

FILED
February 19, 2016
Court of Appeals
Division I
State of Washington

NO. 73262-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GARY BENTLEY, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHAD ALLRED

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ALICE DEGEN
Senior Specialist Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	13
1. THE PROSECUTOR DREW A REASONABLE INFERENCE FROM THE EVIDENCE THAT THE PERSON WATCHING PENA RESEMBLED BENTLEY. THIS INFERENCE WAS NEITHER IMPROPER NOR PREJUDICIAL	13
2. BENTLEY'S CONVICTIONS ON THE TWO COUNTS OF ASSAULT IN THE THIRD DEGREE WERE BASED ON THE EVIDENCE, INCLUDING BENTLEY'S OWN TESTIMONY.....	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Glasmann, 175 Wn.2d 696,
286 P.3d 673 (2012)..... 15

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 14

State v. Guizzotti, 60 Wn. App. 289,
803 P.2d 808 (1991)..... 14

State v. McKenzie, 157 Wn.2d 44,
134 P.3d 221 (2006)..... 14

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997)..... 14

State v. Warren, 165 Wn.2d 17,
195 P.3d 940 (2008)..... 14

A. ISSUE PRESENTED

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's comments were improper and that there was a substantial likelihood that the comments affected the verdict. Counsel has wide latitude in closing argument to draw and express reasonable inferences from the evidence. During the trial, the victim testified that he saw a person, whom he described in detail, watching him as he prepared to leave on a long trip. The description given bore a resemblance to the defendant. During closing argument, the prosecutor summarized the victim's description, and noted the similarity to Bentley. Is there a substantial likelihood that the prosecutor's comment, even if improper, affected the verdict?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Gary Bentley, Jr., with one count of possession of stolen vehicle and two counts of assault in the third degree.

The jury found Bentley guilty as charged on all counts.
11/18/2014 RP 2.¹

2. SUBSTANTIVE FACTS

On August 26, 2014 at around noon, Gustavo Pena was preparing to leave for an out of country trip to Colombia.

11/13/2014 RP 42. Pena's Seattle home faced a ballpark, and he noticed a person sitting on the bleachers staring at his house.

11/13/2014 RP 42. Pena found this unusual because the bleachers face west-east and his house is on the north side of the park; Pena did not notice any other persons in the park at that time.

11/13/2014 RP 43.

Pena observed this individual for a period of 20-30 minutes from various vantage points, including from his front door (which he described as being the distance from where he was seated in the witness stand to the entrance doors of the courtroom), through a couple of windows, and from behind a gate outside of his house.

¹ The Verbatim Report of Proceedings consists of seven volumes of transcript ("RP"). The first three volumes include a motions hearing that occurred on November 12, 2014, and Voir Dire that occurred on November 12-13, 2014; they will not be referenced in this brief. The fourth and fifth volumes are of the jury trial that occurred on November 13 and 17, 2014; they are each sequentially numbered and will be referred to as "11/13/2014 RP" or "11/17/2014 RP." The sixth volume is the verdict, which occurred on 11/18/2014 and will be referred to as "11/18/14 RP." The last volume is the sentencing; it will not be referenced.

11/13/2014 RP 43-44. Pena described this individual as male, African-American, between the ages of 30-40, shaved or bald head, and with a goatee. This person was medium build, somewhat athletic or fit looking; he was not wearing a shirt and he was smoking a cigar. Bentley did not object to testimony regarding this description. 11/13/2014 RP 44.

Pena was concerned about the person watching his home, but he ultimately called a cab and left his home with two large suitcases, so as not to miss his flight. As the cab turned around in Pena's driveway to leave, Pena was able to get a closer look at the man and his features. 11/13/14 RP 45.

Two days later, Pena received a call from his neighbors. Pena learned his home had been burglarized and his 2006 Land Rover was gone from the driveway. It was later determined that Pena's spare set of keys had been taken from the house. 11/13/14 RP 47-48, 50.

While still in Colombia, the King County Sheriff's Office called Pena to let him know his vehicle had been located. 11/13/14 RP 47. Mr. Pena returned home on September 9, 2014; he took a cab directly to the SeaTac Police Department. Pena was shown six pictures of six different people but was unable to positively identify

the person he had seen watching his house. Pena testified that all six photos depicted persons with the same characteristics as the person he had seen. 11/13/14 RP 49-50.

