

NO. 72399-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

HAROLD BAIN, Jr.,

Appellant.

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STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

In his closing argument, the prosecutor asked the jury to make the inference permitted in the knowledge instruction that the defendant knew he was selling stolen merchandise because the defendant was a person of average intelligence. He also advised the jury to convict based on the law and the facts proved. Did the prosecutor commit error when he correctly explained the permissive inference and when he advised the jury to convict based on the law and the facts?

The defendant did not object during the prosecutor's closing. Did the defendant waive any error when any prejudice that occurred could have been corrected by further instruction?

Is a defendant denied effective assistance of counsel when his lawyer does not object to proper closing argument?

## **II. STATEMENT OF THE CASE**

On November 12, 2013, the owner of the Lynnwood Food Mart arrived to open his store just before 7 a.m. and discovered someone had broken in and stolen lottery tickets. 1RP 96, 98, 99. The store's security system videotaped the burglary. 1RP 77. It showed someone running in to the store and stealing the tickets at

5:28 a.m. 1RP 77. For the next hour, the defendant went from store to store redeeming the stolen tickets.

Twenty minutes later, at 5:47 a.m. as confirmed by a representative of the Washington State Lottery, the defendant cashed some of the stolen tickets at a nearby Circle K. 1RP 173, 194; 209. The transaction time on the videotape that showed the defendant redeeming the tickets was 5:35 a.m. but a store clerk testified the time was likely ten minutes off. 1RP 197-98. Id.

About twenty minutes later, at 6:13 a.m., the defendant attempted to cash some of the tickets at a nearby AVS Gas and Groceries. 1RP 117. The store did not have enough cash to redeem all of the tickets so the defendant redeemed only some. 1 RP 133. Again, a surveillance camera again captured the transaction. 1RP 117.

Within another twenty minutes, at approximately 6:30 a.m., the defendant redeemed more tickets at a local 7-11, a transaction also on videotape. 2RP 1, 4, 7, 1RP 175. After he finished, he purchased coffee and a donut. 1 RP 176, 2RP 7.

Snohomish County detectives collected the videotape from each of the four stores and took still shots of the person redeeming the tickets. 2RP 19, 20. Two days later, they talked to the

defendant at the Rodeo Inn. 2RP 23-34. When the defendant opened the door, detectives recognized him as the person in the videos redeeming the tickets. 2RP 26.

The defendant first said he had no memory of cashing any lottery tickets in the past few days. 2RP 25. Only after he was shown one of the stills did he admit it was he and remember that he had redeemed the tickets. 2RP 27.

The defendant explained that he had purchased the tickets on a Lynnwood street corner from someone he knew only as Davies. 2RP 28-29, 33. Davies was selling the tickets for fifty cents on the dollar. 2RP 31. Asked how someone could sell tickets for half of their value and still make money, the defendant said he thought they might have “walked out the back door” of a mini mart. 2RP 31-32. (The detective remembered that phrase and specifically wrote it in his interview notes. 2RP 32.) The defendant still said he did not know the tickets were stolen. 2RP 36. Asked if that meant they were stolen, the defendant said he did not know if they were. Id. The defendant said a friend in a Durango drove him to various stores to redeem the tickets. 2RP 34.

The trial took place in July 2014.

In closing, the State argued that even if the defendant's story were to be believed, the defendant's statement that he believed the tickets had "walked out the back door" meant that he knew they were stolen. 2RP 89-90. The circumstances surrounding Davies would have led any reasonable person to believe they were stolen. 2RP 90-91.

In discussing the permissible inference on knowledge, the State reread Instruction 15:

...

If a person has information that would lead a reasonable person in the same situation to believe that a fact or circumstance exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact or circumstance.

2RP 91-92, CP 49. The prosecutor argued:

[T]here's no evidence before you that the defendant suffers from some mental defect or is otherwise not a person you should hold up to the normal, average, reasonable person inference. I think in this case to do that would not be to employ the law you have been charged to do so as jurors.

