

NO. 36761-1-II

FILED
COURT OF APPEALS
DIVISION II

08 OCT 27 PM 1:38

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY SP
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

SCOTT EVATT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz
The Honorable Frank E. Cuthbertson
The Honorable Thomas P. Larkin

No. 07-1-01686-6

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
SCOTT R. PETERS
Deputy Prosecuting Attorney
WSB # 35469

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defense failed to meet its burden by alleging prosecutorial misconduct when the prosecutor presented a valid argument about testimony at trial and responding to defendant's improper statements during the trial? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 6

 1. DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT..... 6

D. CONCLUSION..... 17

Table of Authorities

State Cases

<i>State v. Ashby</i> , 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969).....	13, 14, 16
<i>State v. Binkin</i> , 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), overruled on other grounds by <i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002)	7
<i>State v. Crawford</i> , 21 Wn. App. 146, 152, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979)	14
<i>State v. Dennison</i> , 72 Wn.2d 842, 849, 435 P.2d 526 (1967)	10
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 729, 899 P.2d 1294 (1995).....	13
<i>State v. Gentry</i> , 125 Wn.2d 570, 640, 888 P.2d 570 (1995)	6, 7
<i>State v. Graham</i> , 59 Wn. App. 418, 428, 798 P.2d 314 (1990).....	10
<i>State v. Green</i> , 46 Wn. App. 92, 96, 730 P.2d 1350 (1986)	10
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991)	6
<i>State v. Ingle</i> , 64 Wn.2d 491, 392 P.2d 442 (1964).....	16
<i>State v. Kroll</i> , 87 Wn.2d 829, 837, 558 P.2d 173(1976).....	15
<i>State v. Litzenberger</i> , 140 Wash. 308, 311, 248 P. 799 (1926)	13
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	6
<i>State v. Ramirez</i> , 49 Wn. App. 332, 336, 742 P.2d 726 (1987).....	14
<i>State v. Reed</i> , 25 Wn. App. 46; 604 P.2d 1330 (1979)	12, 14
<i>State v. Russell</i> , 125 Wn.2d 24, 86, 883 P.2d 747 (1994).....	7, 10
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)	7

Federal and Other Jurisdictions

Miranda v. Arizona, 384 U.S. 436, 86 s. Ct. 1602,
16 L. Ed. 2d (1966).....5

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

1. Has defense failed to meet its burden by alleging prosecutorial misconduct when the prosecutor presented a valid argument about testimony at trial and responding to defendant's improper statements during the trial?

B. STATEMENT OF THE CASE.

1. Procedure

On March 28, 2007, the State charged defendant, Scott Evatt, with burglary second degree, assault third degree, theft third degree, resisting arrest, and obstructing a law enforcement officer. CP 1-3. At arraignment, defendant requested to proceed pro se and act as his own attorney. 1RP 5¹. After a colloquy, the court granted defendant's request. 1RP 5.

On May 9, 2007, defendant was arraigned on an amended information. 2RP 30. The amended information changed the burglary count to a charge of burglary in the first degree; the other four counts remained the same. CP 47-49. After this arraignment, the court again

¹ The State is following the format for the verbatim report of proceedings set forth in Appellant's opening brief on page 3. The State has added verbatim report of proceedings from August 20, 2007 and will refer to it as "9RP."

engaged defendant in a colloquy to confirm he wanted to represent himself. 2RP 31-41.

On June 27, 2007, defendant was sent to Western State Hospital for a competency evaluation. 5RP 45-46. On July 31, 2007, defendant was found competent by the court. 6RP 3. The court engaged in third colloquy with the defendant to ensure that he wanted to continue to represent himself. 6RP 4-11. The court once again found defendant had made a knowing, intelligent, and voluntary waiver of his right to an attorney and permitted defendant to continue self-representation. 6RP 11.