The prosecutor began to question Pena about facial hair that he found in his bathroom upon his return. Bentley objected to this question based on relevance. 11/13/2014 RP 53. The jury was excused and Bentley argued that inquiry into the burglary of the home was unfair because Bentley was not charged with burglary.

The prosecutor argued that possession of stolen vehicle required the State to prove not only that Bentley was in a stolen vehicle, but that he knew the vehicle was stolen. The prosecutor argued that if the jury were to find from the facts that it was Bentley who had been watching Pena and the house, and, further, if he had been in the house, then that would go to knowledge. Bentley raised no additional objections based on the State's argument. 11/13/2014 RP 54.

The trial court continued to sustain the objection regarding evidence of the facial hair and noted that given the evidence that had already come in, evidence of the hair found in the home had questionable probative value. Bentley raised no additional objections. 11/13/2014 RP 55.

The jury was brought back in, and Pena was excused with no further questions from the State or Bentley. 11/13/2015 RP 55.

William Juell testified that on August 29, 2014, at about 9:00 p.m., he was driving south on Route 509 when he encountered a Land Rover in the middle of the road. He observed two men pushing it. 11/17/14 RP 6. Juell drove the men, later identified as Gary Bentley and Russell Bentley, to get gas.² 11/17/2014 RP 6.

Juell was told that Bentley had recently purchased the vehicle and that they were headed south, possibly to Tacoma, when they ran of gas. 11/17/14 RP 19-20. It was Juell's understanding that the two men were related. 11/17/14 RP 9.

After returning to the vehicle with gas, Juell kept his headlights on as the two put in the gas. Within a minute, a police vehicle arrived and Juell saw at least one officer talk to the two men. 11/17/14 RP 9. As other officers arrived, it appeared to Juell that they were trying to place Bentley under arrest. Bentley started to struggle, broke free, ran a few feet, and struggled again; officers yelled at him to stop. When the officers contacted Bentley again, Juell saw him "throwing elbows, and pushing, and trying to get out

² To avoid confusion with the defendant, the State will refer to Russell Bentley as Russell. The State intends no disrespect.

of their grasp." 11/17/14 RP 11-12. One officer deployed a taser, and then Bentley and two officers went to the ground in the struggle; during this time he heard the officers yelling to stop, quit resisting, and stop fighting. Once on the ground officers were able to handcuff Bentley. 11/17/14 RP 12-13, 19. Russell appeared calm and had remained by the vehicle. 11/17/14 RP 13.

Deputy Christopher Dearth, with the King County Sherriff's Office, testified that he was on patrol when he saw the Land Rover on the side of the road; he knew from an earlier broadcast that the vehicle had been seen in the area and was reported stolen.

11/13/2014 RP 7.

Deputy Dearth noticed Bentley getting in the driver's side of the vehicle and Russell on the passenger side. 11/13/2014 RP 9. Deputy Dearth went to the Land Rover with the intent of engaging the men in casual conversation until back up arrived. 11/13/2014 RP 12.

It was very dark and the area was not safe. 11/13/2014 RP 13. Bentley told the deputy that the car belonged to his uncle and they were headed to that uncle's house in Kent; he had not paid attention to the gas gauge and they had run out of gas. 11/13/2014 RP 15.

Bentley asked if they could leave as other deputies began to arrive, so Deputy Dearth told the two men to turn around, and put their hands behind their back; he also told them they were under arrest for a stolen car. 11/13/2014 RP 19. Both Bentley and Russell turned around, and as Deputy Dearth moved forward and touched Bentley to place handcuffs on, Bentley turned and struck the deputy in the face, knocking him off balance; Bentley then attempted to run. The deputy had a sense that the blow was coming and was able to step back so as not to receive the full impact of the blow. 11/13/2014 RP 21.

