

No. 36231-7-II  
Consolidated No. 36163-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS FAZIO  
ANCIL G. JONES, III

Appellants.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks, Judge  
Cause No. 06-1-02249-5  
06-1-02265-7

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence to support Fazio's conviction for conspiracy to commit first degree robbery.

2. Whether the prosecutor's remarks during rebuttal constituted misconduct, and if so, whether Fazio was prejudiced thereby.

3. Whether there was sufficient evidence presented at trial to persuade a rational trier of fact that Jones was guilty of the crimes of second degree assault and conspiracy to commit first degree robbery.

B. STATEMENT OF THE CASE.

The State accepts the appellants' statements of the case.

C. ARGUMENT

1. There was sufficient evidence to support Fazio's conviction for conspiracy to commit first degree robbery.

a. There was sufficient evidence from which a reasonable trier of fact could find that Fazio was aware that at least one of his co-conspirators was armed, regardless of whether he was part of the original agreement to use a firearm.

Fazio argues that because he remained in his car, while Yeldon and Jones went into Skau's house to ask for the gun later used to shoot the victim, Hamlin, he could not have known that a deadly weapon was involved, and that since the use of the deadly weapon is the factor that elevates the robbery to first degree robbery, he cannot be found guilty of conspiracy to commit that crime. However, based upon the totality of the evidence, the jury

could have found that he did know that a weapon was present and was going to be used.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and

direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Erik Skau, one of the group which robbed Hamlin, testified that Yeldon talked about the robbery while the four of them (Fazio, Jones, Yeldon, and Skau) were in Fazio's car [03/21/07 RP 325] and that the four of them drove around for a few hours, including a stop at McDonald's for food. [03/21/07 RP 326-27] Yeldon testified that the four didn't even go inside to eat, but rather ate in the car. [03/26/07 RP 68] Skau said Jones asked him for the gun in the car, and he handed the gun over to Jones, also while they were in Fazio's car, [ 03/21/07 RP 329, 346-47] and although both Fazio and Yeldon were in the front seat and the transfer took place in the back seat, Yeldon knew that it had occurred. [03/26/07 RP 69-70] It is reasonable to infer that Fazio was also aware of it. There was conversation in the car at EVG about the plan for the robbery

[03/21/07 RP 367] and Skau believed that Fazio knew about the plan to rob Hamlin of his drugs. [03/21/07 RP 370] While there was no dispute that Fazio was under the influence of drugs, all four of the conspirators were using drugs that evening. No one passed out. [03/26/07 RP 47] A reasonable trier of fact could infer that a person spending a few hours in a small car with three other people knows what is happening in that car. The car belonged to Fazio, and he could presumably have evicted the other three if he did not acquiesce to the planned robbery. Under the standard of review for challenges to the sufficiency of the evidence, as set forth above, a rational trier of fact could have concluded Fazio was aware that a gun was being used in the robbery.

b. The State is not required to prove that an accomplice had knowledge that a principal was armed.

Even if Fazio was unaware of the fact that Jones was armed with a firearm, he is still liable as an accomplice to the crime of first degree armed robbery. The first Washington case to reach this conclusion is State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984). Davis was the lookout man for a co-defendant who robbed a pharmacy clerk at gunpoint. Davis was convicted as an accomplice to robbery in the first degree, and argued that he did not know the

co-defendant was armed. The Supreme Court affirmed, with this language:

As to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality. State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974).

“The correctness of this holding should be apparent. The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.” Carothers, at 264.

Furthermore, this distinction recognizes that the Legislature has a valid interest in discouraging the use of deadly weapons by imposing strict liability on all those involved in robbery which, by its very nature, generally requires use of weapons to facilitate the act of illegally obtaining money from another by force.

Davis, *supra*, at 658-59.

In a 2005 case, the Washington Supreme Court continued to follow Davis. In State v. Domingo, 155 Wn.2d 356, 369, 119 P.3d 816 (2005), the court specifically upheld both Davis and State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984). Rice held that “where criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice’s general knowledge

of his coparticipant's substantive crime. Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice. Id., at 125.

The sentencing enhancement of the Sentencing Reform Act which follows a jury finding that the defendant was armed with a firearm, applies to the accomplices of the one who possessed the weapon. State v. Bilal, 54 Wn. App. 778, 776 P.2d 153 (1989)

Fazio does not claim that he was unaware that the group planned to rob Hamlin, or that his car was being used as part of that robbery, only that he did not know that Jones was armed. A reasonable jury could have believed that he did know, but even if the evidence had been insufficient, it doesn't matter. Fazio knew the general nature of the crime to be committed, and as an accomplice he bears the same liability as the others.

2. The prosecutor's rebuttal argument did not deprive Fazio of his right to a fair trial.

Fazio contends that it was misconduct for the prosecutor to say about Skau, during rebuttal argument, "Do you think that if he had criminal convictions, don't you think you would have heard about them? You didn't.", and "So you have someone like Mr. Skau, who, although, unfortunately, he has lapsed into drug usage

has no criminal history . . . “. [03/27/07 RP 103] During trial, the court had sustained a defense objection to Skau’s lack of criminal history being admitted into evidence. [03/21/07 RP 339-342] Neither defense attorney objected to the prosecutor’s remarks.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor’s conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict”. . . . We review a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. . . . In addition, prosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective. . . .

