

NO. 34597-8

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RANDY FLORENCE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Beverly G. Grant

No. 05-1-03472-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does the defendant fail to show that unobjected to arguments made by the prosecutor at closing were flagrant and ill intentioned?
2. Does the defendant fail to show that the prosecutor acted improperly when he emphasized particular jury instructions and argued that the evidence did not support the defense's theory at closing?
3. Did the defendant receive constitutionally effective assistance of counsel where counsel's conduct did not prejudice defendant?

B. STATEMENT OF THE CASE.

1. Procedure

On July 14, 2004, the Pierce County Prosecutor's Office charged by information appellant, RANDY FLORENCE, hereinafter "defendant," with unlawful delivery of material in lieu of a controlled substance. CP 1-2. The matter came on for trial before the Honorable Beverly G. Grant on November 8, 2005. RP 29. After hearing the evidence the jury convicted defendant as charged. RP 258.

At the sentencing hearing on January 13, 2006, the parties agreed that defendant's offender score was 9 with a resulting standard sentence of 60 to 120 months. CP 95-108, RP (February 24, 2006) 13-14. The court imposed a DOSA sentence of 45 months in custody and 45 months in community custody. CP 95-108, RP (February 24, 2006) 16-18. The court also imposed various legal financial obligations. Id.

Defendant timely appealed from this judgment and sentence. CP 109-121.

## 2. Facts

On June 27, 2005, the Tacoma Police Department conducted Operation Hard Rock (the "operation"). The purpose of the operation was to target "street level" narcotic dealers in Tacoma. RP 46-47. In conducting this operation the police used a confidential informant ("C.I.") to seek out and attempt to buy drugs from street dealers. Id. The police provided the C.I. with a truck, equipped with a hidden camera, microphones, and a microwave transmitter. Police in a nearby surveillance vehicle received real time audio and video feed of events inside the C.I.'s vehicle. RP 48. In the event the C.I. successfully initiated a transaction, the police in the surveillance vehicle would notify an undercover officer in the vicinity and provide him or her with the location of the transaction and a physical description of the suspects. RP

74. The undercover officer would then move to a location from which he or she could observe the suspects. The undercover officer would maintain visual contact with the suspects until a uniformed officer driving a marked car made contact the suspects. Id.

During the operation the C.I. initiated a transaction with defendant and another suspect in an alley in between J Street and Martin Luther King Boulevard at 15 Street. RP 129. The C.I. stopped his car in the alley after defendant and the other suspect signaled that they had narcotics to sell. Id. The two suspects approached the C.I. and asked what the he “wanted.” RP 131. The C.I. responded, “a 20,” meaning a particular quantity of rock cocaine. RP 131-132. Defendant got into the C.I.’s truck cab and the other suspect stood at the open passenger door. RP 131. The C.I. bought a quantity of what he believed to be rock cocaine from the defendant and a quantity of rock cocaine from the suspect accompanying defendant. RP 133. The C.I. testified that he kept the two quantities of rock cocaine separated by holding rocks from defendant in his left hand, and the rocks from the other suspect in his right hand. RP 134. The C.I. testified that he held the rock cocaine in this manner as he drove approximately one and a half miles to a meeting location designated by the police, and until he gave both samples to Officer Johnson. RP 134-136, 156. Upon handing the cocaine over, the C.I. informed Officer Johnson which quantity had come

from the defendant, and which quantity came from the other suspect. RP 136, 157. The C.I. testified that there was “no chance” that he could have confused which quantities came from which individual. RP 136. Officer Johnson individually bagged, marked and labeled the separate quantities and wrote a property report documenting which marked quantity came from which suspect. RP 157, 163. The quantities were kept separate at all times. RP 158, 162, 164.

Washington State Patrol Crime Laboratory forensic scientist, Maureena Dudschus, analyzed both quantities of what she and the officers believed to be rock cocaine. RP 95, 103. Tests performed by Ms. Dudschus revealed that the substance sold by defendant was not cocaine, but rather, it was nicotinamide (vitamin B), an uncontrolled substance similar in appearance to rock cocaine. RP 104. Ms. Dudschus testified that dealers often use Nicotinamide to dilute a controlled substance and sometimes sell it as cocaine to unsuspecting buyers. RP 108. The substance sold by the suspect accompanying defendant tested positive for cocaine. RP 109.

Officer Robert Baker was the undercover officer called to monitor the drug transaction and to maintain visual contact with the suspects. RP 168. Upon arriving on the scene, Officer Baker observed the C.I. with the defendant and the other suspect in the alley. RP 169. After the transaction

was complete, the C.I. left the alley, and Officer Baker remained in position, maintaining surveillance of defendant and the other suspect. Id. Officer Baker observed uniformed officers contact and identify defendant and the other suspect. RP 170.

