NO. 48008-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JARED EVANS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 15-1-00951-8

BRIEF OF RESPONDENT

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2. Was the prosecutor's argument that the jury could infer malice from the defendant's actions not improper where there was sufficient evidence to support malice and the prosecutor was simply asking the jury to draw reasonable inferences from the admitted evidence?

3. Was there sufficient evidence from which the jury could infer malice and convict the defendant of arson in the first degree?

4. Was the jury properly instructed regarding the burden of proof where the court used the approved language from WPIC 4.01?

B. STATEMENT OF THE CASE.

1. Procedure

On March 10, 2015, the defendant was charged via information with one count of arson in the first degree. CP 1. On August 24, 2015, a jury trial commenced before the Hon. Stanley Rumbaugh, Judge of the Pierce County Superior Court. V RP 4. Closing arguments took place on August 27, 2015, VIII RP 14 et seq. A verdict was returned the same day.

VIII RP 43-44. The defendant was found guilty as charged of arson in the first degree. VIII RP 44; CP 67.

2. Facts

On the evening of February 27, 2015, the defendant went to St. Anthony Prompt Care, a medical facility in Gig Harbor, Washington. VII RP 58. He arrived with his sister and her boyfriend, who was running an errand to the pharmacy there. VII RP 58. The defendant had a "tazer[1]/flashlight combination" which he described as "a black, cylindrical object about eight inches long [with] a high strength LED flashlight on the end of it, as well as four prongs on top of that for a tazer function." VII RP 59. The defendant further testified that the taser worked by "emit[ing] DC electricity from one prong to another." VII RP 59. The defendant also admitted to having a cigarette lighter with him that day. VII RP 60.

While at St. Anthony's, the defendant began clicking either the taser or the lighter, which was audibly noticed by Janet Siler, an employee at St. Anthony's. VII RP 6, 10-11. Ms. Siler contacted the defendant outside and asked him to move away from the door because of the loud clicking. VII RP 11. The defendant agreed and Ms. Siler went back inside.

[1] Although the more accepted spelling is "taser," the verbatim reports of proceedings (RPs) use the less common spelling "tazer." In this brief, the State will use "taser" in its argument, but retain the spelling "tazer" when quoting from the RPs.

VII RP 11. Later, Ms. Siler heard the clicking again and went back outside to confront the defendant. VII RP 13-14. While outside, Ms. Siler also noticed that a large stone garbage can had been moved from the sidewalk into a parkway in front of the facility. VII RP 14. Ms. Siler testified that the defendant told Ms. Siler that he did not to know how the garbage can ended up in the roadway happened, but agreed to move it back. VII RP 14. The defendant testified that he "may have" put the garbage can into the roadway. VII RP 61. After Ms. Siler went back inside, the defendant entered the facility. VII RP 15, 62. Although the facility was still open for urgent care patients, all businesses inside were closed. VII RP 15-16. Ms. Siler was concerned enough about the defendant's presence inside the building that she called 911. VII RP 16.

The defendant walked around the facility a bit and was seen on surveillance video with something in his hand. VI RP 41-42. At one point, the surveillance video captured the bright flare of the taser being activated. VI RP 41-42. The defendant then entered a restroom. VI RP 42. Approximately four and a half minutes later another person entered the bathroom. VII RP 73. That man was identified as Kevin Donoghue. VI RP 64. Mr. Donohue saw the defendant removing burning paper towels from the bathroom garbage can. VI RP 64. Mr. Donoghue left to retrieve a fire extinguisher and returned to put out the fire. VI RP 65. While Mr.

Donoghue was gone, the defendant left the restroom and ran toward the front of the building. VI RP 48-49, 65.

As the defendant was leaving the building, he was observed by Officer Joseph Hicks of the Gig Harbor Police Department. VII RP 34. Officer Hicks was responding to the call of an unwanted person at the location. VII RP 30. Officer Hicks was in full uniform. VII RP 35. He called out to the defendant to stop, but the defendant did not initially stop. VII RP 35. Eventually, the defendant did stop and Officer Hicks contacted him. VII RP 35. With the defendant's consent, Officer Hicks looked in the defendant's bag and observed both the taser and the lighter. VII RP 36.

C. ARGUMENT.

1. THE PROSECUTOR'S CLOSING ARGUMENT THAT A TASER WAS CAPABLE OF IGNITING PAPER TOWELS WAS NOT IMPROPER BECAUSE THERE WAS SUFFICIENT EVIDENCE UPON WHICH TO DRAW THAT REASONABLE INFERENCE.

The prosecutor's argument in closing argument that a taser was capable of igniting paper towels was not improper because there was sufficient evidence upon which to draw that reasonable inference.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Prejudice is established where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" ***Dhaliwal***, 150 Wn.2d at 578, 79 P.3d 432 (quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996)).