2RP 91-92. Thus, even without the defendant's admission that he thought the tickets had "walked out the back door", the circumstances were such that a reasonable person would believe

the tickets were stolen: the unidentified Davies; the 5:30 a.m. street corner sale; the amount and face values of the tickets worth hundreds of dollars; the sale for fifty cents on the dollar. 2RP 95-69.

But, the State argued, the defendant's story was not credible: the mysterious "Davies" likely did not exist; the defendant likely knew more about who had stolen the tickets; there was no friend in a Durango because the store videos showed the defendant apparently getting out of another model car. 2RP 96-97.

Finally, the State asked the jury to be guided by the evidence and instructions.

"I would counsel you, as I counseled you at the beginning, please be guided by these instructions... they're all that matter... focus yourselves on those elements... based on the presentation of the evidence... I would counsel you and request you, based upon the evidence, to return verdicts of guilty... he knew they were stolen."

2RP 103.

The defendant made no objection to any of the State's closing. He argued that the "real crux" of the case was the knowledge element. 2RP 105. He argued that none of the evidence established that the defendant knew the tickets were stolen. 2RP 105. There was no evidence that purchasing lottery

tickets at half-price was not a common occurrence. 2RP 109. He argued that the State had not even proved that he acted recklessly because a person might sell lottery tickets at half price and be making money because they don't know if the tickets are winners. 2RP 114.

On July 9, 2014, a jury found the defendant guilty on all three counts. CP 227, 229, 231.

### **III. ARGUMENT**

#### **A. THE PROSECUTOR COMMITTED NO ERROR WHEN HE CORRECTLY ARGUED THE LAW AND FACTS AND URGED THE JURY TO CONVICT BASED ON THEM.**

To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice.<sup>1</sup> State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221

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<sup>1</sup>“Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association’s Criminal Justice Section (ABA) urge courts to limit the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved 4/10/10), <http://www.ndaa.org/pdf/prosecutorialmisconductfinal.pdf> (last visited Sept. 24, 2014); American Bar Association Resolution 100B (Adopted 8/9-10/10), [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf) (last visited Sept. 24, 2014). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaff, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

(2006). Prejudice occurs when there is a substantial likelihood that the claimed errors affected the jury's verdict. 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). A prosecutor's closing arguments are reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." McKenzie at 52, quoting Brown, 132 Wn.2d at 561.

If a defendant fails to object at trial, any error is waived unless the prosecutor's error was "so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The defendant must show not only that no instruction would have cured the error and but also that the error had a substantial likelihood of affecting the verdict. Id. "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Id. at 762.

## **1. The Prosecutor Correctly Described The Reasonable Person Inference In The Knowledge Definition.**

The defendant argues that the State misstated the permissible inference instruction. The State did no such thing.

In State v. Shipp, the Supreme Court clarified that the definition of “knowledge” created a permissive inference. 93 Wn.2d 510, 514, 610 P.2d 1322 (1980). A jury is permitted, not required, to find knowledge if the defendant has “information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.” Id. The reasonable person standard merely tells the jury “what level of circumstantial evidence is sufficient for it to conclude that the defendant had actual knowledge.” Id. at 517. The jury can still conclude that the defendant was not as intelligent as the ordinary person. Id.

In the present case, the court gave WPIC 10.02, the knowledge definition:

A person knows or acts knowingly with respect to a fact or circumstance when he or she is aware of that fact or circumstance.

If a person has information that would lead a reasonable person in the same situation to believe that a fact or circumstance exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact or circumstance.

CP 249.

The State's argument mirrored the instruction and highlighted the circumstances known to the defendant at the time of the crime that would have led a reasonable person to believe that he was redeeming stolen tickets. The tickets were on sale at 5:30 a.m. The tickets being offered for sale on a street corner in Lynnwood. The tickets were being sold by an apparent stranger to an apparent stranger. The tickets were being sold for fifty cents on the dollar. Those circumstances would have led any reasonable person to believe the tickets were stolen.

