen, so I can't really object to the existence of the burglary, but I feel like we're getting too deep into the facts of the burglary and not into the actual charge that he's charged with. Clearly the State wants to infer or imply that Mr. Bentley was the burglar as well and I think that's unfair, given that Mr. Pena can't identify him as the burglar. It's just piling on inferences upon inferences that actually don't lead anywhere, but it makes it look like the State has further evidence somehow that Mr. Bentley was the burglar but just hasn't charged him. So I think it's unfair and prejudicial to get too far into the burglary.

The trial court sustained the objection, noting that Pena did not have sufficient foundational knowledge regarding the facial hair. The court further noted that if there was any minor probative value it was outweighed by confusion of the issues and prejudicial effect under ER 403.

During closing argument, the prosecutor reviewed Pena's testimony, including his testimony about the physical description of the individual who had been watching Pena's house:

> And he described an African American male with a balding head, a goatee and no shirt, somewhat muscular build. A person not unlike the defendant. Now it's true that Mr. Pena could not pick him individually out when he got back three or four weeks later and was shown some pictures, but you recall he said he was probably at a distance from here to the door. But got the general physical description, and we know it wasn't a female that was watching the house, it wasn't a Hispanic person with long hair –

At that point, Bentley objected on the basis of relevance noting that the identity of the burglar does not have anything to do with Bentley. The trial court overruled the objection and stated that Bentley would have the opportunity to make a counter

argument. The prosecutor continued, noting that two days after Pena left he received a call that his house had been burglarized.

The jury found Bentley guilty as charged. Bentley appeals.

DISCUSSION

Bentley argues that the prosecutor engaged in prosecutorial misconduct during closing argument. Prosecutorial misconduct may deprive a defendant of his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). An appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

A prosecutor's comments during closing argument are reviewed in context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. McKenzie, 157 Wn.2d at 52. It is improper for the prosecutor to argue that the burden of proof rests with the defendant. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). Therefore, a prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence. Id.

Knowledge that the Land Rover was stolen was an element the State had to prove to convict Bentley of possession of a stolen vehicle. See 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21, at 177 (3d ed. 2008). During closing argument, the State emphasized Bentley's possible involvement with the burglary presumably to prove that Bentley had knowledge. Bentley asserts that the prosecutor improperly shifted the burden of proof by implying that he had a burden to present favorable or exculpatory evidence showing that he did not commit the burglary.

None of the prosecutor's remarks in closing argument explicitly commented on Bentley's failure to present evidence, exculpatory or otherwise. And, we find nothing in the prosecutor's closing argument to support a characterization that she implicitly commented on the fact that Bentley did not provide any evidence contradicting that allegation. And, to the extent the prosecutor's closing argument implied Bentley was involved with the burglary based on evidence in the record, this was not improper.[3] Boehning, 127 Wn. App. at 519. The prosecutor's argument did not shift the burden to Bentley.

Bentley further asserts that the trial court's ruling on his objection during closing argument—informing him he could make a counter argument in his closing

[3] Bentley also implies that the prosecutor's remarks were in contravention of the trial court's ruling excluding evidence about the burglary. Bentley asserts that the court refused to allow any testimony suggesting Bentley had burglarized Pena's house. This is a mischaracterization of the record. During trial, Bentley did not object to Pena's testimony regarding the man watching his home or the description of the man. He objected only when the State attempted to admit evidence of the facial hair found at Pena's house. The trial court sustained the objection to only that specific evidence. The trial court never excluded all evidence suggesting that Bentley burglarized Pena's house.

argument—compounded the error. He asserts that the trial court's ruling suggested that Bentley, "could present a counter argument to the State's impermissible argument, putting forth the favorable or exculpatory evidence that he was not constitutionally required to present in the first place." However, the trial court was merely commenting that Bentley would have the opportunity to rebut the inferences the prosecutor was drawing. The trial court did not state that Bentley had the obligation to rebut the inferences through evidence or otherwise.

Absent error, we need not address the issue of prejudice. See Warren, 165 Wn.2d at 26 (stating that a defendant must first show that the prosecutor's comments were improper in order to prevail on a claim of prosecutorial misconduct).

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

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