Deputy Dearth testified that Deputy Broderson ran to Bentley and tackled him and that Bentley immediately started swinging his elbows and fists. 11/13/2014 RP 21. Two other officers eventually became involved in the struggle and Bentley continued to resist and was not complying with verbal commands to stop fighting. Deputy Broderson ultimately deployed a taser and they were able to handcuff Bentley. 11/13/2014 RP 27-28. Photographs were taken of Bentley and admitted as evidence. 11/13/2014 RP 29-30.

Deputy Broderson testified that when he arrived he saw Deputy Dearth speaking to Bentley. As Deputy Broderson approached on foot, he saw Bentley lunge toward Deputy Dearth;

he saw Dearth move back quickly but he was unable to tell if it was because he had been struck or because he was avoiding the lunge. 11/17/2014 RP 31. Bentley then ran directly toward Deputy Broderson and Broderson shoved Bentley into the patrol vehicle. 11/17/2014 RP 31-32. The deputies attempted to take Bentley to the ground. Bentley was actively fighting and Deputy Broderson was receiving blows and kicks to his upper body, primarily his arms and shoulder. Deputy Broderson believed Bentley was specifically targeting his strikes and not just trying to get away. 11/17/2014 RP 34.

When Deputy Samuel Copeland arrived on the scene, it was dark and the area was illuminated only by vehicle headlights. He saw Deputies Broderson and Dearth struggling to gain control of Bentley, who was pulling away and trying to fight. Copeland heard both deputies yelling at Bentley to stop resisting. 11/13/2014 RP 64.

Deputy Copeland assisted in helping gain control of Bentley. He saw a black key fob and a cell phone underneath Bentley's shins. 11/13/2014 RP 65.

Bentley testified in his own defense. He testified that his Uncle Russell picked him up in the Land Rover shortly before they

were approached by police. Bentley had not seen his Uncle Russell in about ten months because his uncle was on a fishing boat in Alaska. 11/17/2014 RP 63. They were headed to another uncle's house in Kent when they ran out of gas. 11/17/2014 RP 64. They pushed the car to the side of the road and then Juell showed up and offered to take them to get gas. 11/17/2014 RP 65. After they returned to the vehicle, his uncle was unable to find the keys, so Bentley looked on the driver's side for the keys while his uncle poured the gas. Bentley located the keys partially underneath the driver's seat. As he was retrieving the keys, the police arrived. 11/17/2014 RP 65-66.

Bentley testified that he explained to the deputy that they had run out of gas, but were good now. The deputy asked the two to sit on the concrete barrier and then asked who the car belonged to; Bentley pointed to his uncle and answered that it belonged to him. Bentley told the deputy that they were headed to his uncle's house in Kent. 11/17/2014 RP 66.

Bentley testified that after about another five to ten minutes, they asked if they could leave. The deputy just shrugged and kept talking. Other officers arrived and the deputy then told them to "turn around, put your hands behind your back, you're under

arrest." 11/17/2014 RP 66. Bentley complied, but as soon as he heard the clicking sound of the handcuffs, he immediately ran toward another officer. 11/17/2014 RP 66. That officer knocked Bentley into a car causing Bentley to stumble and fall. Each officer grabbed both of his arms and began to violently slam him to the ground. Bentley testified that, as he braced himself and stood firm, he was asking what he had done. 11/17/2014 RP 66.

Bentley testified that they continued to swing him around and slam him and they were telling him to quit resisting. Bentley told them he was not resisting and then he heard somebody say, "Taser, taser," and the next thing he knew he was on the ground, at which point an officer put handcuffs on him. 11/17/2014 RP 67.

Bentley testified that he ran because he knew he had a probation warrant and that if he received another violation he would be sent back to prison. 11/17/2014 RP 67-68. Bentley testified that he never struck any of the deputies at any time and that he did not swing his fists or his elbows or kick out at the deputies; he just stood there and tried to not let the deputies slam him to the ground. 11/17/2014 RP 68-69.

On cross-examination, Bentley testified that he had never been in the vehicle prior to his uncle picking him up at about 8:30 p.m. that evening. 11/17/2014 RP 79.