The State then argued that there was nothing to suggest that the defendant was less than an ordinary person. Thus, he could be considered a reasonable person and the permissive inference should be applied.

The State argued that the defendant admitted that he believed the tickets were stolen, that is, had walked out the back door. Actual knowledge may arise from a subjective belief based on circumstantial evidence. State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992), citing Shipp at 517. It was not a misstatement of the permissive inference to remind the jury that the

defendant admitted he had a subjective belief that the tickets were stolen.

Interestingly, the defense did not argue that the defendant was of less-than-average intelligence or less attentive than a regular person. Rather, it argued that the same circumstances would not have led a reasonable person to believe, or even suspect, that the tickets were stolen. 2RP 115.

The prosecutor did not misstate the law. He never suggested that the jury apply a mandatory inference. The defendant's claim is should be rejected.

## **2. The Prosecutor Did Not Misuse His Office Or Attempt To Improperly Align Himself With The Jury.**

The defendant argues that the State improperly aligned itself with the jury it used the word "counsel" and "counseled" the jury to base its decision on the facts and the law. That is not error.

The prosecutor counseled the jury to be guided by the instructions, to focus on the elements, and to return a verdict based on both. The State merely paraphrased what the court had told the jury in its instructions:

It is your duty to decide the facts in this case based on the evidence presented to you during the trial... you must apply the law from my instructions to the

facts that you decide have been proved, and in this way to decide the case. ..

... You must reach your decision based on the facts proved to you and on the law given to you...

WPIC 1.02, Instruction 1, CP 33.

The prosecutor used the verb word “counsel”. The verb “counsel” means “to give advice” or “to suggest or recommend.” Merriam-Webster at [www.merriam-webster.com](http://www.merriam-webster.com) (accessed April 21, 2015). It means “to urge the adoption of, as a course of action; recommend (a plan, policy, etc.)”. Dictionary.com at [dictionary.reference.com](http://dictionary.reference.com) (accessed April 21, 2015). No error occurs when the State recommends, advises, or suggests to the jury that it should base its decision on the law and the facts.

The defendant is asking this court to substitute the verb “counsel” with the noun “counsel” and to imagine that the prosecutor suggested he was the jury’s lawyer. That simply did not occur.

A prosecutor’s closing arguments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.” McKenzie at 52, quoting Brown, 132 Wn.2d at 561. The prosecution in closing has wide latitude to draw reasonable inferences from the evidence

and to invite the jury to so. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). “A defendant’s failure to object to a prosecutor’s remarks when they are made “strongly suggests” that the remarks did not appear critically prejudicial in the trial’s context.” State v. Monday, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

In the context of the total argument together with the instructions, it is abundantly clear that the prosecutor was arguing the law and facts as they applied to this defendant, not suggesting he was the jury’s lawyer. The prosecutor properly invited the jury to draw the same inferences. That is not error.

**3. Even If The Prosecutor’s Arguments Were Erroneous, The Defendant’s Claim Fails Because An Instruction Could Have Cured Any Prejudice.**

The defendant did not object during closing argument. If a defendant fails to object at trial, he waives the objection unless the misconduct was “so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.” Emery, 174 Wn.2d at 760-61, 278 P.3d 653 (2012). The defendant must show both that no instruction would have cured the error and that the misconduct has a substantial likelihood of affecting the verdict. Emery at 760-61. The focus is less on whether the argument was flagrant or ill

intentioned and more on whether any resulting prejudice could have been cured. Id. at 762. In other words, “has such a feeling of prejudice been engendered in the minds of the jury as to prevent a [defendant] from having a fair trial?” Id., quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

Both of the prosecutor’s so-called erroneous statements could have been cured by further instruction. Neither prevented the defendant from having a fair trial.

In Emery, the court found that a prosecutor’s fill-in-the-blank argument and claim that a trial was a search for truth were both improper. 174 Wn.2d at 759. There was no defense objection and the reviewing court affirmed despite the errors. Id. at 762.