Id., at 306, cites omitted.

The trial court must have an opportunity to correct the alleged error, and failure of the defendant to object at trial constitutes a waiver of his right to challenge the remarks on appeal. State v. Fullen, 7 Wn. App. 369, 389, 499 P.2d 893 (1972). “If misconduct is not objected to or a curative instruction is not

requested, then reversal is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction. . . . In closing argument, a prosecutor may comment on a witness's veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury." State v. Stith, 71 Wn. App. 14, 20-21, 856 P.2d 415 (1993). The defendant has the burden of establishing both the impropriety and the prejudicial effect of the prosecutor's comments. State v. Perkins, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999). "[T]he question to be asked is whether there was a 'substantial likelihood' the prosecutor's comments affected the verdict." State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)

The remarks made by the prosecutor during this trial were innocuous. It is unlikely that it escaped the notice of the jury that Mary Yeldon and Dean Hamlin were both questioned in some depth about their criminal histories. [03/20/07 RP 275-76; 03/26/07 RP 57-58] Skau was not. The remarks were made during rebuttal argument, after the attorneys for both Fazio and Jones had attacked Skau's credibility. [03/27/07 RP 61-64, 89] There was never any question that Skau was a drug user, lived in a drug

house, and had provided the gun used in this crime, as well as drove Fazio's car during the robbery. The prosecutor acknowledged during his closing argument that Skau was not of impeccable character. [03/27/07 RP 34] A prosecutor may comment on a witness's veracity, but he may not personally vouch for the witness's credibility. State v. Sandoval, 137 Wn. App. 532, 540, 154 P.3d 271 (2007). Here the prosecutor did not vouch for Skau's credibility, but rather pointed out reasons why the jury should believe him. Even if he had vouched for Skau, Fazio has not established that he was prejudiced by the remarks. Skau was not the sole witness against him, and given the totality of the evidence, there is no reasonable chance that the remarks affected the outcome of the trial. The jury was instructed that the remarks of the attorneys were not evidence. [03/27/07 RP 9]

It is unlikely that even if the jury drew the conclusion, as Fazio argues, that Skau received a favorable deal because he had no criminal history, and therefore Fazio must have had criminal history, that it would make much of an impact on them. There was considerable testimony that both Jones and Fazio were long-time drug users, and it wouldn't be much of a stretch for the jury to

conclude they probably had prior convictions, even without knowing that Skau did not.

As noted before, neither defense attorney objected during the prosecutor's argument, nor did either ask for a curative instruction.

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. The absence of a motion for mistrial at the time of the argument 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. Moreover, "[c]ounsel 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."

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)

Because no objection was made, the question before this court is whether, even if the remarks were improper, any curative instruction would have removed the prejudice. Reversal is called for only if the remarks were so flagrant and ill-intentioned that no instruction could have cured the prejudice. Belgarde, *supra*, at 507.

That is not the case here. The remarks, considered in the context of the total argument, were innocuous and non-prejudicial.

3. There was sufficient evidence to persuade a rational trier of fact that Jones committed the crimes of second degree assault and conspiracy to commit first degree robbery.

The test for determining sufficiency of the evidence is set forth above.

Three witnesses—Hamlin, Skau, and Yeldon—all testified about the planned robbery, and all identified Jones as one of the robbers. Hamlin and Yeldon identified Jones as the person who shot Hamlin, and Skau testified that he gave the gun used in the shooting to Jones. Jones contends that because the three received favorable plea agreements from the State, they cannot be deemed credible. However, the jury heard evidence about the plea agreements when the witnesses testified, and it had that information to take into consideration when it decided whom to believe.

The jury was the sole judge of the credibility of the witnesses. “The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing to State v. Cord, 103

Wn.2d 361, 367, 693 P.2d 81 (1985)). Here there was substantial evidence from several witnesses, as well as photos taken when he was booked into jail that are consistent with the description given by the victim [Exhibit 77]. The defense attorneys had ample opportunity, of which they took full advantage, to cross-examine all the witnesses. Jones is asking this court to make a credibility determination different from that made by the jury. That is beyond the scope of this court's review.

Jones argues that the testimony of his girlfriend, Angel Pierce and her roommate, McClain, established his alibi for the night of the crime. Here again the jury decides whom to believe, and they obviously did not believe Pierce and McClain, both of whom had considerable bias, particularly in light of the evidence that the photos of Jones Pierce claimed to have taken a few days later and which showed him with longer hair, may well have been taken at some other time. [03/26/07 RP 132-135, 208-11]

There was sufficient evidence to support Jones' conviction for conspiracy to commit robbery in the first degree and assault in the second degree.

D . CONCLUSION.

There was sufficient evidence to support the convictions of both defendants. The remarks made by the prosecutor during rebuttal argument do not constitute prosecutorial misconduct. Even if they were improper, there is no evidence that Fazio was prejudiced. The State respectfully asks this court to affirm the convictions of both defendants.

Respectfully submitted this 1st of February, 2008.

*Carol La Verne*

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Attorney for Respondent

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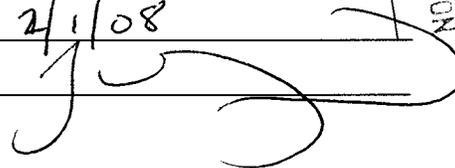
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Date: 2/1/08

Signature: 

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