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

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MICHAEL BROWN, Appellant.	No. 37352-5-III UNPUBLISHED OPINION

MELNICK, J. — Christopher Michael Brown appeals his convictions for unlawful possession of a stolen vehicle and driving while license suspended in the third degree. He alleges prosecutorial misconduct and ineffective assistance of counsel. He also contends the trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing. We affirm.

FACTS

Around 11:00 p.m., Lakewood Police Officer Jordan Feldman observed the driver of a Honda CRV fail to stop at a stop sign. Feldman attempted to stop the Honda, however the driver accelerated away. The driver pulled into an apartment complex and then fled from the vehicle on foot by going through a hole in a nearby fence. Feldman chased the driver but could not locate him.

Feldman returned to the Honda and inside it found a backpack that had the name "Chris Brown" written on the outside. 3 Report of Proceedings (RP) at 223. The officer ran a record check on the Honda and learned that it had previously been reported stolen. Feldman also discovered a cell phone on the ground near the Honda. The officer observed that the phone was unlocked and that someone had logged into a Facebook account under the name "FoLks Sense Day'One" with the name "Chris Buckle" listed in parentheses. 3 RP at 224. Feldman learned that Brown lived at the apartment complex where the Honda was parked.

While leaving the apartment complex, Feldman observed a man walking who looked like the driver and wore similar clothing. Feldman asked if he was "Chris Brown" and he said "Yes." 3 RP at 245. When Feldman asked if Brown drove the Honda, Brown said no and that he had been at a motel for the last several hours with a woman named "Michelle." 3 RP at 253. The two then went to the motel.

At the motel, Feldman contacted Michelle Nolasco who denied being with Brown in her room. Brown asked the officer to ask Nolasco one more time. The officer returned to the motel room; Nolasco again denied that Brown had been in her room but said she had seen him outside another room shortly before Feldman arrived.

The State charged Brown with unlawful possession of a stolen vehicle, obstructing a law enforcement officer, and driving while license suspended in the third degree.

Prior to trial, Brown filed a motion to suppress certain statements he made to police at the time of arrest. The trial court held a hearing and denied Brown's motion.

During trial, Feldman identified Brown as the driver of the vehicle. The prosecutor asked, "do you have any doubt whatsoever that the man that you identified was the same one who fled from that vehicle?" 3 RP at 226. Feldman replied, "I don't, sir." 3 RP at 226.

Nolasco testified that she was engaged to Brown's brother and was close friends with Brown. She also testified that Brown had been with her in her motel room from 9:30 p.m. until around 1:30 a.m. or 2:00 a.m. She denied telling Feldman that Brown had never been in her room.

During the State's cross-examination, Nolasco said she told Feldman that Brown was not "in" her room because he was "under the patio." 5 RP at 362. Further, she did not know that Brown was with Feldman, "so, of course, I'm going to say, no, he's not in my room." 5 RP at 362. She denied ever telling Feldman that she saw Brown outside the motel shortly before Feldman arrived. The following colloquy took place between the prosecutor and Nolasco:

> Q. And after hearing that [Brown] was facing these charges, you never contacted our office, correct, the prosecutor's office?
> A. I didn't think I would have to. I didn't think I would be up here.
> Q. Never submitted a written statement?
> A. No.
> Q. Never called Lakewood Police Department later on?

5 RP at 357. Brown then objected, stating "[i]t's not the witness' duties to be investigating a case." 5 RP at 357. The prosecutor stated, "Your Honor, I believe there is." 5 RP at 357. The trial court then overruled the objection.

During closing argument, the prosecutor asked the jury to consider if any witness was biased or had a reason to lie. The prosecutor also argued that Nolasco testified on behalf of her future brother-in-law "to protect the family." 5 RP at 386. The prosecutor continued:

> If you knew you had a family member that is facing charges that you know for a fact are not true, you would want to contact someone, contact police, contact any type of law enforcement, and contact prosecutor's office . . . . Nine months passed, nothing . . . . Only then after this trial began did she meet and provide a statement . . . . Ladies and gentlemen, you can draw your own conclusions based on all this, but remember as the law says you, and no one else, are the sole judges of credibility. Is there motive? Is there bias? Ladies and gentlemen, draw your own conclusion as to what we saw today.

