

63038-5

63038-5

NO. 63038-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GORDON WILLIAMS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

---

**BRIEF OF RESPONDENT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

RISA D. WOO  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
Norm Maleng Regional Justice Center  
401 Fourth Avenue North  
Kent, Washington 98032-4429

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**A. ISSUE**

1. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. All reasonable inferences must be drawn in favor of the State and drawn most harshly against the defendant. Here, all reasonable inferences establish Williams is the same "Gordon Williams" listed in the certified copies of the prior convictions. Should the conviction now be affirmed where the State produced substantial evidence supports the conviction?

2. To establish prosecutorial misconduct, a defendant must prove that the argument complained of was both improper and prejudicial. Failure to object to an alleged improper remark constitutes a waiver unless the comments were so flagrant and ill-intentioned that the resulting prejudice could not have been neutralized by an admonition to the jury. During rebuttal argument, the prosecutor responded to defense counsel's closing remarks by referring to the lack of evidence to support the argument that the woman the defendant was found with was not the individual protected by the no contact order. Should the conviction now be affirmed where Williams failed to establish that the prosecutor's

argument was so flagrant and ill-intentioned that any resulting prejudice could not have been cured and where the conviction is supported by overwhelming evidence?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS**

The State charged Gordon Williams by Information with Felony Violation of a Court Order Domestic Violence. CP 1. The Honorable Douglass North presided over the trial. A jury convicted Williams as charged. CP 21. The trial court sentenced Williams within the standard sentencing range, imposing the low end of the standard sentencing range, 13 months of confinement. CP 44.

**2. SUBSTANTIVE FACTS**

On August 2, 2008, Seattle Police Officer responded to a dog park near Pike Street in the City of Seattle when an individual called 911 at approximately 2:00 a.m. to report a disturbance. 1/15/09 RP 9-10, 13-15, 17. The caller indicated he was at the dog park with a black male and a Native American female and the male was grabbing the female and the female was attempting to fend him off. 1/15/09 RP 9. The caller provided a physical description of

himself, as well as the male who was assaulting the female.

1/15/09 RP 10. Officer Moran arrived in the area described by the caller and found Defendant matching the description of the assaultive male given by the 911 caller. 1/15/09 RP 15, 17. When Officer Moran approached, he saw both Defendant and the female, later identified as Gina Curley<sup>1</sup>, each were carrying a beer can.

1/15/09 RP 18. Officer Moran detained each individual and waited for a second unit to arrive. 1/15/09 RP 18.

After the back up unit arrived, Officer Moran identified each individual and performed a record check on each. 1/15/09 RP 20. Each individual matched the physical descriptors provided in the records Officer Moran checked. 1/15/09 RP 20-21. Officer Moran discovered there was a No Contact Order in place against Defendant for the protection of Gina Curley. 1/15/09 RP 21. Officer Moran then arrested Defendant. 1/15/09 RP 22. Officer Moran attempted to obtain a statement from Ms. Curley, but she refused to cooperate and she was upset that Defendant was being arrested at all. 1/15/09 RP 22-23.

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<sup>1</sup> At trial, the State offered a certified copy of Ms. Curley's Washington State Identification Card. 1/15/09 RP 24. Officer Moran testified the woman pictured in the identification card was the same woman he found Defendant with on the date of this incident. 1/15/09 RP 24-25.

### 3. CLOSING ARGUMENTS

Prior to closing arguments, the trial court read the court's instructions to the jury. 1/15/09 RP 35-44; CP 23-37. Specifically, the first jury instruction stated in relevant part:

"It is your duty to determine which facts have been proved in this case from the evidence produced.... The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement, or argument that is not supported by the evidence or the law...."

CP 24; 1/15/09 RP 45.

The prosecutor then gave her closing argument. She discussed each element the State was required to prove at trial and how each element was in fact satisfied. 1/15/09 RP 44-52. She specifically discussed the issue of Ms. Curley's identity and argued this element was satisfied by both direct and circumstantial evidence. 1/15/09 RP 50-51. In his closing argument, counsel for Williams focused his argument on the identification by Officer Moran of Ms. Curley. 1/15/09 RP 53-55. Specifically, he argued:

We don't know anything about that, that day. We don't know if she was best friends with Gina Curley, we don't know if they were sisters, we don't know if they were cousins, we don't know if they were roommates, we don't know what information that woman that day has about Gina Curley. Maybe she knew she had the no contact order against

Mr. Williams, let's use the facts to tell the police.  
We don't know that, none of that evidence is here  
(inaudible).

