

64081-0

64081-0

NO. 64081-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOEY WAYLAND,

Appellant.

2010 MAY 28 PM 4:45
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL AND SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	4
1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT WAYLAND OF THEFT IN THE THIRD DEGREE.....	4
2. THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT	7
a. The Prosecutor’s Comments Were Not Improper.....	7
b. Arguments By The State, Even if Improper, Were Not Sufficiently Flagrant To Justify Reversal.....	16
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Anderson, 153 Wn. App. 417,
220 P.3d 1273 (2009)..... 11, 14

State v. Bennett, 161 Wn.2d 303,
165 P.3d 1241 (2007)..... 9, 10, 11

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 8

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 5

State v. Carver, 122 Wn. App. 300,
93 P.3d 947 (2004)..... 12

State v. Charlton, 90 Wn.2d 657,
585 P.2d 142 (1978)..... 9

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 5

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006)..... 8

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996)..... 4

State v. Hoffman, 116 Wn.2d 51,
804 P.2d 577 (1991)..... 16

State v. McKenzie, 157 Wn.2d 44,
134 P.3d 221 (2006)..... 17

State v. Myers, 133 Wn.2d 26,
941 P.2d 1102 (1997)..... 5

<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	8
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	8, 13
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2001), <u>opinion corrected</u> , 39 P.3d 294 (2002).....	17, 18
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	16
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	5
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006), <u>cert. denied</u> , 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).....	17

Statutes

Washington State:

Laws 2009, ch. 431	5
RCW 9A.56.050	5

Other Authorities

WPIC 1.02.....	18
WPIC 4.01.....	9, 10, 18

A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Here, there was abundant evidence presented at trial which led the jury to find Wayland guilty of the crime of Theft in the Third Degree. Should Wayland's claim of insufficiency of the evidence be rejected because the jury found the State's witnesses' testimony credible?

2. The State is generally afforded wide latitude in making arguments to the jury. Absent a proper objection and a request for a curative instruction a defendant waives the issue of prosecutorial misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not cure the prejudice. Here, the prosecutor merely restated the well accepted and judicially approved definition of reasonable doubt and did not misrepresent or dilute the burden of proof. Should Wayland's claim of prosecutorial misconduct be rejected because the trial prosecutor's arguments in closing were proper and not prejudicial?

B. STATEMENT OF THE CASE

1. PROCEDURAL AND SUBSTANTIVE FACTS

At about 12:30 am on September 21, 2008, Joey Wayland entered the QFC store located at 1401 Broadway in the Capitol Hill neighborhood of Seattle. 6/9/09 RP 18, 22, 24. Wayland entered the store, selected a cart and placed his backpack in the front of the cart with the backpack open so he could place items in the bag. Id. at 127. Wayland walked down isle number 1, referred to as the beer aisle, selected two six-packs of beer from the store shelves and placed the two six-packs in his backpack. Id. at 28-131. Wayland then passed all points of sale and left the store without paying for the items. Id. at 29. When Wayland exited the store he was wearing the backpack, in which he had hidden the beer, strapped to his shoulders. Id. at 32. Loss Prevention Officers (LPO) Matthew Evans and Colin Gierzak stopped Mr. Wayland outside the store and asked him to return to the QFC with the items. Id. at 35. Mr. Wayland refused and the loss prevention officers tried to detain Wayland for police. Id. at 38-39. Wayland struggled with Evans and Gierzak, biting Gierzak on the arm and punching both LPOs with closed fists in an attempt to get away.

RP 39-46. The backpack that contained the stolen beer was not recovered. Id. at 48.

On October 9, 2008, Joey Wayland returned to the QFC store at 1401 Broadway and was seen by Loss Prevention Officer Trevor Lucas in the deli section of the store selecting items and placing them in a backpack. 6/10/09 RP 50-51. Lucas observed Wayland leave the store without paying for any of the items. Id. at 54. Lucas followed Wayland out of the store, identified himself as store security and requested that Wayland come back inside the store. Id. at 62. Wayland refused to return to the store, and punched Lucas in the head with a closed fist. Lucas attempted to detain Wayland for police but Wayland struggled with Lucas, eventually biting Lucas in his right arm. Id. at 63-75.

Wayland was charged with two counts of robbery in the second degree. CP 1-5. The jury found Wayland not guilty of the robberies but found him guilty of the lesser included offenses of theft in the third degree for both the September 21, 2009, incident and the October 9, 2009, incident. CP 11-14. Wayland filed a timely appeal. CP 62-66. Wayland is not appealing his conviction for theft in the third degree that occurred on October 9th, only the one that occurred on September 21, 2009. Appellant's Brief at 4.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE TO CONVICT WAYLAND OF THEFT IN THE THIRD DEGREE.

