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I. ISSUES PRESENTED

- A. Were the prosecutor's comments during closing argument improper, prejudicial, and so flagrant and ill-intentioned that the prejudicial effect could not have been neutralized by a curative instruction to the jury?
- B. Was the collection of Parish's DNA following his felony conviction proper under RCW 43.43.754?

II. STATEMENT OF THE CASE

The State accepts Parish's "Statement of the Case" appearing in Appellant's Opening Brief as adequate for this response with the following additions and/or clarifications:

Regarding the testimony of Tyler Muir, Parish states that Tyler "heard someone come into the house, go upstairs, [and] come back downstairs." Appellant's Opening Br. at 2. Additionally, it should be noted that Tyler not only heard someone go upstairs, but heard that person "mess around up there for awhile," which he described as making "rustling noises." 3/27/2006 Report of Proceedings at 9. While Tyler recognized this person as Parish, at no time in Tyler's testimony did he refer to Parish as an "old family friend," as Parish has characterized it. *See* RP at 6-17; Appellant's Opening Br. at 3. In reality, it was Todd Muir, Tyler's father, who later testified that Tyler had referred to Parish as Dick, "one of [Mr. Muir's] old friends," but added, "[t]hat's a nice way to put it." RP at 20. When Tyler caught Parish with his father's change jars laid

out on the bed Tyler exclaimed, “what the hell are you doing in my house.” RP at 12. According to Tyler, Parish responded by saying he was there to fix the trim, and then “started messing around with the bathroom doorway.” RP at 12. Also, Tyler had to *repeatedly* tell Parish to exit the residence until Parish complied. RP at 13.

Concerning Detective Matt Wallace’s testimony—to clarify, Detective Wallace testified that Parish *originally* stated that he had “recently” spoken to Mr. Muir about the trim work and then later specified that the supposed conversation took place “nine months” ago. RP at 30. The Appellant’s Opening Brief failed to point out that the silver dollar found on Parish was unique because of its age and the fact that it contained a misprint. RP at 33, 43. Moreover, Parish valued the coin and had had it for a long time. RP at 33, 43. A search of Parish’s vehicle did not reveal any notepads, which would indicate that he was at the residence to take measurements for trim work. RP at 34.

III. ARGUMENT

A. Parish has failed to show that the prosecutor’s comments were improper, that the comments were prejudicial, and that the comments were flagrant and ill-intentioned

Under Superior Court Criminal Rule 7.5(a), a court, on motion of a defendant, may grant a new trial when it appears that “a substantial right of the defendant was materially affected.” Among other things, a

substantial right of a defendant may be materially affected when there was “misconduct of the prosecution or jury.” CrR 7.5(a)(2).

To answer this question, the court “must first determine that the comments are in fact improper.” *State v. Reed*, 102 Wash.2d 140, 145, 684 P.2d 699 (1984). If they are improper, the court must next consider whether the comments were “prejudicial.” *State v. Stith*, 71 Wash.App. 14, at 19, 856 P.2d 415 (1993). A comment is prejudicial when, taken in context, there was “a substantial likelihood” that the misconduct “affected the jury's verdict.” *Id.*, quoting *State v. Barrow*, 60 Wash.App. 869, 876, 809 P.2d 209, review denied, 118 Wash.2d 1007, 822 P.2d 288 (1991). Furthermore, when “the defense fails to object to an improper comment, the error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006); See also *State v. Brown*, 132 Wash.2d 529, 568, 940 P.2d 546 (1997).

The basis for CrR 7.5(a)(2) is rooted in the Sixth Amendment and the United States Constitution Article 1, Section 22, which grants defendants the right to trial by an “impartial jury.” However, the right to an impartial jury does not include the “right to an error-free trial.” *Reed*, 102 Wash.2d at 145. Additionally, the defendant bears the burden of proof

on this issue. *McKenzie*, 157 Wash.2d at 57. *See also Brown*, 132 Wash.2d at 561.