Terry Mills was called by the State as a rebuttal witness. Mills testified that she was Bentley's cousin and Russell's niece. 11/17/2014 RP 86. Mills said that she loved both Bentley and Russell. 11/17/2014 RP 87. Mills said that the day prior to Bentley being arrested in the vehicle, he had come to her home in the same vehicle. 11/17/2014 RP 87. Bentley was showing the vehicle off to her and wanted her to go for a ride in it. Mills was surprised because it was a nice vehicle and Bentley did not, to her knowledge, have a consistent full time job. 11/17/2014 RP 88-89, 90.

Mills said that Russell did odd jobs such as landscaping but that he has never been on a fishing boat for 10 or 12 months at a time. 11/17/2014 RP 89. Mills also said that the only living relative named Michael that she knew of lived in Seattle. 11/17/2014 RP 89, 92-93.

In closing argument, the prosecutor reviewed the testimony of the witnesses including Pena's description of the person who

was watching his house on the day he was preparing to leave for a long vacation, saying,

And he described an African-American male with a balding head, a goatee and no shirt, somewhat muscular build. A person not unlike the defendant. Now it's true that Mr. Pena could not pick him individually out when he got back three or four weeks later and was shown some pictures, but you recall he said he was probably at a distance from here to the door. But got the general physical description, and we know it wasn't a female that was watching the house, it wasn't a Hispanic person with long hair – 11/17/2014 RP 105-06.

At that point, Bentley objected: "Your Honor, I've got to object. This is not relevant as per the previous argument." The Court inquired as to "which argument?" and Bentley's attorney responded "Concerning whether the identity of the burglar has anything to do with Mr. Bentley." The judge responded, "It's overruled for purposes of closing argument. You're going to have your chance to make your counter argument." 11/17/2014 RP 106.

The prosecutor continued:

Thank you. And finally he got to the point where he had to make a decision, leave or not leave. Miss all his connections and not get out of the country or stay, and he decided to leave. Two days later he got a call from his neighbor, finding out that his house had been burglarized. The keys to his Land Rover were taken and his car was gone. That was on October 28th [sic], when he learned that. On October 29th [sic] the vehicle happened to be pulled over, happened to be

on the side of the road, on SR 509, apparently run of gas. You heard from William Juell, just an individual who happened to be driving home or driving wherever at that moment, and he said he came along and the car was basically in the middle of the road and he had to stop so that he didn't hit it. 11/17/2014 RP 106-07.

The rest of the prosecutor's argument centered on the testimony of the other witnesses, facts surrounding the assault counts, discussion of some of the jury instructions, and discrepancies between Bentley's testimony and the testimony of the other witnesses. 11/17/2014 RP 107-15.

C. ARGUMENT

- 1. THE PROSECUTOR DREW A REASONABLE INFERENCE FROM THE EVIDENCE THAT THE PERSON WATCHING PENA RESEMBLED BENTLEY. THIS INFERENCE WAS NEITHER IMPROPER NOR PREJUDICIAL.**

Bentley incorrectly claims that his conviction for possession of stolen vehicle, and two counts of assault in the third degree must be reversed because, in closing, and contrary to the trial court's earlier ruling, the prosecutor "shifted the burden of proof" when the prosecutor summarized Pena's description of the person watching his home, and noted that the description Pena gave was not unlike Bentley. 11/17/2014 RP 106.

The law governing Bentley's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that any instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the 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. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Counsel has latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991). To establish prejudice sufficient to require reversal, a defendant who timely objected to the challenged conduct in the trial court must "show a substantial likelihood that the misconduct affected the jury

verdict.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Bentley has not met his burden of showing that the prosecutor’s argument was improper, let alone that there was a substantial likelihood that it affected the jury verdict.

Bentley suggests that this argument was contrary to the trial court’s ruling; this assertion is incorrect. Bentley did not object to Pena’s testimony regarding the man watching his home or the description of the man. 11/14/16 42, 44. Bentley’s sole objection was to any testimony regarding facial hair that Pena found inside his home. 11/14/16 52-54. In response, the State articulated that it intended to argue from the facts that it was, in fact, Bentley who was sitting on the bleachers watching Pena prepare to leave. 11/13/2014 RP 54.

The judge ruled that that testimony had already come in and that discussion of hairs found inside the house did not have sufficient probative value. 11/14/16 55. Bentley did not at any time, prior to closing, object to the State’s intended argument or the trial court’s ruling. Therefore, Bentley’s objection was not based on the trial court’s ruling and had no legal basis. The trial court correctly overruled the objection. 11/17/2014 RP 106.