Wayland argues that there was insufficient evidence to prove that he committed Theft in the Third Degree because the evidence failed to show Wayland took property belonging to QFC out of the store with the intent to deprive QFC of that property. His argument fails. The State presented evidence that Wayland entered the store, placed two six-packs of beer into his backpack, passed all points of sale and left the store with the beer without paying for the items. Further, the State presented evidence that when asked to come back inside the store Wayland refused and engaged in a struggle with the LPOs. When viewing the evidence in the light most favorable to the State, a rational trier of fact easily could have found that Wayland committed the crime of theft in the third degree. Thus, this Court should affirm the jury's verdict.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). The elements of a crime

may be established by either direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Therefore, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id. Credibility determinations are for the finder of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

A person commits the crime of Theft in the Third Degree if he or she commits theft of property or services which does not exceed two hundred fifty dollars in value. RCW 9A.56.050(1)(a).¹

A jury is permitted to infer intent where it is plainly indicated as a matter of logical probability from the circumstantial evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). There

¹ Recently amended statute increased the maximum value to \$750. Laws 2009, ch. 431.

was ample evidence from which a rational trier of fact could find that Wayland intended to deprive QFC of their property. LPO Matthew Evans described watching Wayland select first one, and then a second six-pack of beer from the store shelves and place them in his backpack. 6/9/09 RP 129-31. LPO Evans maintained near constant surveillance on Wayland from the time he entered the store until the time he left. Id. at 124-34. The only time Evans did not have surveillance on Wayland was when Evans' partner Colin Gierzak did. Id. at 133-34. LPOs Gierzak and Evans witnessed Wayland pass all cash registers where a customer would normally pay for their items and leave the store without paying. 6/9/09 RP 29; 6/10/09 RP 17. Both Evans and Gierzak testified that Wayland was still wearing his backpack which contained the stolen beer when he left the store. 6/9/09 RP 31; 6/10/09 RP 32.

There was no testimony that Wayland offered to return the merchandise, only that he refused to come back inside the store when requested and fought with both LPOs. 6/9/09 RP 34-39; 6/10/09 RP 17-32. Wayland's actions of selecting beer, hiding it in his backpack, walking past all points of sale, leaving the store without paying for the items, refusing to go back into the store and then fighting with the loss prevention officers all demonstrate his

intention of depriving the store of its property. The jury obviously found the testimony of Evans and Gierzak as it related to the theft credible and convincing.

2. THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT.

Wayland argues that his convictions must be reversed because of prosecutorial misconduct. Specifically, Wayland argues that the prosecutor committed misconduct during closing and rebuttal closing arguments by improperly diluting the burden of proof. Wayland's arguments fail. The State did not dilute the burden of proof by merely rephrasing the well established and judicially approved definition of reasonable doubt. Wayland provoked one of the State's alleged instances of misconduct with his own closing argument and then failed to object to all of the challenged remarks. To the extent that any of the prosecutor's arguments were improper, any error was harmless.

a. The Prosecutor's Comments Were Not Improper.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw

reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The Appeals Court reviews the prosecuting attorney's allegedly improper remarks in 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. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred the Court first examines whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecutor's statements were improper and defense objected at the time they were made, the Court will then consider whether there was a substantial likelihood that the statements affected the jury. Id. at 145.

Wayland argues that the prosecutor committed prosecutorial misconduct by diluting the burden of proof. Appellant's Brief at 11. Wayland points to comments made by the prosecutor regarding the burden of proof during closing and rebuttal as grounds for the

alleged misconduct. Wayland did not object to any of the comments at trial, nor did he request a curative instruction. 6/11/09 RP 55-98. Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

There is no question that in a criminal case the State must prove every element of each offense charged beyond a reasonable doubt. WPIC 4.01. In this case, the Court used Washington Pattern Jury Instruction 4.01 to instruct the jury both as to the State's burden and as to what constituted a reasonable doubt. WPIC 4.01 reads "The State has the burden of proving every element of each offense beyond a reasonable doubt...A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 43. WPIC 4.01 has been approved by the Washington State Supreme Court. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).