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. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). Circumstantial evidence is sufficient to support a verdict of guilty so long as the jury is convinced of a defendant's guilt beyond a reasonable doubt. ***State v. Thompson***, 153 Wn. App. 325, 334, 223 P.3d 1165 (2009) (citing ***State v. Bencivenga***, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)). *See also* WPIC 5.01 ("The law does not distinguish between direct and circumstantial evidence"); CP 53.

A defendant who fails to object to an allegedly improper argument waives the right to assert prosecutorial misconduct unless the argument was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. ***State v. Boehning***, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (citing ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)). In determining whether the misconduct warrants reversal, the appellate court considers its prejudicial nature and its cumulative effect. ***Boehing***, 127 Wn. App. at

518 (citing ***State v. Suarez–Bravo***, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)).

Here, the defendant did not object to the prosecutor's allegedly improper argument and did not request a curative instruction. VIII RP 17. The defendant himself testified that he had the taser with him that night, and that the taser operated by creating an arc or spark of electricity between the prongs at the end of the device. VIII RP 59. Surveillance video was admitted that showed the defendant activating the taser and creating this spark. VI RP 41-42. The defendant also admitted to having a cigarette lighter with him that night. VII RP 60. In addition, Officer Hicks observed both the cigarette lighter and the taser in the defendant's bag. VII RP 36. Finally, the jury saw photographs of burnt paper towels from the bathroom, where the defendant was the only occupant when the fire started. VI RP 52.

A review of the full context of the prosecutor's statement shows he was explaining why the jury should conclude that the defendant had the capacity to start the fire:

> You saw on the video the blue flashes from the tazer. That's an electrical charge that the tazer causes. Everybody knows what a tazer is. It causes an electrical charge and it's designed to shock people. Well, that electrical charge obviously creates heat, and that heat can start a fire. So the Defendant had a device that would allow him to start the fire. He actually had two. He had a lighter as well.

VIII RP 17. This was not arguing facts not in evidence. To the contrary, it was arguing a very reasonable inference from the facts that were in evidence, to wit: the defendant started the fire. He had in his possession two items which could have ignited the tinder-like paper towels: the taser, which created a sustained electric arc, and the cigarette lighter.

Therefore, the prosecutor was not arguing facts not in evidence. Accordingly, the prosecutor's argument was not improper.

2. THE PROSECUTOR'S CLOSING ARGUMENT THAT THE JURY COULD INFER MALICE FROM THE DEFENDANT'S ACTIONS WAS NOT IMPROPER BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT MALICE AND THE PROSECUTOR WAS ASKING THE JURY TO DRAW REASONABLE INFERENCES FROM THE ADMITTED EVIDENCE.

The prosecutor's argument in closing argument that the jury could infer malice from the act of setting the fire itself was not improper because there was sufficient evidence to support an inference of malice and the prosecutor was simply asking the jurors to draw that reasonable inference.

As explained, *supra*, 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. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). A defendant who fails to object to an allegedly improper argument waives the right to assert prosecutorial misconduct unless the argument was so "flagrant and ill intentioned" that it caused enduring and

resulting prejudice that a curative instruction could not have remedied. ***State v. Boehning***, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (citing ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)).

Specifically, "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." RCW 9A.04.110(12); accord WPIC 2.13.

Here, the prosecutor began his closing argument by asserting that not all of the elements of the crime were in issue, *e.g.*, that the events took place in the State of Washington. VIII RP 15. He asserted that the only issue was whether the defendant started the fire, because he had testified that he had not. *Id.* The question of whether igniting paper towels in a bathroom with no legitimate purpose was malicious was not, in the prosecutor's mind, at issue. Rather, the prosecutor was explaining, as a sort of roadmap, his contention that the only contested issue was the identity of who did the undeniably malicious act of starting the fire. It was in this context, beginning his argument with a discussion of the elements of the crime that the prosecutor said:

> Now, I would submit to you, ladies and gentlemen, that really there's only one element of those four that's in dispute, and that is did the Defendant cause the fire.
> ...
> Really, if you determine that the Defendant acted in this case, that the Defendant started the fire, the act in itself is

> knowing and malicious. Clearly, you don't start a fire unless you know what you're doing, and you don't do so unless you're being malicious under your instructions.

VIII RP 15.

The prosecutor was not arguing that no other evidence supported the inference of malice. To the contrary, he was explaining to the jury that he would not be discussing the evidence supporting that element at length, because he did feel it would be contested. VIII RP 15. Indeed, nowhere else in his argument did the prosecutor discuss inferring malice from the evidence. Nevertheless, the jury was free to consider all of the evidence presented, regardless of whether the prosecutor emphasized it.