Trial commenced on August 16, 2007, in front of the Honorable Thomas Larkin. 8RP 1. Before the trial began, the court reengaged defendant in a colloquy to make sure he wanted to proceed with a trial representing himself and found defendant was making a knowing, intelligent, and voluntary waiver of his right to an attorney and could proceed pro se. 8RP 7-9. On August 23, 2007, the jury found defendant guilty of theft third degree, resisting arrest, obstructing a law enforcement agent, and the lesser crime of burglary second degree. 8RP 316-317.

Sentencing followed on September 14, 2007. 8RP 324. Defendant had an offender score of 10 which put him in the 51-68 month range for the burglary second degree charge. 8RP 327-328. The theft and obstruction charges are gross misdemeanors and the resisting arrest charge is a simple misdemeanor. 8RP 330. The court granted defendant a DOSA sentence. 8RP 336-337. The State objected to the DOSA because

defendant had already been granted a DOSA sentence for a past crime. 8RP 328-330, 339. Defendant received a sentence of 29.75 months in prison and 29.75 months on community custody based on the DOSA sentence. 8RP 337. Defendant filed this timely appeal. CP 389.

2. Facts

On March 27, 2007, around 9:00 p.m., defendant entered the Rite Aid Store located at 72nd Street and Pacific Avenue in Tacoma, Washington. 8RP 79-80, 101-102. Defendant had been told previously on several occasions that he was not allowed at that Rite Aid store. 8RP 114-115. As soon as defendant entered Rite Aid, a loss prevention agent, Chris Comstock, recognized him from previous encounters. 8RP 101-102, 114-115.

Chris began watching defendant from the back of the store via a surveillance camera. 8RP 102-103. Defendant walked to the back of the store and selected a single can of beer. 8RP 103. Defendant then selected an 18 pack of beer. 8RP 103. Defendant placed the 18 pack of beer under his coat and used his coat to conceal it. 8RP 103-104. He then walked up to the cashier with the single can of beer in hand. 8RP 104. At the counter, defendant stood behind a sales rack in an effort to conceal the hidden beer from the sales cashier. 8RP 103-104. Defendant placed the single beer on the counter and gave the cashier, Georgiana Braddick, change to pay for the beer. 8RP 80-81, 105. Georgiana received only

enough money from defendant to pay for the single can of beer and she entered a sale on the single can of beer. 8RP 80-81, 105. Defendant left the store without paying for the 18 pack of beer and Chris chased after him. 8RP 81-82, 104-105. The surveillance tape from Rite Aid that recorded these events was admitted into evidence. 8RP 104-108.

After defendant exited Rite Aid, Chris was able to contact him two-to-three feet from the front door. 8RP 108. Chris unsuccessfully tried to get the defendant to go back into the store. 8RP 108-111. Instead, defendant urinated on the building. 8RP 108-109. During this time and throughout the incident, customers were present at the business and defendant acknowledged that customers saw him do this. 8RP 94, 97, 109, 147. After defendant finished urinating, Chris asked him again to return to the store to take care of the stolen beer. 8RP 109-110. The defendant responded by saying, "I can pick up that beer and walk right out, and there's nothing that you can do about it." 8RP 110. After making this statement, defendant shoved Chris using his hands and started to walk across the parking lot. 8 RP 110-111.

Around this time, Tacoma Police Officer Birge and Officer Metzger arrived at Rite Aid. 8RP 169-170, 198-200. Each officer arrived in a marked police car equipped with lights and sirens, and each officer was wearing a uniform. 8RP 170-171, 229. Defendant made eye contact with the officers. 8RP 172, 200. The officers verbally identified themselves as police and defendant began to run away from the officers.

8RP 172, 200. Both officers began to chase the defendant and shouted a minimum of five times between the two officers for defendant to stop running. 8RP 171-173, 200-201. After 150 yards, Officer Birge tackled defendant. 8RP 173, 201.