Wayland claims that the trial prosecutor told the jury "that to find a reasonable doubt and acquit Wayland they had to identify a specific reason to doubt." Appellant's Brief at 12. However, the

Appellant in his brief misrepresents what the prosecutor actually said to the jury. During closing arguments the State discussed the burden of proof with the jury. The prosecutor said, "Now, the State has a high burden, beyond a reasonable doubt...It is not beyond any doubt. It is not beyond all doubt. It is beyond a reasonable doubt. And what that means is that you must have a reason, a reason to doubt Mr. Wayland's guilt. It is a high burden, but it is not an impossible one. And I am going to talk to you now about how and why the State has met that burden." 6/11/09 RP 60.

Wayland's claim that the State's argument that "reasonable doubt" means the jury "must have a reason to doubt Mr. Wayland's guilt" was improper and must fail. The prosecutor in making the argument was simply rephrasing the standard for reasonable doubt outlined in WPIC 4.01. WPIC 4.01, which was given to the jury, clearly says "Reasonable doubt is a doubt for which a reason exists." CP 43. The Washington State Supreme Court has held that it is not improper to define "reasonable doubt" as "a doubt for which a reason exists." State v. Bennett, 161 Wn.2d 303 (2007). In this case, the prosecutor argued for the jury to find Mr. Wayland not guilty they must have a reasonable doubt as to his guilt. If it is proper to define "reasonable doubt" as "a doubt for which a reason

exists,” State v. Bennett, 161 Wn.2d 303 (2007), WPIC 4.01, then it follows that it is proper to argue that in order to find Wayland not guilty the jury “must have a reason to doubt Mr. Wayland’s guilt.”

The State here did not suggest, as the prosecutor did in State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), that the jury had to supply a specific reason for acquitting the defendant. In Anderson, the prosecutor said “in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because’ and then you have to fill in the blank.” Id. at 31. In this case the prosecutor did not argue that the jury need specify a reason for doubting Wayland’s guilt, that they needed to “fill in the blank,” only that they must have a reason to doubt his guilt and then went on to explain why they should not have any doubts as to his guilt. While the Court in Anderson held that the prosecutor’s remarks discussed above were improper the Court found that the comments were not so prejudicial as to require reversal. Id. at 432. The prosecutor’s comments in this case did not rise to the level that they did in Anderson.

During closing defense counsel discussed the reasons the jury should doubt Wayland’s guilt, including the fact that the State had not introduced the backpack in which Wayland placed the

items he stole from QFC in either instance. In response, the prosecutor said that the fact that the State didn't bring in the actual backpack that was captured in the surveillance photos was not a reason to doubt. That statement, when examined in the entire context of the closing, was in direct response to defense counsel's comment about the physical evidence the State did not present, it was not emphasizing that the jury needed a specific reason to acquit Wayland as the appellant suggests. 6/11/09 RP 94; Appellant's Brief at 13. A prosecutor's remarks are not grounds for reversal, even if otherwise improper, if they were invited or provoked by defense counsel and were pertinent to reply to his arguments. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Wayland's other claims of misconduct must also be rejected. Wayland claims that the prosecutor told the jury "they should believe Gierzak and Evans' testimony because '[t]here is no reasonable explanation for why they would be dishonest about Wayland taking property from the store." Appellant's Brief at 12-13. Wayland claims this comment was misconduct because it "reverses the State's burden of proof and presumption of innocence." Appellant's Brief at 13. However, not only has the appellant again

misrepresented to this Court what the prosecutor actually told the jury but it ignores the fact that a prosecutor's closing remarks must be evaluated in 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. Russell, 125 Wn.2d 24, 85-86 (1994).

What the prosecutor actually told the jury regarding Evans and Gierzak's testimony was "[Y]ou are the sole judges of the credibility of the witnesses in this case. And so when I talk about the elements and what the evidence shows, I'm going to be keeping in mind credibility issues." 6/11/09 RP 58. The prosecutor then went on to talk about some of the tools for the jury to use when evaluating the credibility of witnesses that are contained in the jury instructions. Id.; CP 39. One of the factors the jury is to consider according to the jury instructions is the reasonableness of the witness' testimony in light of all of the other evidence. Id. After discussing how the jury instructions suggest jurors examine a witness' credibility, the prosecutor recounted the testimony of the State's witnesses as it related to the theft committed by Wayland on September 21, 2009. 6/11/09 RP 61-63. After talking about the testimony that related to the theft the prosecutor told the jury "there is no reasonable explanation for why Mr. Gierzak and Mr. Evans would be dishonest

about this particular fact of Mr. Wayland stealing.” 6/11/09 RP 63.