Here, the evidence of malice included the repeated contacts by Ms. Siler, asking the defendant to be quiet and leave the area. VII RP 11. His malice toward the facility was demonstrated by moving a heavy stone garbage can into the parkway in front of the facility. VII RP 14; VIII RP 61. He then entered the otherwise closed clinic and walked around until he finally entered the bathroom and started the fire. VII RP 41-41; VI RP 64. This was more than enough from which malice could be inferred.

Therefore, the prosecutor was not asking the jury to draw an impermissible inference, because (1) the inference was permissible, and (2) he was simply explaining why he would not be arguing about malice at all. Accordingly, the prosecutor's argument was not improper.

3. THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD INFER MALICE AND CONVICT THE DEFENDANT OF ARSON IN THE FIRST DEGREE.

As stated explained, *supra*, there was sufficient evidence from which the jury could infer malice and convict the defendant of arson in the first degree.

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." ***State v. Federov***, 181 Wn. App. 187, 193-94, 324 P.3d 784 (2014) (quoting ***State v. O'Neal***, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007)). "The standard of review for a challenge to the sufficiency of the evidence" is whether, viewing the evidence "in a light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" ***State v. Sweany***, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (quoting ***State v. Randhawa***, 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (citation omitted) (internal quotation marks omitted) (quoting ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980))); *see also, e.g.*, ***State v. Rich***, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Stated another way, a conviction will be reversed "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." ***Federov***, 181 Wn. App. at 194 (quoting ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005)).

Here, again, the evidence supportive of malice included repeated contacts by Ms. Siler asking the defendant to be quiet and leave the area, VII RP 11, the defendant moving a heavy stone garbage can into the parkway in front of the facility, VII RP 14; VI RP 61, and the defendant entering the otherwise closed clinic and walking around until he finally entered the bathroom to start the fire, VII RP 41-41; VI RP 64. This was more than enough evidence from which "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Sweaney***, 174 Wn.2d at 914.

This evidence of malice, when combined with the surveillance video of the defendant entering the bathroom shortly before the fire and Mr. Donoghue's testimony that he saw a man he believed to be the defendant in the bathroom at the time of the fire, VI RP 64, and the defendant's own admission that he was the man Mr. Donoghue saw, VII RP 63, was more than sufficient to allow the jury to conclude that the state had proved beyond a reason doubt that the defendant committed each element of the crime of arson in the first degree.

Accordingly, there was sufficient evidence to support the verdict of guilty.

4. THE JURY PROPERLY WAS INSTRUCTED REGARDING THE BURDEN OF PROOF WHEN THE COURT USED THE STANDARD LANGUAGE FROM WPIC 4.01.

The jury was properly instructed regarding the presumption of innocence and the burden of proof beyond a reasonable doubt when the court used the standard language from WPIC 4.01.

The defendant complains about the last sentence of the WPIC 4.01 instruction: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 54. The defendant argues that the instruction asks the jury to focus on an improper search for the truth rather than determining its verdict on the evidence presented in court and the burden of proof. However, this very argument was rejected in ***State v. Federov***, 181 Wn. App. 187, 324 P.3d 784 (2014):

> [The defendant] argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth."
> We disagree. ***State v. Bennett***, and ***State v. Pirtle*** control. [The defendant] relies on ***State v. Emery*** to challenge the "abiding belief" language. He claims this language is similar to the impermissible "speak the truth" remarks made by the State during closing. ***Emery*** found the "speak the truth" argument improper because it misstated the jury's role. Here, read in context, the "belief in the truth" phrase accurately informs the jury its "job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." The reasonable doubt instruction accurately stated the law.

Federov, 181 Wn. App. at 199 (internal citations omitted) (citing ***State v.***

Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), ***State v. Bennett***, 161 Wn.2d 303, 165 P.3d 1241 (2007), and ***State v. Pirtle***, 127 Wn.2d 628, 904 P.2d 245 (1995)).

Therefore, the jury was properly instructed regarding the presumption of innocence and the burden of proof. Accordingly, the case should not be reversed and remanded for a new trial.

D. CONCLUSION.

The prosecutor's closing argument that a taser was capable of igniting paper towels was not improper because there was sufficient evidence upon which to draw that reasonable inference. The prosecutor's closing argument that the jury could infer malice from the defendant's actions was not improper because there was sufficient evidence to support malice and the prosecutor was simply asking the jury to draw reasonable inferences from the admitted evidence. There was sufficient evidence from which the jury could infer malice and convict the defendant of arson in the

first degree. The jury properly was instructed regarding the burden of proof when the court used the standard language from WPIC 4.01.

Accordingly, the defendant's conviction should be affirmed.

DATED: April 20, 2016

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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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