5 RP at 387-88.

The jury found Brown guilty of unlawful possession of a stolen vehicle and driving while license suspended in the third degree; the jury acquitted Brown of obstructing a law enforcement officer. Brown appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Brown contends that the prosecutor committed misconduct by stating "there is" when Brown objected to questioning regarding no duty to investigate a crime and by referring to Nolasco waiting to come forward during closing remarks. 5 RP at 357. We disagree.

A. Standard of Review and Legal Principles

We review allegations of prosecutorial misconduct for an abuse of discretion. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). To show prejudice, a defendant must demonstrate a substantial likelihood that the prosecutor's misconduct affected the outcome of the trial. *Glasmann*, 175 Wn.2d at 704. When a defendant fails to object to the improper comments at trial, the defendant must also show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61.

It is misconduct for a prosecutor to misstate the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). However, during closing argument, the prosecutor "has wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017), *review denied*, 190 Wn.2d 1013 (2018). When reviewing claims of prosecutorial misconduct, we review the record as a whole. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

B. Comment Following Objection

Brown argues that the prosecutor misstated the law when commenting after Brown objected to the prosecutor's questioning of Nolasco. Concluding Brown has not shown any prejudice, we disagree.

Assuming the comment was improper, Brown cannot show prejudice. Because Brown did not object to the prosecutor's comment, Brown must show the comments were prejudicial and "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. Feldman testified that Brown was the driver of the vehicle without "any doubt whatsoever." 3 RP at 226. This testimony in conjunction with the backpack, cell phone, and the location of the Honda all connect Brown to the vehicle and make it unlikely that the trial outcome would be any different. Assuming without deciding that the comment was flagrant and ill-intentioned, an instruction could have cured any prejudice that may have resulted.

C. Closing Argument

Brown further argues that the prosecutor committed prosecutorial misconduct during closing argument by referencing Nolasco's delay in coming forward with information that Brown was with her on the night in question. We disagree.

Here, the prosecutor argued that Nolasco waited until after the trial began to come forward and that this delay seemed inconsistent with wanting to help a soon-to-be family member. Because Nolasco gave inconsistent statements to Feldman and at trial, Nolasco's credibility was in question. In light of the entire record, this argument was not improper.

Even assuming the prosecutor's closing remarks were improper, Brown cannot show prejudice. Because Brown did not object to these remarks, Brown must show the comments were prejudicial and "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. Based on the same reasoning discussed above, Brown cannot meet this standard.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Brown next contends that he was denied effective assistance of counsel when counsel did not object again after the prosecutor commented on counsel's first objection. We disagree.

A. Standard of Review and Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Representation is deficient if, after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Prejudice

exists if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458.

B. No Prejudice

Assuming without deciding that the prosecutor's comment was improper and defense counsel should have objected, Brown cannot show prejudice. For the reasons discussed above, there is not a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458. For this reason, Brown's ineffective assistance of counsel claim fails.

III. ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Brown requests remand for entry of written findings of fact and conclusions of law as required by CrR 3.5(c). On September 5, 2018, the trial court held a hearing on the admission of Brown's statements. The court made an oral ruling. As of the filing of Brown's opening brief on July 30, 2019, the court had yet to enter the requisite findings of fact and conclusions of law on that proceeding. The court belatedly entered the findings and conclusions on August 27, 2019. Because the court has complied with CrR 3.5(c), we can no longer provide the relief sought and Brown's request is moot. *State v. Gentry*, 125 Wn.2d 570, 616-17, 888 P.2d 1105 (1995).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.[1]

WE CONCUR:

Korsmo, A.C.J.

Lawrence-Berrey, J.

[1] The Honorable Richard Alan Melnick is a Court of Appeals, Division Two, judge sitting in Division Three under CAR 21(a).