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67837-0

NO. 67837-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

OCTAVIUS ROSTICK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. Here, the State presented evidence that Rostick made many inconsistent statements relating to where and how he obtained stolen property, that he pawned the property for a fraction of its worth, that he pawned the property after being expressly warned that they could be stolen, that he repeatedly changed his story when confronted by police, and that he admitted that he had lied. Did the State produce sufficient evidence to support Rostick's conviction for trafficking in stolen property in the second degree?

2. In order to establish prosecutorial misconduct, a defendant must prove that a prosecutor's remark was improper and that it prejudiced his right to a fair trial. The failure to object to an improper remark constitutes a waiver unless the comment is so flagrant and ill-intentioned, and the resulting prejudice so enduring, that a jury admonition could not neutralize its effect. Here, in rebuttal, the prosecutor once referred to a suggestion made by defense counsel as a "red herring." Has Rostick failed to identify

any improper remark? And if improper at all, has Rostick failed to demonstrate the prejudice necessary to warrant reversal and remand?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Octavius Rostick, was charged by information with one count of trafficking in stolen property in the second degree. CP 1. Prior to trial, the State amended the information adding a second count of trafficking in stolen property in the second degree. 1RP 4. The jury returned verdicts of guilty on both counts. 5RP 8.<sup>1</sup>

2. SUBSTANTIVE FACTS

On the evening of April 15, 2009, Mrs. Dana Leavitt returned to her home in Bellevue after spending the day visiting her father in the hospital. 3RP 6-7. When she opened the back door she could see wood splinters all over the entry way near the front door and

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<sup>1</sup> The verbatim report of proceedings consists of six volumes: 1RP (9/20/2011), 2RP (9/21/2011), 3RP (9/27/2011), 4RP (9/28/2011), 5RP (9/29/2011), and 6RP (10/21/2011).

down the hallway. 3RP 7. Upon realizing that her house had been broken into, Mrs. Leavitt ran to a neighbor's house and called police. 3RP 7.

After police arrived, Mrs. Leavitt and her husband, walked through the house and realized that four of their electric guitars were missing from the basement music room. 3RP 7, 11. Among the guitars taken were a Gibson guitar, valued at approximately \$3000, a Comanche guitar valued at \$2700, a Taylor guitar valued at approximately \$2700, and a Variax guitar valued at about \$800. Only the Taylor and the Variax guitars were later recovered. 3RP 11-12.

Mr. Leavitt provided Detective Lindquist of the Bellevue Police Department with serial numbers for each of the stolen guitars. 3RP 13, 37. Detective Lindquist took the serial numbers for the guitars and entered them on Leads Online, a system that tracks pawned property. 3RP 40-41. Detective Lindquist discovered that the Leavitts' Gibson and the Comanche guitars had both been pawned at Pawn X-Change at two separate locations. 3RP 42. The Comanche had been pawned on April 18, 2009, at Pawn X-Change on Rainier Avenue South in Seattle, Washington. 3RP 51. The Gibson was pawned on April 20, 2009, at the Pawn X-Change on

Aurora Avenue North in Seattle, Washington. 3RP 52. Detective Lindquist first contacted the pawn shop on Rainier Avenue, where the Comanche was pawned. 3RP 48. He then contacted the Pawn X-Change on Aurora Avenue where the Gibson had been pawned. 3RP 48. Detective Lindquist requested the pawn receipts and also obtained still photos of the person who pawned the guitar at that location. 3RP 48-49.

Detective Lindquist called the telephone number listed on the pawn receipts and spoke with Octavius Rostick, the person who had pawned both guitars. 3RP 54. On June 2, 2009, Rostick met with Detective Lindquist. 3RP 55. The detective advised Rostick of his Miranda rights and explained that he was not under arrest. 3RP 55.

When Detective Lindquist asked about the guitars, Rostick told him a story that he later recanted. 3RP 55-72. Initially, Rostick said that while he was in Pike Place Market a "white guy he had seen before but didn't know" approached him, gave him some guitars, and asked him to pawn the guitars for him. 3RP 56. Rostick said that he took the guitars, got on the bus, and pawned them. 3RP 56. Detective Lindquist found the story to be incredible and said to Rostick that nobody would give expensive guitars to a

stranger and ask them to pawn them. 3RP 63. Rostick then added that he had left laptop computers with the man as collateral while he pawned the guitars. 3RP 64. As Detective Lindquist asked more questions, Rostick's story quickly evolved and fell apart. 3RP 64.

Next, Rostick said that he concocted the story and that the man that asked him to pawn the guitars had also asked him to lie to the police. 3RP 65. Then, Rostick changed his story and admitted that there was no man in Pike Place Market. 3RP 65-66. Rostick claimed that he received a phone call from a man that he knew, that the man asked him to go to another location to pick up a guitar and to pawn it. 3RP 66. Rostick refused to provide the man's name and would not tell the detective where he had picked up the guitar. 3RP 66. He said that his ex-girlfriend went with him to the Pawn X-Change on Rainier, and that he took the money and delivered it to the man who had called him. 3RP 67. Rostick claimed that he did not receive any money from the pawn, but that he simply brought the money to the man who had called him. 3RP 68.

