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COURT OF APPEALS
DIVISION ONE
JUN 06 2011

NO. 66223-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

(King County Superior Court Cause No. 09-1-05312-6 SEA)

CITY OF AUBURN,

Petitioner,

v.

RONALD J. CRAWFORD,

Respondent.

BRIEF OF PETITIONER

Daniel B. Heid, WSBA # 8217
Attorney for Petitioner, City of Auburn
25 West Main Street
Auburn, WA 98001-4998
Tel: (253) 931-3030

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

A. IDENTITY OF PETITIONER.....1

B. DECISION BELOW.....1

C. ISSUES PRESENTED FOR REVIEW1

D. STATEMENT OF THE CASE.....1

E. SUMMARY OF ARGUMENT4

F. ARGUMENT IN SUPPORT OF REVIEW8

 1. The Defendant Failed to Object to What He Now Claims is
 Prosecutorial Misconduct.....9

 2. The Defendant Failed to Prove that the Prosecutor’s
 Statements were Improper10

 3. The Defendant Failed to Prove that the Prosecutor’s
 Statements were Prejudicial.....13

 4. The Defendant Failed to Prove that the Prosecutor’s
 Statements Appealed to the Jury’s Sympathy.....19

G. CONCLUSION.....20

TABLE OF AUTHORITIES

Table of Cases

State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008).....11

State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)15

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).....15

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997)7

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978).....6

State v. Dennison, 72 Wn.2d 842, 435 P.2d 526 (1967).....11

State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990).....5, 19

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003)8

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).....7, 8, 10, 12

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)13

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)10, 13

State v. Guizzotti, 60 Wn. App. 289, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991)6

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....11

State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009)9, 19

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993)10, 13

State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006)10

State v. Lewis, 156 Wn. App. 230, 233 P.3d 891 (2010).....13

<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407, <i>reconsideration denied, cert. denied</i> , 479 U.S. 995 (1986).....	7, 11
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	8, 15
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	13
<i>State v. Scott</i> , 58 Wn. App. 50, 791 P.2d 559 (1990).....	12
<i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) <i>cert. denied</i> , 523 U.S. 1008, 118 S.Ct. 1193 (1998).....	10
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).....	9
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	12
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006), <i>cert. denied</i> , 551 U.S.1137 (2007).....	10, 13
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359, 392 (2007).....	9

Statutes

RCW 9A.36.041.....	3
RCW 9A.76.175.....	2
RCW 10.99.020.....	3
RCW 69.50.412.....	2

A. IDENTITY OF PETITIONER

The Petitioner, City of Auburn, hereinafter referred to as the City, is the prosecuting jurisdiction of the case on review before this Court.

B. DECISION SUBJECT OF REVIEW

The City is requesting this Court to reverse the King County Superior Court's finding of prosecutorial misconduct and order remanding the matter back to the Auburn Municipal Court.

C. ASSIGNMENT OF ERROR

The Superior Court erred by finding that statements made by the trial prosecutor during closing arguments amounted to prosecutorial misconduct when: 1) there was no objection to the statements; 2) an instruction was given to the jury that that the attorneys' arguments were not evidence and to disregard any comment that did not comport with the evidence or the law the court had given [Jury Instruction No. 1 (CP 387-88)]; and 3) the statements made by the prosecutor were made during his rebuttal argument and were in response to the arguments made by defense counsel.

D. STATEMENT OF THE CASE

On January 7, 2009, Officers Aaron Williams and John Bruce of the Auburn Police Department were dispatched to 3221 20th Street SE, in Auburn, Washington, in response to a complaint made by sixteen year old

Heidi Crawford that her father was in the house with several other people, smoking crack cocaine, and that at some point she had gotten into an argument with him and that he had lit a crack pipe, inhaled, and then blew the smoke in her face. (CP 245-246.)