1/15/09 RP 55.

In rebuttal, counsel for the State responded:

If she's not Gina Curley, and the Defendant has committed no crime, she has not come forward at all and said it was me with the Defendant that day, it wasn't Gina Curley. If it was her sister or her cousin or her best friend (inaudible) for whatever reason (inaudible). . . . We don't have any evidence to support any of these questions that Mr. Green (inaudible). That would be holding the State to the burden of beyond all possible doubt. . . . We don't have any evidence to support the fact that this was Gina Curley's sister, best friend, cousin, roommate. If it was Gina Curley's friend, roommate, sister, whatever, why would she have the reaction she did? . . . . If this woman wasn't Gina Curley, why else would the defendant and Ms. Curley have denied knowing each other when they obviously did. . . .

1/15/09 RP 56-57.

**C. ARGUMENT**

**1. THE JURY VERDICT IS SUPPORTED BY  
SUBSTANTIAL EVIDENCE AND SHOULD NOT BE  
DISTURBED ON APPEAL**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable

doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). By claiming insufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d at 201; State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d at 201. The court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Green, 94 Wn.2d at 221.

Furthermore, the State is entitled to rely upon circumstantial evidence to prove its case. See State v. Thompson, 73 Wn. App. 654, 870 P.2d 1022, rev. denied, 125 Wn.2d 1014, 889 P.2d 499 (1994) ("The State need not show a causal connection between the defendant and the crime and can rely entirely on circumstantial evidence to establish the elements of the *corpus delicti*."); State v. Bernson, 40 Wn. App. 729, 733, 700 P.2d 758, rev. denied, 104 Wn.2d 1016 (1985) (defendant's murder conviction should be

upheld although based entirely upon non-physical circumstantial evidence, citing State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)); State v. Fasick, 149 Wash. 92, 95, 270 P. 123, 274 P. 712 (1928); State v. Erving, 19 Wash. 435, 440, 53 P. 717 (1898).

**a. The State Produced Sufficient Evidence To Establish The Defendant In The Present Charge Was The Same Defendant Who Was Twice Previously Convicted Of Violation Of A Court Order**

That the defendant in the present charge has the same name as the defendant in the earlier conviction is sufficient proof of a prior conviction unless the defendant declares under oath that he is not the same person named in the prior conviction. State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 719 (1986). The appellants in Ammons argued that the State was required to prove that he and the defendant named in the certified copies of the prior convictions were the same person at a sentencing hearing when determining their offender scores. Id. at 189. The Ammons court held that the identity of names is sufficient proof, and that may be rebutted by defendant's declaration under oath that he is not the same person named in the prior conviction. Id. at 190. Though Ammons was decided in the context of a sentencing hearing, where

the standard of proof is admittedly lesser than that at trial, preponderance of evidence at sentencing as opposed to beyond a reasonable doubt at trial, this analysis was adopted recently by the Court of Appeals in Division 2 in the context of sufficiency of evidence produced at trial for a Felony Violation of a Court Order. Id. at 185-86; State v. Wofford, 148 Wn. App. 870, 201 P.3d 389 (2009).

A defendant's violation of a court order is elevated to a class C felony if, at the time of the violation, the defendant has at least two previous convictions for violating the provisions of an order. RCW 26.50.110(1) and (5). To prove the existence of prior convictions, the State must prove that the person named in the prior convictions is the same person on trial. Wofford, 148 Wn. App. 870, 884, citing State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978) (citing State v. Kelly, 52 Wn.2d 676, 328 P.2d 362 (1958)). That the defendant in the present charge has the same name as the defendant in the present charge has the same name as the defendant in the earlier conviction is sufficient proof of a prior conviction unless the defendant declares under oath that he is not the same person named in the prior conviction. Id. at 884, citing State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 719 (1986).

If the defendant does rebut the identity, the State must produce some independent evidence of identity. Id. at 884, citing Brezillac, 19 Wn. App. at 13.

In a claim of insufficiency of the evidence presented at trial as this is, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Accordingly, all reasonable inferences to be drawn from the fact of Williams' name on the certified copies of the prior convictions are that those two priors in fact belong to Williams. Furthermore, there was no sworn declaration, or anything of the sort, by Williams that he is not the same Gordon Williams listed in the prior Judgment and Sentences as required by Ammons and Brezillac. Ammons, 105 Wn.2d 175; Brezillac, 19 Wn. App. 11. Therefore, the State clearly did produce substantial evidence to support the jury verdict and the conviction should not be disturbed on appeal.