At trial, the defense argued that the C.I. could have mixed up the samples, and therefore it was not known whether defendant had sold the uncontrolled material or the rock cocaine. The defense argued that the C.I. was not credible, and therefore his testimony that he distinguished the quantities of drugs by which individual sold them and that he kept them separated at all times during the transaction was not reliable. RP 192-210. Defendant did not testify and the defense did not call any witnesses.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW THAT THE PROSECUTOR ACTED IMPROPERLY WHEN HE EMPHASIZED PARTICULAR JURY INSTRUCTIONS AND ARGUED THAT THE EVIDENCE DID NOT SUPPORT THE DEFENSE'S THEORY AT CLOSING.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so “flagrant and ill intentioned” that no curative instruction would have obviated the prejudice it engendered. State v. Hoffman, 116 Wn.2d 51,

93, 804 P.2d 577 (1991); State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) "remarks must be read in context." State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. Finch, 137 Wn.2d 792 at 839. The

trial court is best suited to evaluate the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory. Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

In this case defendant argues that the prosecutor committed misconduct at closing by misstating the State’s burden. During closing, defense counsel called into question the accuracy of the C.I.’s testimony that he kept the samples given by defendant and the other individual separated, arguing that the C.I. was not credible given his history of drug use and that it would have been “impossible” for the C.I. to drive while holding onto the drugs. RP 198-211. In rebuttal, the prosecutor pointed out that defense counsel’s comment was not evidence, and that no evidence established that the C.I. “mixed-up” the samples. The prosecutor emphasized police testimony that the C.I. was a “reliable informant,” and the C.I.’s testimony that he kept the samples separate. RP 214. Additionally, the prosecutor emphasized the court’s instructions to “disregard any remark[], statement[] or argument that is not supported by the evidence,” CP (Jury Instruction No. 1) 23, RP 215, and then read the following from the first page of the jury instructions; “It is your duty as

the jury to determine which facts have been proved in this case from the evidence produced in court.” CP (Jury instruction No. 1), CP 22, RP 214.

Defendant did not object to the arguments or request a curative instruction at trial and thereby the issue is waived unless defendant can show that the argument was flagrant and ill-intentioned. RP 198, 216.

Defendant claims that the prosecutor’s arguments misstated that law and that his comments improperly shifted the State’s burden to defendant to disprove the State’s case. The prosecutor did not shift or even confuse the State’s burden. Rather he made a fair response to the arguments of defense counsel. Such a response is not misconduct. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). A prosecutor may comment on the arguments of defense counsel, characterize the arguments of the defense, and argue that the evidence does not support the defense theory. Russell, 125 Wn.2d at 87. Moreover, the language defendant claims to be prejudicial was taken predominately from the Jury Instructions. See Brief of Appellant at 7.

The court instructed the jury that the State had “the burden of proving each element of the crime beyond a reasonable doubt,” and that a “reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP (Jury Instruction No. 2) 25. It is presumed that the jury followed the court’s instructions. State v. Grisby,

97 Wn.2d 493, 509, 647 P.2d 6 (1982). Moreover, any confusion possibly resulting from the prosecutor's remark could have been obviated by an additional instruction referring the jury to the courts instruction regarding the beyond a reasonable doubt standard. The prosecutors remarks here did not lesson the State's burden or prejudice defendant, and the court clearly instructed the jury on the State's burden. Defendant fails to show conduct that was flagrant and ill intentioned.

2. DEFENDANT RECEIVED  
CONSTITUTIONALLY EFFECTIVE  
ASSISTANCE OF COUNSEL THROUGHOUT  
THE PROCEEDINGS BELOW.

A defendant's right to counsel is guaranteed by both the United States Constitution and the Washington State Constitution. See U.S. Const. amend 6; Const. art. 1, § 22. The test for ineffective assistance of counsel has two parts: (1) the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) the defendant must show that such conduct caused actual prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816

(1987) (applying the two-prong test from Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

With respect to the first prong of the test, scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U. S. 995 (1986). As to the second prong, a defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. Thomas, 109 Wn.2d 222, 743 P.2d 816 at 225-26.

In the present case, defendant claims ineffective assistance of counsel based on his attorney's decision not object to remarks made by the prosecutor at closing. Defendant must prove that his attorney's representation fell below an objective standard of reasonableness and that the deficient representation resulted in prejudice that effected the sentence. See State v. Maurice, 79 Wn. App. 541, 544, 903 P.2d 514 (1995).

Here, defendant fails to show that defense counsel was unreasonable for not objecting to the prosecutor's argument at closing. As discussed, the prosecutor remarks did not misstate the law or shift the State's burden and

therefore did not warrant objection. Defendant, likewise, fails to meet his burden under the second prong. Defendant's argument that but for the defense counsel not objecting, the outcome of the proceeding would have been different fails. Defendant argues that "given the weakness" of the State's evidence that the C.I. had kept the samples separate, the verdict would have been affected had defense counsel objected. (Brief of Appellant at 13). Defendant's argument rests on his assumption that the C.I. was not credible. For the defendant's argument to succeed, this Court would have to adopt this assumption. Credibility determinations are made by the trier of fact, who alone, "had the opportunity to view the witness's demeanor and to judge his veracity." State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). The prosecutor's remarks at closing did not lessen the State's burden. Accordingly counsel's decision not to object did not prejudice defendant.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the Court affirm defendant's conviction.

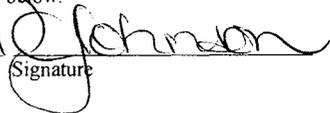
DATED: FEBRUARY 1, 2007

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Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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