When the police arrived at the dispatched address, they knocked on the door, and were met by Ms. Heidi Crawford. (CP 245-46.) Heidi recounted her call to 911 and also advised the police that she's been around drugs and their use her entire life due to her father has a history of drug use. (CP 249-50.) While describing what she saw and the events leading up to her calling 911, Officer Williams could see that Heidi was upset and after asking the police what she should do, began crying heavily.

Id.

Officers asked Heidi to have her father, Ronald Crawford [hereinafter the Defendant] come out and talk with them. (CP 246-247.) Heidi attempted unsuccessfully in having the Defendant come to the door. (CP 248-249.) Officer Williams also rang the doorbell, knocked on the door, and identified himself as the police, requesting that the Defendant come to the door. (CP 249.) Defendant did not respond. *Id.*

The Defendant was subsequently charged and convicted of 1) Unlawful Use of Drug Paraphernalia (RCW 69.50.412); 2) Making a False Statement to a Public Servant (RCW 9A.76.175); and 3) Assault in the

Fourth Degree, Domestic Violence (RCW 9A.36.041-10.99.020). CP 357-60, 410-13.

Raised for the first time in his appeal to the Superior Court, the Defendant argued that statements made by the trial prosecutor in final argument were prosecutorial misconduct. The exact words spoken by the prosecutor, which were not objected to by the Defendant at trial, are as follows:

And there is an emotional impact in this case. You know what that emotion is that you're feeling, that sort of anger, that sort of aspect to the evidence, that feeling that you get? You know what that is? That's you being convinced beyond a reasonable doubt that he's guilty. That's exactly what that is.

(CP 220.)

To put these comments into perspective, it must be noted that they were made in final argument - - - in response to closing argument made by the defense, provided in part as follows:

MR. JOHNSON: . . . Now, as far as Heidi, yes, her testimony was all over the place. And, granted, it's his daughter. I don't think there's many of us here who would ever want to see a family member hurt or put through the judicial system, et cetera. Let's look at what Heidi presented. We know that she's had a history of run -- running away. That was brought out during the City's case. When she's talking to the 911 operator she's asking about if there's any warrants out for (CP 215) her from a diff -- you know, all these court -- different courts. She was angry that another woman was wearing her clothes. Now, remember what her testimony was, her father's response to

that was. Why is she wearing my clothes, dad? Because she had nothing to wear. Now, that's kind of a rational response to providing clothing, possible shelter to another person if they were without. But, she's upset about this. She wants that person and the others, understandably, to get lost. But, she's also fighting with her father that morning over her relationship with a man, a man with a 16-year-old, that's inappropriate, and dad threatened her with that. But, I think the phrase she said was "statutory rape."

So, is it really beyond the realm of possibility that a 16-year-old girl getting into a fight with her father about the different things, given her background, given some -- the situation there [inaudible], and that after actually living first-hand the process of the police coming into one's house, you know, I've always said this before, that, you know, the government is not a very good houseguest. You know, you invite them into your house, but when you want them to leave, they don't necessarily leave. They don't necessarily get out of your life when you want them to. And I think Heidi learned that lesson [inaudible]. She's had time to reflect, time to calm down. She's not a (CP 216) 16-year-old emotional teenage girl in a fight with dad. She's had some time to reflect, think about what was said. That statement that's provided here was written by a police officer who wants to make an arrest. No agenda? No purpose there behind that? Don't know. . . .

(CP 217.)

E. SUMMARY OF ARGUMENT

The Defendant argued, and the Superior Court apparently agreed, that the statements made by the prosecutor appealed to jury's emotions and thus deprived the Defendant of a fair trial. While it may be that appeals to jury sympathy and compassion can be subject of prosecutor misconduct complaints, the facts of this case do not support such a

finding. In *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), the defendant complained because the prosecutor apologized to the victim's mother for having mispronounced the victim's name. The defendant's argument was that the apology focused attention on the victim's mother in an effort to create sympathy. In that case, however, the court ruled that since the defendant neither objected nor offered curative instruction, his objection was waived.