Finally, even if this Court were to agree with Williams and conclude that the jury's finding of two prior convictions is not supported by sufficient evidence, the remedy would not be dismissal of the entire conviction as Williams claims. See Brief of

Appellant, at 9-10. Rather, the correct remedy in such circumstances would be to remand for entry of judgment for Misdemeanor Violation of a Court Order -- a lesser-degree crime all the elements of which were necessarily found by the jury beyond a reasonable doubt in finding Williams guilty of Felony Violation of a Court Order. See State v. Gilbert, 68 Wn. App. 379, 384-86, 842 P.2d 1029 (1993); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996); State v. Scherz, 107 Wn. App. 427, 429, 27 P.3d 252 (2001); State v. Hughes, 118 Wn. App. 713, 732-34, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004). However, this Court should reject Williams' argument in its entirety, and affirm.

**2. THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT DURING CLOSING ARGUMENT.**

Williams alleges that the prosecutor committed reversible misconduct by commenting improperly shifting the burden of proof. This argument should be rejected because the prosecutor's rebuttal was in fact proper. Furthermore, even supposing this Court finds that the arguments were improper, reversal is not required because the State presented overwhelming evidence of Williams' guilt.

**a. The Prosecutor's Remarks Were Proper**

To establish prosecutorial misconduct, the defendant must show that the conduct complained of was both improper and prejudicial. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice is established only if the defendant demonstrates a substantial likelihood that the misconduct affected the jury's verdict. Id. A prosecutor's comments during closing argument must be viewed in the context of the total argument, the issues in the case, the instructions given by the trial court, and the evidence addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006). Courts afford a prosecutor wide latitude to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. State v. Gregory, 158 Wn.2d 759, 806-07, 147 P.3d 1201 (2006). The relevant issue is whether the prosecutor manifestly intended the remarks to be a comment on that right. Id., citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

Here, the prosecutor's arguments were not improper because he was merely responding to the arguments Williams made during closing. The prosecutor's remarks were completely appropriate in pointing out the lack of evidence to support the propositions of counsel for Defendant. This is precisely the purpose of rebuttal argument: to respond to the arguments made by defense counsel in his closing argument. The prosecutor never argued the Defendant had an obligation to present evidence. The prosecutor merely encouraged the jury to disregard the arguments of defense counsel where there was no evidence to support such arguments, as the Court's instructions to the jury require.

When viewing the prosecutor's remarks in the context of the trial court's instructions to the jury, the issues in the case, and the evidence addressed in the prosecutor's entire closing argument, these remarks were not improper. This is further evidenced by Williams' failure to object to the allegedly improper argument.

1/15/09 RP 55. See Perez-Mejia, 134 Wn. App. at 916-17.

**b. Williams' Failure To Object To The Allegedly Improper Closing Arguments Constitutes A Waiver Of His Claim Because The Comments Were Not Flagrant Or Ill-intentioned.**

Reviewability in the absence of an objection below depends on whether the prosecutor's argument was so flagrant and ill-intentioned as to create prejudice incurable by instruction. State v. Klok, 99 Wn. App. 81, 84, 992 P.2d 1039 (2000); see also State v. Belgrade, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)<sup>2</sup>. Some improper prosecutorial remarks can be described as "touching on" a constitutional right, and still be curable by a proper instruction. Id. at 84. Failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, 116 Wn.2d at 93. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an

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<sup>2</sup> To determine whether prosecutorial misconduct is reviewable without an objection, the Washington State Supreme Court has unswervingly adhered to the standard articulated in Belgrade. State v. Klok, 99 Wn. App., 81, 84, 992 P.2d 1039, citing State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999); State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

One of the reasons that the burden of objecting is placed on the defense during the course of argument is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. See Klok, 99 Wn. App. at 85, citing Swan, 114 Wn.2d at 661. Williams did not object to the alleged misconduct during rebuttal argument. As discussed above, because these remarks were made in response to Williams' closing argument, the prosecutor, as an advocate, was entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir.1978)). "The rule against prosecutorial misconduct is not designed to hamper a prosecutor's effectiveness in rebuttal." State v. Stith, 71 Wn. App. 14, 21, 856 P.2d 415 (1993). Surely counsel for Williams is duty-bound to make strong arguments in his client's favor and highlight discrepancies in testimony to the jury. However, the State is equally entitled to respond to such arguments in rebuttal.