1. The prosecutor's comments during closing arguments were not improper because they were simply comments deduced from the testimony in the case

“While it is improper for a prosecuting attorney, in argument, to express his individual opinion he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.” *McKenzie*, 157 Wash.2d at 53; *See also State v. Dhaliwal*, 150 Wash.2d 559, 577, 79 P.3d 432 (2003) (*finding* that prosecutors may not make prejudicial statements that are not sustained by the record). “In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.” *McKenzie*, 157 Wash.2d at 53.

“To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context.” *Id.* “It is not uncommon for statements . . . which, standing alone, sound like an expression of personal opinion.” *Id.* “However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that [the prosecutor] is trying to convince the jury of certain ultimate facts and

conclusions to be drawn from the evidence.” *Id.* at 53-54. Moreover, where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying. *See State v. Copeland*, 130 Wash.2d 244, 291-92, 922 P.2d 1304 (1996).

Parish takes exception with the prosecutor's comment during closing argument that “in order to believe the defendant and to believe his version of these events you have to subscribe to a conspiracy theory;” “that Todd and Tyler Muir somehow set the defendant up.” Appellants Opening Br. at 6; RP at 63. Parish points out that in rebuttal argument, the prosecutor again stated that “a conspiracy theory is not reasonable.” RP 73.

At trial, the testimony of Tyler Muir was consistent with the testimony of his father, Todd Muir, while Parish's testimony directly conflicted with Todd Muir's. The prosecutor's comment that in order to believe the defendant you have to subscribe to a conspiracy theory was not a communication of the prosecutor's own belief that Parish was lying. It was simply an attempt to accentuate the evidence that was presented and the conclusions the jury should draw from that evidence. The prosecutor's comment in rebuttal argument that the “[jury was there] to determine credibility” and “determine what makes sense in these facts” emphasizes that this was not a personal opinion, but was an attempt to highlight the

evidence that the jury should consider. RP 72. Moreover, there was additional evidence beyond the contradictory testimony to suggest Parish's guilt; namely a motive (he was financially distressed), his interest in rare coins, and his lack of proper equipment to commence the trim work repair. Taking the prosecutors comment in the context of the facts in the case, this court should rule that the comments were proper.

2. Even if the court feels the prosecutor's comments were improper, the comments were not prejudicial because there was not a substantial likelihood that the comments affected the jury's verdict

As noted above, even if a court feels the comments in this case were improper, to grant Parish a new trial, the court must also rule that the comments were prejudicial. *See McKenzie*, 157 Wash.2d at 52. "Comments will be deemed prejudicial only where there is a substantial likelihood the misconduct affected the jury's verdict." *Id.* "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." *Id. See also Barrow*, 60 Wash.App. at 877. "Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the

evidence, but is expressing a personal opinion.” *McKenzie*, 157 Wash.2d at 54.

In addition to the argument made above that the prosecutor’s comments were not a personal opinion, the jury instructions that were provided at trial ameliorated any prejudicial effect that the comments may have had. Specifically, at trial, the court instructed the jury that they were “the sole judge of credibility of the witnesses and of what weight is to be given the testimony of each.” CP 13. The court added that “[t]he attorney’s remarks, statement and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument which is not supported by the evidence or the law as stated by the court.” *Id.* The court should presume that jurors follow jury instructions. *See State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). This principle, combined with the context in which the comments were made, the issues in the case, and the evidence addressed in the argument, strongly suggests that the comments had no effect on the jury’s verdict.