Rostick explained that later the same man called Rostick again, asked him to pick up another guitar and asked that he pawn it at a different pawn shop. 3RP 68. Rostick then drove to Cash America Superstore, a pawn shop on Aurora Avenue North.

3RP 69. However, the pawn shop refused the pawn because they did not believe the guitar belonged to Rostick. 3RP 69. Rostick then went to the Pawn X-Change on Aurora Avenue North where he received \$500 for the Gibson. 3RP 70. Again, Rostick claimed that he did not receive any money from the pawn. 3RP 70.

Rostick admitted to the detective that the circumstances leading to the pawns were "unusual." 3RP 72. When the detective asked Rostick for the second time whether Rostick knew that the guitars were stolen, Rostick sat in silence. 3RP 72. Rostick provided Detective Lindquist with a telephone number for his cohort; however, the number was disconnected. 3RP 74.

As the investigation proceeded, Detective Lindquist learned that assistant manager Samantha Ross was working at the Pawn X-Change on Aurora Ave N. on April 20, 2009. 3RP 81-84. She remembered that Rostick brought in a \$3000 guitar without a case. 3RP 84. She found this to be very unusual. 3RP 84. When she asked Rostick about the guitar, he told her that it was "a gift from a friend." 3RP 85. In order to complete a pawn at Pawn X-Change, a person completing the pawn must sign a statement that he or she is the owner of the property being pawned. 3RP 85. Rostick signed the pawn slip affirming that the guitar was his property. 3RP 88.

Detective Lindquist also learned that on April 20, 2009, assistant manager Keanna Garner was working at Cash American SuperPawn on Aurora Ave N. 4RP 8. When Rostick brought in a Gibson guitar, he said that someone had given it to him. 4RP 11. Ms. Garner told Rostick that he should not be pawning the guitar because it could be stolen. 4RP 12.

C. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT ROSTICK'S CONVICTIONS FOR TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE.

Rostick maintains that there was insufficient evidence to support his conviction for trafficking in stolen property in the second degree, arguing that the State failed to prove that his conduct was reckless. His claim should be rejected. Rostick's convictions were predicated on evidence that he made many inconsistent statements relating to where and how he obtained the stolen property, that he pawned the property for a fraction of its worth, that he avoided pawning the guitars at the same location, that he pawned the guitars after being expressly warned that they could be stolen, that he repeatedly changed his story when confronted by police, and

finally he admitted that he had lied. Accordingly, there was sufficient evidence to support the jury's finding as to his mental state at the time of the crimes.

a. Relevant Law.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is considered equally as reliable as direct evidence. State v. Delmarter, 94 Wn. App. 634, 638, 618 P.2d 99 (1980). An appellate court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In determining whether there is sufficient evidence, the reviewing court determines not "whether *it* believes the evidence at

trial established guilt beyond a reasonable doubt," but whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221 (emphasis added); State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107, rev. denied, 141 Wn.2d 1023 (2000).

Trafficking in stolen property in the second degree requires that a person "recklessly traffics in stolen property." RCW 9A.82.050. At trial, the jury was further instructed on the definition of recklessness:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 42 (Jury Instruction 10).

- b. The State Presented Sufficient Evidence Supporting Rostick's Convictions For Trafficking In Stolen Property In The Second Degree.

Under the standard set forth above, the uncontroverted evidence presented at trial was more than sufficient to sustain

Rostick's convictions for trafficking in stolen property in the second degree. Specifically, the evidence presented at trial established that Rostick acted recklessly because he knew of and disregarded a substantial risk that the guitars were stolen and that his disregard was a gross deviation from the conduct that a reasonable person would exercise when presented with similar circumstances.

Rostick's conduct was a gross deviation from conduct that a reasonable person would exercise. First, Rostick had implausible and inconsistent explanations for how he came into possession of the guitars. 3RP 55-73. Rostick then admitted that he had lied, changed his story many times, admitted his conduct was "unusual," and admitted that he pawned the guitar even after a pawn employee told him he should not if it were stolen. *Id.* 3RP 55-73. Rostick told pawn shop employees that the guitars were given to him as a gift, although that was not true. Rostick also falsely claimed that he owned the guitars when he presented them at pawn shops. 3RP 85. Viewing this evidence in the light most favorable to the State, the jury could conclude beyond a reasonable doubt that Rostick knew the guitars were stolen.

The mere fact that Rostick himself did not *expressly admit* actual knowledge that the guitars were stolen does not warrant the

reversal of his convictions. The evidence was sufficient to establish that Rostick acted recklessly, at least. Recklessness is established if it is established that a person acted knowingly. RCW 9A.08.010(2).

Accordingly, given the evidence presented at trial, the jury's verdict should be affirmed.

2. THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT IN CLOSING ARGUMENT.

Rostick argues that his convictions must be reversed due to prosecutorial misconduct. He maintains that during closing argument, the deputy prosecutor committed flagrant and ill-intentioned misconduct by improperly disparaging defense counsel by using the phrase "red herring" once. Rostick's argument is without merit.

a. Relevant Law.