The statement in question was made one time only, in conclusion of the rebuttal argument. It was not an argument that the prosecutor belabored insistently throughout her entire closing remarks. In this case, had Williams objected, the court could have instructed the jury as to the comment and reminded the jury that counsel's remarks are not evidence. We presume that juries will ordinarily follow the court's instructions; accordingly, such an instruction would have substantially alleviated any prejudice that may have been caused by the remark. See Klok, 99 Wn. App. at 85.

Because Williams has failed to establish that the prosecutor's remarks were so flagrant and ill-intentioned that any resulting prejudice could not have been cured by an admonition to the jury, Williams' argument is unpersuasive, and the conviction should be affirmed.

**c. Even If The Court Finds The Prosecutor's Comments Were Improper, Reversal Is Not Required Because The Evidence Against Williams Is So Overwhelming It Necessarily Leads To A Finding Of Guilt.**

An error is harmless beyond a reasonable doubt if the untainted evidence is so overwhelming that it necessarily leads to a

finding of guilty. State v. Lane, 125 Wn.2d 825, 839, 889 P.2d 929 (1995). Where a constitutional right is involved, improper comments do not require reversal if the evidence is so overwhelming that it necessarily leads to a finding of guilty. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Some reasonable showing of a likelihood of actual prejudice is what makes a manifest error affecting a constitutional right. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Improper prosecutorial comments should be reviewed in the context of the total argument, the issues at trial, the evidence addressed in the argument, and the jury instructions. State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. State v. Graham, 59 Wn. App. 418, 428-29, 798 P.2d 314 (1990), citing State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

The general rule is that remarks by the prosecutor that would otherwise be improper are not grounds for reversal where they are

invited or provoked by defense counsel or are made in reply to defense counsel's statements. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Thus, a prosecutor may reply to defense argument, although the remarks might otherwise be improper, if the remarks do not go beyond what is necessary to respond to the defense, do not bring before the jury matters not in the record, and are not so prejudicial that an instruction cannot cure them. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), rev. denied, 156 Wn.2d 1004 (2006)<sup>3</sup>. Clearly in this case, the evidence against Williams was overwhelming and necessarily led to a finding of guilty. Officer Moran plainly observed Defendant standing within five feet of Ms. Curley when he arrived to the dog park. 1/15/09 RP 19. There was a No Contact Order in place against Defendant for the protection of Ms. Curley and Defendant was in clear violation of the terms of the order. 1/15/09 RP 25-26.

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<sup>3</sup> In State v. Dykstra, defense counsel stated several times during closing argument that numerous other people had been involved in the crime, but that only the defendant had been prosecuted. 127 Wn. App. 6-7. Defense counsel then invited the jury to speculate on why the State only charged Dykstra. Id. Defense counsel essentially suggested that Dykstra should be acquitted in "the spirit of fairness." Id. On rebuttal, the prosecutor told the jury that the State had prosecuted every person that it had sufficient evidence to prosecute. Id. The Dykstra court held the prosecutor's response to the defense argument was "entirely appropriate." Id. at 8.

Lastly, even if this Court finds the comment by the prosecutor in her rebuttal argument improper, Williams has not shown that the argument resulted in any prejudice that could not have been cured by an admonition to the jury. See Hoffman, 116 Wn.2d at 93. Therefore, Williams' argument must be rejected and the convictions affirmed.

**D. CONCLUSION**

The verdict of the jury is supported by substantial evidence. Viewing the entirety of the evidence, with all reasonable inferences drawn in favor of the State and most strongly against Williams, the State did present sufficient evidence to establish Williams guilty at trial. Furthermore, the prosecutor's comments to the jury in rebuttal argument were proper when considered in the context of the entire trial as well as defense counsel's closing remarks. Williams' failure to object to an alleged improper remark constituted a waiver since he is unable to establish that the comments were so flagrant and ill-intentioned that the resulting prejudice could not have been neutralized by an admonition to the jury. Moreover, Williams' conviction is supported by overwhelming evidence and error, if any,

was harmless beyond a reasonable doubt. Therefore, the conviction should be affirmed.

DATED this 21 day of September, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

RISA D. WOO, WSBA #35411  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Carolyn Morikawa, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GORDON WILLIAMS, Cause No. 63038-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Holly G. Gilmore*

Name HOLLY GILMORE  
Done in Kent, Washington

9.21.09

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