The prosecutor did not suggest that the jury would have to find that Evans or Gierzak were lying in order to acquit Wayland, but pointed out that there was no evidence presented at trial which would suggest that Evans or Gierzak had anything to gain personally, or had any other motive for presenting false testimony against Mr. Wayland. The prosecutor’s argument was essentially, in light of all of the evidence presented, there was no reasonable explanation for Evans or Gierzak to be dishonest in their testimony. The prosecutor’s argument was related to the witnesses’ credibility and was proper in light of the Court’s instructions to the jury, the evidence presented and the State’s closing as a whole.

While the appellant relies on State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) for the proposition that the prosecutor’s comments regarding the credibility of Evans and Gierzak were improper, Anderson, 153 Wn. App. 417 (2009), actually held that comments similar to the ones made in Wayland’s case were not improper. In Anderson, 153 Wn. App. 417 (2009), the appellant claimed that the prosecutor’s statement “that the State’s witnesses were ‘just telling the truth’ were improper. Id. at 430. The Court of Appeals disagreed and held that the comment

was not improper. The Court said “Viewed in context, the prosecutor’s statements were intended to clarify the law and argue inferences from the evidence.” Id. at 431.

While here the appellant claims the prosecutor “told the jury that it ‘must have a reason’ to find Wayland not guilty and faulted Wayland for failing to supply a reason to disbelieve the State’s witness” (Appellant’s Brief at 14), the appellant fails to cite any place in the record where the prosecutor suggested that Wayland had any burden at all, much less faulted him for failing to meet such a burden. In making such an accusation the appellant clearly misrepresents the State’s arguments to the jury. The prosecutor never, at any time suggested that Wayland had any burden at all. In fact, the trial deputy reminded the jury of the State’s burden throughout closing arguments. The prosecutor told the jury “The State has a high burden; beyond a reasonable doubt...It is a high burden, but it is not an impossible one.” 6/11/09 RP 60. In addition, the State reminded the jury that Wayland was presumed innocent until proven guilty. Id. at 71.

b. Arguments By The State, Even if Improper,
Were Not Sufficiently Flagrant To Justify
Reversal.

Even if this Court finds that the remaining challenged remarks were improper, reversal is inappropriate because Wayland did not object to any of them. 6/11/09 RP 55-98. Failure to object to an improper argument constitutes a waiver of the claimed error on appeal unless the 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. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). 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 appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). In this case, reversal is not required because any error easily could have been cured by an instruction to the jury.

Even if the Court finds that the prosecutor's comments in this case were improper, reversal is nonetheless inappropriate because Wayland cannot establish that he suffered any resulting prejudice. Prejudice is established only if the defendant demonstrates that there is a substantial likelihood that the misconduct affected the

jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Thus, even if the prosecutor commits error, a conviction will not be reversed "unless, within reasonable probabilities, the outcome of the trial could have been materially affected had the error not occurred." State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citations omitted), cert. denied, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007). Here, Wayland cannot meet this burden.

First, it is unlikely that the prosecutor's single, isolated remark about the jury needing a reason to doubt the defendant's guilt had any effect on the verdict in this case. The remark itself was a rather minor, insignificant part of the prosecutor's overall closing argument. It is clear that it did not have a prejudicial effect since the jury did not find Wayland guilty of the two most serious charges. CP 11-12.

Additionally, the court instructed the jury prior to closing argument that its duty was to decide the case based solely on the evidence produced at trial, and that counsel's argument is not evidence. CP 40. The jury is presumed to follow the court's instructions. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d

1245 (2001), opinion corrected, 39 P.3d 294 (2002). There is nothing inherent in the facts of this case or in this particular remark to forestall that presumption. Thus, it is unlikely that this remark influenced the jury's decision.

Second, the court properly instructed the jury on the proper burden of proof. CP 43; WPIC 4.01. In addition, the court instructed the jury that arguments contrary to the law given by the court must be disregarded, that the defense had no burden to prove that a reasonable doubt existed, and that a reasonable doubt could arise from evidence or lack of evidence. CP 40, 43; WPIC 1.02; WPIC 4.01. Thus, reversal is unwarranted.

D. CONCLUSION

After viewing the evidence presented at trial in the light most favorable to the State, any rational trier of fact could have found the essential elements of theft in the third degree had been proved beyond a reasonable doubt. Further, the prosecutor's arguments were not improper, and even if the court finds that they were, they

did not rise to the level requiring reversal. The trial court should be affirmed.

DATED this 28th day of May, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

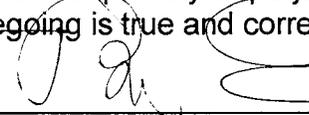
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent in STATE V. JOEY WAYLAND, Cause No. 64081-0-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.



Name
Done in Seattle, Washington

05/28/10
Date