In the case before this Court, defense counsel admits that there was not an effective objection. (CP 16.) In actuality, not only was there *not* an effective objection (defense counsel's language), there was no objection at all. Moreover, there was no appeal to the jury's sympathy nor was there any improper misstatement of the law. The exact words spoken by the prosecutor now subject to the defense counsel's complaints were as follows:

And there is an emotional impact in this case. You know what that emotion is it your feeling that sort of anger that sort of aspect to the evidence that feeling you get? You know what that is that's you've been convinced beyond a reasonable doubt that he's guilty that's exactly what that is.

(CP 220.)

These words do not change the standard of guilt, nor do they subvert or sidestep the obligation of the jury to be convinced beyond a reasonable doubt to find the defendant guilty. While defense counsel may not like the

argument, it does not misstate the law; it only characterizes what the jurors can feel when they are convinced beyond a reasonable doubt. That statement also does not impugn or undermine the “beyond a reasonable doubt” standard, nor does it change the obligation of a jury or what it takes to find the defendant guilty.

However, *for the sake of argument*, even if the argument could be seen as misconduct, the remedy is not reversal. When no curative instruction is requested, prosecutorial misconduct will only result in a reversal of a conviction only if the conduct is so flagrant and ill-intended that the error can not be deemed to be harmless. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). That cannot be reasonably said here. Moreover, a defendant seeking a mistrial based on improper prosecutorial argument has the burden of showing that the prosecutor’s remarks were improper and that a substantial likelihood exists that the misconduct affected the jury’s verdict thereby depriving the defendant of a fair trial.

Additionally, appellate courts, including superior courts when acting as appellate courts in RALJ cases, review a trial court’s determination only for abuse of discretion. *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991). Also, in *Guizzotti*, the court noted that whether improper prosecutorial argument necessitates mistrial is within the discretion of the *trial court*. “A trial

court abuses its discretion [only] when it adopts a view no reasonable person would take.” *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). That cannot be said here. The trial court took no action that could be said to constitute adoption of a position or view that no reasonable person would take.

Again, the prosecutor’s rebuttal closing argument was only acknowledgement of the jury’s reasonable reaction to the argument of defense counsel. But even if the prosecutor’s statements could somehow be seen as improper, not only was there no defense objection, the trial judge expressly instructed the jurors that the attorneys’ arguments are not evidence and instructed them to disregard any comment that did not comport with the evidence or the law. Further, and again assuming that the prosecutor’s statements were somehow problematic, clear precedent holds that reversal is not warranted where defense counsel failed to request a curative instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

The precedent in *Fisher* reflects the legal principal that it is only fair that prosecutors are given latitude¹ in responding to defense counsel’s closing arguments, especially where those arguments are unsupported by testimony, outlandish and irresponsible. The law currently imposes a duty

1. *State v. Mak*, 105 Wn.2d 692, 698, 718 P.2d 407, *reconsideration denied, cert. denied*, 479 U.S. 995 (1986), uses the term “wide latitude.”

on the part of the defense to object and request a curative instruction when the defense believes that a prosecutor crossed the line.

But more than that, if the Superior Court's holdings were the controlling law, that would result in prosecutors suffering from the chilling effect of being constrained from responding to unreasonable, unsupported, outlandish and irresponsible defense arguments; and if defense counsel face no consequences when they make unreasonable, unsupported, outlandish and irresponsible closing arguments, there would at least be a temptation to push the limits of argument in terms of unreasonable, unsupported, outlandish and irresponsible defense arguments. That, in turn, would make it harder for prosecutors to have a fair trial process.

F. ARGUMENT

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The appellate courts review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d

432 (2003).