To establish prosecutorial misconduct, a defendant must show that the conduct complained of was both improper and prejudicial. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Prejudice is established only if the defendant demonstrates

a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Thach, 126 Wn. App. 297, 316, 106 P.3d 782 (2005). Absent a proper objection, the issue of prosecutorial misconduct is waived unless the misconduct was so flagrant and ill-intentioned that it caused such enduring prejudice that it could not be neutralized with a curative instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor commits misconduct by personally attacking defense counsel, impugning counsel's character, or generally disparaging defense counsel as a means of convincing jurors to convict the defendant. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). A prosecutor's comments during closing argument must be viewed in the context of the total argument, the issues in the case, and the evidence addressed in the argument. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). "Courts afford a prosecutor a wide latitude in closing argument to draw and express reasonable inferences from the evidence." Thach, 126 Wn. App. at 316.

A prosecutor's allegedly improper comments are viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions

given, which are presumed to have been followed. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Reversal is not required unless there is a substantial likelihood that the argument affected the jury's verdict. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Finally, a prosecutor's remarks are not grounds for reversal if they were invited or provoked by defense counsel and were a pertinent reply to his or her arguments. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

b. The Prosecutor Did Not "Denigrate The Defense Or Argue Her Personal Opinion."

During closing arguments, defense counsel argued that each of "the pawn witnesses [the pawn shop employees] were very self-serving in their testimony." 4RP 105.

In rebuttal, the prosecutor simply responded to Rostick's arguments:

Ladies and Gentlemen of the jury, you didn't check your common sense at the door when you came to sit as jurors in this case. This is not all speculation. It is not reasonable to think that Mr. Rostick was duped.

There is quite a bit of evidence that actually suggests to the contrary, that proves the contrary.

Someone calls him to pawn some guitars for him and then calls him two days later and asks him to pawn another one. These are expensive looking guitars and he's pawning them, just for someone else, and then taking the money back to him, pawning them for a fraction of what they're worth.

He takes them to two different pawn shops. He pawns the second one after someone tells him that the property might be stolen. **And counsel's suggestion that the pawn shop employees' testimony is self-serving, that's a red herring.** They have no -- the pawn shop employees had no motive. They have no motive to tell you something that's not true. They told you what Mr. Rostick told them, what he did when he was in those pawn shops. And Mr. Rostick himself confirmed to Detective Lindquist that he had pawned those items.

5RP 112-13. Rostick did not object to these remarks.<sup>2</sup>

Now, on appeal, Rostick asserts that the prosecutor improperly "called the defense theory a 'red herring.'" Appellant's Brief at 10. Rostick argues that by using the phrase "red herring," the prosecutor argued to the jury that the defense counsel was himself dishonest, that the defense theory of the case was disingenuous, and that the prosecutor expressed a personal

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<sup>2</sup> 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).

opinion by disparaging defense counsel and the defense theory of the case. Appellant's Brief at 10-13. This broad characterization of the prosecutor's single use of a common two-word phrase is unsupported, if not contradicted, by the record.

Given the context in which the statement was made, this remark was not improper. It is well-settled that a prosecutor does not commit misconduct when he or she makes a fair response to defense counsel's arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). When viewed in the context of the remarks made in closing argument, the prosecutor was simply responding to defense counsel's argument that "the pawn witnesses [the pawn shop employees] were very self-serving in their testimony." 4RP 105. When reviewed in the context of the arguments, the prosecutor's use of the phrase "red herring" was intended to highlight that the employees of the pawn shops had no personal stake in the outcome of the trial. Moreover, defense counsel's suggestion that their testimony was self-serving was apparently intended to distract the jury from the *substance* of their testimony. The prosecutor then continued in rebuttal to properly respond to

different arguments made by defense counsel. When reviewed in the context of the entire argument, the prosecutor did not err.

Even if improper, Rostick cannot demonstrate that this single comment amounts to reversible error. Considering the strength of the State's evidence, the isolated nature of the comment, and the court's instructions to the jury that counsel's remarks are not to be considered as evidence, Rostick has failed to establish a substantial likelihood that the remark affected the jury. Likewise here, Rostick has failed to establish any prejudicial effect of the prosecutor's remark. Because Rostick has failed to demonstrate either impropriety or prejudice, his claim that the above remarks constitute reversible misconduct must fail.

D. CONCLUSION

The State presented sufficient evidence to support the jury's finding of guilt as to the charges of trafficking in stolen property in the second degree, and the deputy prosecutor in this case did not commit reversible misconduct. Accordingly, for all of the foregoing

reasons, the State asks this Court to affirm Rostick's conviction for trafficking in stolen property in the second degree.

DATED this 26<sup>th</sup> day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

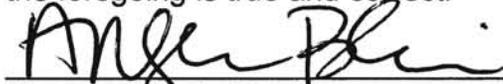
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's brief, in STATE V. OCTAVIUS ROSTICK, Cause No. 67837-0-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: Angela Block  
Done in Seattle, Washington



Date: April 26, 2012

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