In keeping with the trial court's ruling, the prosecutor did not mention the hairs that were found inside the home and did not argue that Bentley went into Pena's home. 11/17/2014 RP 105-06. The prosecutor simply reviewed the description given by Pena, and noted that the description was "[a] person not unlike the defendant." 11/17/2014 RP 106.

The jury heard Pena's testimony regarding the man he saw on August 26, 2014, and the jury had photos of Bentley taken August 28, 2014, when he was arrested. 11/13/2014 RP 29-30, 43-44. Given the time line, it was a reasonable inference, from all of the facts, that it was Bentley sitting on the bleachers watching Pena prepare to leave on his trip. Someone burglarized Pena's home and obtained the keys to the Land Rover. Regardless of how Bentley came into possession of the vehicle, or his level of involvement in the burglary, it was a reasonable inference from the evidence that he would have reason to know Pena did not consent to the taking of the Land Rover.

Even if the argument was improper, Bentley has failed to show a substantial likelihood that the misconduct affected the jury's verdict. The facts at trial established that Pena left for a lengthy trip on August 26, 2014. 11/13/2014 RP 43. On August 27, 2014,

Bentley's cousin, Mills, saw him in the vehicle when he came to her home bragging about his new car. The next day she learned that Bentley had been arrested in that same car. 11/17/2014 RP 87-89.

On August 28, 2015, Juell helped Bentley and his uncle get gas and learned that Bentley had just recently purchased the vehicle. 11/17/2014 RP 19-20. Minutes later, Bentley told Deputy Dearth that the vehicle belonged to an uncle that lived in Kent. 11/13/2014 RP 15.

Bentley testified that the first time he ever saw the vehicle was about 30 minutes before the incident, when his Uncle Russ picked him up in the vehicle. Bentley denied ever driving the vehicle or telling Deputy Dearth that the vehicle belonged to an uncle that lived in Kent. 11/17/2014 RP 79-80, 84-85.

In closing, the prosecutor pointed out the discrepancies in testimony saying,

So it's really whether or not you believe that the defendant knew the vehicle was stolen when he was in it. Now what you have is his own statements. He told you on the stand that his Uncle Russ picked him up in the vehicle. He told the deputy that his uncle lives in Kent that owned the vehicle. You heard his aunt [sic] who said no, he said it was his vehicle and he was in it the day before. He told you he'd never been in it before. Why would he tell you he'd never been in it before if he didn't know it was stolen?
11/17/2014 RP 114.

Given the contradictory testimony, it is clear that the jury found Bentley's testimony to be less credible than the other witnesses.

2. BENTLEY'S CONVICTIONS ON THE TWO COUNTS OF ASSAULT IN THE THIRD DEGREE WERE BASED ON THE EVIDENCE, INCLUDING BENTLEY'S OWN TESTIMONY.

Bentley further claims that the prosecutor's one sentence reference that the person sitting on the bleachers bared a resemblance to the defendant prejudiced Bentley as to the two counts of assault in the third degree because the jury may have been waiting for some exculpatory evidence from Bentley. Appellant's Brief at page 9-10.

This argument is also without merit. Bentley did testify; his testimony regarding the assaults was that they did not happen, and that it was the officers who were aggressive with him after he made a very brief attempt to run because of an outstanding warrant. 11/17/2014 RP 66-68.

Given the verdict, it is clear that the jury gave more credence to the testimony of the other witnesses. This included Deputy Dearth, who said he was struck in the face by Bentley, Deputy

Broderson, who said he was struck multiple times by Bentley in a targeted fashion, and Juell, who said Bentley was "throwing elbows, and pushing, and trying to get out of their grasp."

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Bentley's conviction for possession of stolen vehicle and two counts of assault in the third degree.

DATED this 19th day of February, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ALICE DEGEN, WSBA #29091
Senior Specialist Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the Brief Of Respondent, in State v. Gary Daryll Bentley, JR, Cause No. 73262-5, 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.

Dated this 19th day of February, 2016.

Janice Schwarz

Name:

Done in Kent, Washington