To prevail on a claim of prosecutorial misconduct, the defendant “bears the burden of proving, first, that the prosecutor’s comments were improper and, second, that the comments were prejudicial.” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, 392 (2007). Furthermore, the courts have held that if defense counsel fails to object to an improper remark, the court will reverse only if the remark is “so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.” *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). In the matter before this court, the Defendant not only failed to object to what he now claims as an improper remark at the time of trial, but also failed to show both the required elements; that the prosecutor’s comments were improper and that the comments were prejudicial. Thus, the Defendant’s appeal based on allegations prosecutorial misconduct should be denied and the trial court’s rulings upheld.

1. THE DEFENDANT FAILED TO OBJECT TO WHAT HE NOW CLAIMS IS PROSECUTORIAL MISCONDUCT

The appellate courts of this state have consistently stated that any objection to prosecutorial misconduct is waived by failure to make a timely objection and request a curative instruction. *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct.

752, 112 L.Ed.2d 772 (1991); *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993). Even if what the prosecutor said could constitute or be deemed prosecutorial misconduct, something the Plaintiff strenuously disputes, in this case, the Defendant did not object. Defense counsel's failure to object to prosecutorial misconduct at trial constitutes waiver of the objection on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" and is incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). See also *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137 (2007) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) cert. denied 523 U.S. 1008, 118 S.Ct. 1193 (1998)). Therefore, the Defendant's objection to the potential prosecutorial misconduct in this case is waived.

2. THE DEFENDANT HAS FAILED TO PROVE THAT THE PROSECUTOR'S STATEMENTS WERE IMPROPER.

To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). The Defendant has not and cannot meet that burden. The prosecutor has wide latitude to argue the facts in evidence and reasonable

inferences therefrom. *State v. Mak*, 105 Wn.2d 692, 698, 718 P.2d 407, *reconsideration denied, cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *see also State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008). Additionally, the courts have indicated that even where the remarks of a prosecutor would otherwise be improper, grounds for reversal were lacking when the remarks were invited, provoked or occasioned by the defense counsel, unless remarks went beyond pertinent reply and brought before the jury extraneous matters not in the record or were so prejudicial that instruction would not cure them. *State v. Dennison*, 72 Wn.2d 842, 435 P.2d 526 (1967).

In this case, the Defendant argues that the prosecutor committed prosecutorial misconduct by improperly attacking the Defendant and arguing facts not in evidence. More specifically, the Defendant takes exception to comments made by the prosecutor that the Defendant was blaming his own daughter. While defense counsel may feel like this was an “attack” against the Defendant, the prosecutor’s statements were not unfounded and were in fact supported by the record. The Defendant told the police that she (his daughter) was a runaway, she was not credible and that she was causing trouble. (CP 131) Once a defendant elects to testify on his own behalf, he places himself in the same footing as any other

witness, and comment on his testimony and credibility may be made by the prosecution in closing argument. *State v. Scott*, 58 Wn. App. 50, 791 P.2d 559 (1990). However, in this case, the defense rested without calling any witnesses. Defense counsel's argument was therefore fashioned solely on the defense theory – ostensibly based on the testimony and cross-examination of prosecution witnesses. And thus, the prosecutor's rebuttal was solely responding to defense counsel's argument.

Again, a prosecutor is allowed wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Reversal is not called for where defense counsel failed to request a curative instruction regarding the prosecutor's comments. *Fisher*, 165 Wn.2d at 747. Moreover, the trial court instructed the jury that the attorneys' arguments were not evidence and to disregard any comment that did not comport with the evidence or the law the court had given. Under these circumstances, there was no prosecutorial misconduct. For that matter, the jury is presumed to follow the court's instructions that counsel's arguments are not evidence and to disregard arguments not supported by evidence. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

However, even improper remarks by the prosecutor 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. *State v. Weber*, 159 Wn.2d at 276-77, (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). Additionally, courts give a prosecutor's "rebuttal" arguments even more latitude than initial arguments. Again, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). This is especially so where, as here, the prosecutor is rebutting an issue the Defendant raised in his closing argument. *State v. Lewis*, 156 Wn. App. 230, 233 P.3d 891 (2010); *State v. Jones*, 71 Wn. App. 798, 809, 863 P.2d 85 (1993).