The Emery court said that the statements were erroneous but not inflammatory. Id. at 763. Although they could have confused the jury about its role and the burden of proof, they were curable by further instruction. Id. The court said that some improper arguments, even those that touch on constitutional rights, can be curable. Id.

The same is true in the present case. Even if erroneous, the prosecutor’s statements were not inflammatory. Even if they

confused the jury about its role, further instruction could have cured any prejudice. That is where the reviewing court must focus.

**B. THERE WAS NO INEFFECTIVE ASSISTANCE BECAUSE THE PROSECUTOR'S ARGUMENT WAS PROPER AND THE EVIDENCE OF GUILT WAS OVERWHELMING.**

**1. The Defendant's Lawyer Did Not Object To The Prosecutor's Proper Closing Argument.**

Counsel's performance Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. The guarantee applies to all critical stages of the proceedings. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

Reviewing courts presume strongly that that counsel's representation was effective. State v. McFarland, 128 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show both that his counsel's representation was deficient and that the deficiency prejudiced him. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). The defendant must also show that but for

the mistake, there is a reasonable probability that the outcome would have been different. Thomas, 109 Wn.2d at 266. If the defendant fails to satisfy either element of the test, his claim fails. State v. Kyllo, 116 Wn.2d 856, 862, 215 P.3d 177 (2009). Counsel's mistake must have been so serious that, in effect, counsel was not functioning as counsel. Id.

In the present case, the defendant has not shown ineffective assistance. First and foremost, there was no prosecutorial error and no objectionable argument as discussed above.

## **2. Even If The Argument Was Erroneous, The Failure To Object Could Have Been A Legitimate Trial Tactic.**

An action that can be characterized as a legitimate trial tactic cannot form the basis for an ineffective assistance claim. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied 479 U.S. 996, 107 S.Ct. 599, (1986), overruled on other grounds by State v. Hill, 132 Wn.2d 641-46, 870 P.3d 313 (1994).

The defendant in the present case cannot show that an objection would have led to a different outcome. The State's argument regarding the presumption did not change the defendant's case strategy. His argument was not that he defendant was not a reasonable person. His theory was that *no* reasonable

person would have found the circumstances surrounding the acquisition of the tickets suspicious. He argued that no evidence established any fact or circumstance that demonstrated to a reasonable person that the tickets were stolen. 2RP 105. Instead, the defendant argued, the evidence showed just the opposite: the defendant was in no hurry; he was not disguised; he asked Davies for ID before he purchased the cut-rate tickets. 2RP 106. Those things, the defendant argued, proved that he did not realize the tickets were stolen. 2RP 106-07.

The same is true regarding the second so-called error. Even with an objection, the outcome would have been the same. Had the defendant objected to the State's "counselling" the jury to convict based on the law and evidence, the State would merely have had another chance to urge, encourage, suggest, and recommend conviction based on the facts and evidence.

**3. Any Error Was Harmless Because Of The Overwhelming Evidence That The Defendant Knew The Tickets Were Stolen.**

Even if the closing arguments so erroneous as to raise a constitutional issue, the convictions still should be affirmed because the evidence of knowledge was overwhelming.

Violations of a constitutional right are in some cases so insignificant that they are harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” Id. This standard insures that convictions will not be reversed on simply technical or academic grounds. Id. at 426. The burden is on the State to prove that the error was harmless. Id. at 425.

Here, overwhelming evidence would lead any reasonable person to know that the tickets were stolen. A time-stamped tape showed the tickets being stolen at approximately 5:30 a.m. Three time-stamped tapes showed the defendant himself cashing the tickets. And he cashed the tickets at three different locations within one hour of the theft. Confronted with the evidence, the defendant told an incredible story about meeting a virtual stranger on a street corner and purchasing the tickets from him for half of their face value, all at 5:30 a.m.

The facts and circumstances presented at trial proved overwhelmingly that the defendant knew, as would any reasonable

person, that the tickets he was redeeming were stolen. If any error occurred, it was harmless.

#### **IV. CONCLUSION**

For the foregoing reasons, the convictions should be affirmed.

Respectfully submitted on April 29, 2015.

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