3. ***Even if the court rules that the comments were improper and prejudicial, the court should not grant a new trial because the comments were not flagrant and ill-intentioned***

“Where the defense fails to object to an improper comment, the error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *McKenzie*, 157 Wash.2d at 52. 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 Wash.2d 613, 661, 790 P.2d 610 (1990). “Moreover, counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” *Id.*

At trial, Parish’s attorney failed to object to the prosecutor’s comments that Parish now alleges to be improper. Consequently, even if the court feels the comments were improper *and* prejudicial, the court must also find that the comments were so “flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *McKenzie*, 157 Wash.2d at 52. At trial, the prosecutor’s comments obviously did not appear so flagrant and ill-intentioned that they warranted an objection by the defense counsel. Any prejudicial effect could have been mitigated by the appropriate objection followed by a curative instruction. Moreover, a

curative instruction was provided in the form of the jury instructions that were given. *See* CP at 13.

Other cases have analyzed the prejudicial effect of comments made during a prosecutor's closing arguments. In *State v. Brown*, the prosecutor warned that "this will become a city of sodomy" in response to arguments advanced by the defendant. 35 Wash.2d 379, 384, 213 P.2d 305 (1949). Although the court noted that the comment was to not be commended, it was not viewed as prejudicial misconduct. *Id.* at 386. Similarly, in *State v. Baker*, the jury was told that if they did not find the defendant guilty, one of the jurors or the wife of one of them would "wake up some day and find the same thing happens to you." 30 Wash.2d 601, 607, 192 P.2d 839 (1948). This comment was also not found to constitute prejudicial error. The comments in this case are far less inflammatory than the comments in either *Baker* or *Brown*.

In *Barrow*, a prosecutor argued that by giving testimony contradictory to that of the police officers who testified for the State, the defendant was, in effect, calling the police officers liars. 60 Wash.App. at 874. The court held that the prosecutor's comments constituted misconduct because it was possible that the defendant's testimony indicated that the officers were mistaken, not lying. *Id.* at 875. However, the court declined to reverse the conviction because of the failure of

defendant's counsel to object to the argument and because it was not substantially likely that the comments affected the jury's verdict. *Id.* at 876-77. *See also McKenzie*, 157 Wash.2d 44 (*holding*, in part, that a prosecutor's comments were improper but because there was no objection, the comments did not rise to the level of misconduct warranting a new trial). Accordingly, this court should follow the decisions in *Barrow* and *McKenzie* and hold that even if the prosecutor's comments were improper, Parish's failure to object indicates that the comments did not affect the juries' verdict.

B. Under RCW 43.43.754, the collection of Parish's DNA following felony conviction was proper

In *State v. Surge*, Division One of the Court of Appeals upheld the constitutionality of RCW 43.43.754, which mandates the collection of DNA evidence from convicted felons. 122 Wn.App. 448, 94 P.3d 345. (2004). In the decision, the court reasoned that *State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076 (1993) was still good law, despite the fact that in *United States v. Kincade*, the Ninth Circuit had held in a three-judge panel that a similar federal statute violated the Fourth Amendment. *See* 345 F.3d 1095 (9th Cir.2003). The *Surge* court noted that the Ninth Circuit ordered *Kincade* be reheard en banc, (*See* 354 F.3d 1000 (9th Cir.2004)) but that at the time the *Surge* decision was drafted, the en banc opinion

had not been issued. *State v. Surge*, 122 Wn.App. 448, 450, 94 P.3d 345. (2004). Since the *Surge* ruling, the Ninth Circuit has issued their en banc opinion, and ruled that the similar federal statute *does not* violate the Fourth Amendment. 379 F.3d 813 (2004). Parish failed to point this out in his appeal. Appellant's Opening Br. at 12, Fn. 1.

The Washington Supreme Court has granted review of Division One's decision in *Surge*. 153 Wn2d 1008 (2005). The issue has been argued but the opinion is still pending. Accordingly, with Division One's ruling in *Surge* and the Ninth Circuit's opinion in *Kincade* the current controlling authority, Division Two should follow the decision in *Surge* and rule that the collection of Parish's DNA following his felony conviction was proper.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Parish's conviction be affirmed and his appeal be denied.

Respectfully submitted this 11th day of September, 2006.

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CERTIFICATE

I certify that on September 11th 2006, I mailed a copy of the foregoing supplemental response by depositing it in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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