Even if a prosecuting attorney's rebuttal remarks were otherwise improper, they do not require reversal when "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. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995).

In this case, the prosecutor's statements were not an "appeal to the jury's emotions," as argued by the defense. They were a characterization of what the jurors were already feeling. The prosecutor did not say anything that would cause jurors to feel more or less sympathetic to

anything. More importantly, what the prosecutor was commenting on was what the jurors would have been feeling based on the defense argument. As noted above, the prosecutor's statements were in response to closing argument made by the defense, where he attempted to place blame for the situation on the Defendant's daughter; *e.g.*, she had a history of running away and she had some arguments with her dad (a dad who was smoking crack cocaine with his friends at the house where she lived and who blew crack cocaine smoke in her face when she objected to his drug use. (CP 217.)) Defense counsel also argued to the jury that even though the police had been invited into the residence:

...[T]he government is not a very good houseguest. You know, you invite them into your house, but when you want them to leave, they don't necessarily leave. They don't necessarily get out of your life when you want them to.

(CP 217.)

Finally, Defense counsel "argued" that the statements the police provided were "written by a police officer who wants to make an arrest. No agenda? No purpose there behind that?" (*Id.*)

In this case, it may be that the defense counsel doesn't care for the prosecutor's arguments, but they were proper in the context in which they were given, and they were a reasonable response to the Defendant's (defense counsel's own) arguments.

3. THE DEFENDANT HAS FAILED TO PROVE THAT THE PROSECUTOR'S STATEMENTS WERE PREJUDICIAL.

A prosecutor's improper comments are prejudicial "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) (emphasis the Court's) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)). Even if, for the sake of argument, the Defendant could show that the prosecutor's comments were improper, the Defendant has not shown that the comments were so persuasive or influential that they affected the jury's verdict and moreover, they were so prejudicial that no instruction could cure them. *See State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

However, "[a] reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments ... by looking at the comments in isolation but by placing the remarks 'in the context of the total arguments, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Brown*, 132 Wn.2d at 561. In this regards, the total context includes the prior statements and arguments of defense counsel. That context also includes the other things said by the prosecutor. The more complete text of the prosecutor's statements is as

follows:

MR. BOESCHE: So that's what he says. Blames it on her. Dad, I want you to get these people out of the house. I can't make them leave; you go make them leave. You call 911. You do it.

What are we doing today? Blaming her. You heard the arguments from the Defense. Many of the arguments are really insulting to the intelligence, and I won't go into most of those. But it's really unfortunate that that's what's happening here. His own daughter is the source of the evidence. She's being fed to the wolves in this case by her own father.

And there is an emotional impact in this case. You know what that emotion is that you're feeling, that sort of anger, that sort of aspect to the evidence, that feeling that you get? You know what that is? That's you being convinced beyond a reasonable doubt that he's guilty. That's exactly what that is.

(CP 219-20.)

The transcript of the proceedings defeats the Defendant's appeal based on prosecutorial misconduct in two respects: First, the transcript shows that the Defendant did not object to the prosecutor's statement at the time they were made; and second, the transcripts show that when taken in context, the prosecutor's statements are a reasonable rebuttal to arguments presented by the defense.

Furthermore, the Defendant has not and can not show that the prosecutor's statements had more of an impact on the jury than those given by the witnesses in this case. If the prosecutor committed any error at all, something that the City disputes, it would have been harmless in

light of the overwhelming and powerful testimony given by the responding officers and the Defendant's own daughter, which testimony alone provides a significant basis for the guilty verdicts.

Auburn Police Officer Williams testified that he was dispatched in response to a 911 call made by sixteen year old Ms. Heidi Crawford who reported that "her father was in the house with several other people, smoking crack cocaine, and that at some point she had gotten into an argument with him [and] [t]hat he had lit a crack pipe, inhaled, and then blew the smoke in her face." (CP 245.)

The police also testified that Heidi was pretty upset the first time when she opened the door and talked to the officers. They could tell she was almost at the verge of tears. The first time she went back and tried to get her dad to come to the door, she came back crying. Heidi also told the police that her father has a history of using drugs, that she's been around drugs and their use all her life. She described to the officer what the pipe [her dad used] looked like, describing it pretty accurately. (CP 250.) Heidi described a glass tube that is held and burned at one end, with a Brillo pad kind of a metal or steel wool that's cut up in little pieces, pushed in the bottom of the pipe, and used to hold the drug in place while it's being smoked. (CP 250.) Based on the officer's training and experience, he was able to determine that the device that was described was consistent with a

crack cocaine pipe. (CP 251.)

The police also said that “[Heidi’s] story seemed genuine. She was able to accurately describe drugs and drug paraphernalia, and she was able to tell [the police] that there is at least—at least three other people in the house. (CP 252-253.)

Officer Williams asked the Defendant if there was anyone else in the house, to which he said that there was [only] one other people present in his house. (CP 260.) The Defendant also said that the door to a particular bedroom was stuck shut, and denied what Heidi was claiming. *Id.* Heidi said that the Defendant was lying about the bedroom door being stuck, and that there were three other people present in the house using drugs. (CP 260-261)

Officer Williams went down the hallway and started knocking on doors. An adult female exited one of the rooms. Two other doors were closed. (CP 261-262) As Officer Williams was knocking on doors, Heidi pointed to a piece of rubber tubing on the floor of the bathroom. (CP 262.) That rubber tubing was consistent with drug paraphernalia – drug usage. (CP 262.) The house was cleared, and a search warrant was sought. (CP 262-266.) Ultimately, other people were located in the house, contrary to the statement of the Defendant. (CP 263.)

This compelling evidence strongly supports the verdict and the

Defendant has not shown that the prosecutor's comments, to which he failed to object to at trial or ask for a curative instruction, was "so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice." *See State v. Jackson*, 150 Wn. App.877, 883, P.3d 533 (2009).

4. THE DEFENDANT HAS FAILED TO PROVE THAT THE PROSECUTOR'S STATEMENTS APPEALED TO THE JURY'S SYMPATHY.

The Defendant mischaracterizes the prosecutor's arguments as an appeal to the jury's emotions. The prosecutor did not say anything that would cause jurors to feel more or less sympathetic. Rather, what the prosecutor essentially said was "you [jurors] know what you feel and what you are feeling is a belief beyond a reasonable doubt that the Defendant is guilty." With that, it must be noted that the prosecutor's comment support the correct standard for guilt - a belief beyond a reasonable doubt that the Defendant is guilty.

In *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), the defendant complained because the prosecutor apologized to the victim's mother for having mispronounced the victim's name. The defendant's argument was that the apology focused attention on the victim's mother in an effort to create sympathy. In *Dennison*, the court ruled that as the defendant neither objected nor offered curative instruction, his objection

was waived. In the case before this Court, not only was there no objection, there was no appeal to sympathy at all, nor was there anything improper or a misstatement of the law. Rather, all that the prosecutor said was that the jurors knew what they, the jurors, were feeling and that their feelings were the product of the jurors having been convinced beyond a reasonable doubt of the Defendant's guilt. Again, the prosecutor's words did not change the standard of guilt, nor did they subvert or sidestep the obligation of the prosecutor to prove guilt beyond a reasonable doubt, or the obligation of the jury to be convinced beyond a reasonable doubt to find the Defendant guilty. While defense counsel may not like the argument, the argument does not misstate the law; it only characterizes what the jurors can feel when they are convinced beyond a reasonable doubt.

G. CONCLUSION

The statements made by the prosecutor to the jurors do not amount to prosecutorial misconduct as they were neither improper nor prejudicial. The statements were in direct response to argument of defense counsel. The Defendant has the obligation to show such and has failed to meet that obligation. Furthermore, the Defendant did not object, nor did he request a curative instruction, and when an objection is not made and no curative instruction is requested at the time of trial, a conviction will only be reversed if the misconduct is so flagrant and ill-intended that the error can

not be deemed to be harmless. As the Defendant has failed to meet these burdens, the City requests that this Court reconsider its decision to remand this case back for retrial and deny the Defendant's appeal.

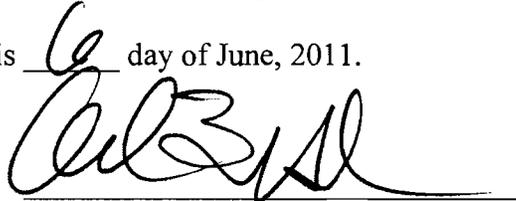
It is important for this Court to recognize that even if (for the sake of argument) the prosecutor's statements could have been construed as being inappropriate if made in initial closing argument, it is not the same where they were made in rebuttal, in response to defense counsel's comments. The appellate courts rightfully grant prosecutors even greater latitude in rebuttal arguments when responding to defense arguments. But, again, the defense did not object, and there is clearly sufficient evidence to support the verdicts. Moreover, the trial court instructed the jury that attorney arguments are not evidence and that they are to disregard any comment that did not comport with the evidence or the law the court had given (assuming that the prosecutor's comments could even be seen as not comporting with the evidence).

Moreover, if the Superior Court's holdings were the controlling law, there would be two resultant effects; (1) prosecutors would suffer the chilling effects of being constrained from responding to unreasonable, unsupported, outlandish and irresponsible defense arguments; and (2) defense counsel would face no consequences if they make unreasonable, unsupported, outlandish and irresponsible closing arguments while at the

same time being relieved of their obligation to object to the prosecutor's justifiable response to those arguments. Moreover, as an additional result of that, defense council (certainly some) would be more tempted to, and perhaps emboldened to, push the limits of their arguments in terms of unreasonable, unsupported, outlandish and irresponsible defense arguments. That, in turn, would further slant the playing field, making it even harder for prosecutors to have a fair trial process.

For all of these reasons, the prosecutor's comments are not misconduct, there is no basis for reversing and remanding for re-trial, and the defense challenge alleging prosecutorial misconduct must fail. To be fair, in this case, the Superior Court's erroneous ruling should be reversed.

Respectfully submitted this 6 day of June, 2011.

A handwritten signature in black ink, appearing to read 'Daniel B. Heid', written over a horizontal line.

Daniel B. Heid, WSBA # 8217
Attorney for Petitioner, City of Auburn
25 West Main Street
Auburn, WA 98001-4998
Tel: (253) 931-3030

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF AUBURN,

Petitioner,

v.

RONALD J. CRAWFORD,

Respondent.

NO. 66223-6-I

CERTIFICATE OF SERVICE
OF BRIEF OF PETITIONER

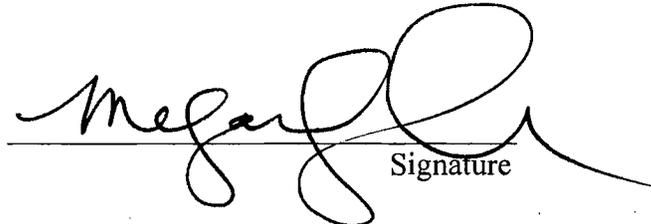
King County Superior Court
Cause No. 09-1-05312-6

I, Megan B. Stockdale hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Brief of the Petitioner concerning the above entitled matter to:

Attorney for Defendant/Respondent
Stephen G. Johnson
925 South Ridgewood Avenue
Tacoma, Washington 98405
badseedlawyer@gmail.com

by mailing in the United States Mail, postage prepaid, to the above mailing address, and by sending the same to the above e-mail address, on the 6th day of June, 2011.

SIGNED at Auburn, Washington, this 6th day of June, 2011.


Signature

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COURT OF APPEALS
STATE OF WASHINGTON
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