Once defendant was on the ground, he tucked his arms underneath his chest and would not cooperate with officers. 8RP 173-174, 203. Defendant tried to push himself off the ground, while officers repeatedly told him to stop resisting. 8RP 174, 203-204. Defendant never cooperated but, after a brief struggle, officers were able to get him handcuffed. 8RP 174, 203-204.

The officers walked defendant back to their patrol cars; while Officer Metzger advised defendant of his *Miranda*² rights. 8RP 204-205. Defendant responded to his rights by saying, "Fuck you, bitch." 8RP 205. While walking back to the patrol car the defendant spontaneously stated, "I know I'm a shit head and I deserve this." 8RP 206. Once inside the patrol car, defendant started cursing and calling the officer names. 8RP 205. Defendant stated, "You're going down, you lying fucking bitch. You lying fucker...I'm going to get you." 8RP 205. During this time, defendant threatened to sue the officer numerous times for arresting him for a felony. 8RP 206. Upon arrival at the jail, defendant told Officer

² *Miranda v. Arizona*, 384 U.S. 436, 86 s. Ct. 1602, 16 L. Ed. 2d (1966).

Metzger that, “[H]e was tired of this rookie cop shit,” and, “You’re going down. I’m going to get you.” 8RP 206.

Defendant called Lea Sanders, a defense investigator, in his defense case. 8RP 233-247. Ms. Sanders testified that she interviewed Chris and Georgiana about a month and half after the incident. 8RP 234, 243-244. Ms. Sanders also took photographs of the Rite Aid store during the time of the interview. 8RP 240. Ms. Sanders did not provide any information that contradicted the State’s witnesses. 8RP 233-247.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). To prove that a prosecutor’s actions constitute misconduct, 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). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v.*

Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson, supra*, at 719, citing *Gentry, supra*, at 593-594.

Comments by a prosecutor cannot be viewed in a vacuum. Statements by the prosecutor must be viewed in context of the entire trial to determine in the State was responding to an issue raised by defense counsel. *State v. Russell*, 125 Wn.2d 24, 86, 883 P.2d 747 (1994).

Defendant alleges that the following arguments constituted improper argument. The first alleged instance occurred during the State's closing argument. The prosecutor argued that the surveillance video

showed the theft and stated, “The video, you have seen it; you have watched it. There’s no contradiction of the video. That is really him exerting control over the beer and taking it out of the store without paying for it.” 8RP 281-282. During that same closing, the State argued that the witnesses did not give contradicting statements about the obstruction or resisting charges. 8RP 284-285. At the end of the closing, the prosecutor stated:

What I want you to do is, look at all the evidence in this case. The defendant is going to come up here and say, “Well, not every person’s story was exactly the same.” Of course, they’re not. It would be odd if they were. If everybody came up here and said exactly the same thing word for word, that would be really suspicious. What we talked about in voir dire is, basically, that overtime, people’s memories slightly fade. And what you saw here was four people, four witnesses, give, basically, the same account of this incident. *There was no real contradiction between any of their versions.* They, basically, gave the same account of what occurred, and it has been uncontradicted throughout. I want you to take that into account when you’re looking at the evidence.

8RP 290 (emphasis added). The second challenged argument occurred during the State’s rebuttal argument. The prosecutor stated:

You and you alone are the sole judges of the credibility of the witnesses, and Jury Instruction 1 talks about that. You heard all of the testimony from my four witnesses, from his investigator. You get to judge their credibility. You also get to judge what was said here. There’s one consistent story, and that is the defendant is guilty of these crimes. I’m asking that you find him guilty of the five that were originally charged.

8RP 303-304. There were no objections to any of these arguments. Therefore, defendant must demonstrate that the comments were so “flagrant and ill-intentioned” that a curative instructions would not remedy the situation. As will be more fully discussed below, he cannot meet this burden and the convictions should be affirmed.

a. The Challenged Arguments Did Not Impermissibly Comment On The Defendant’s Right To Remain Silent.

Look at the challenged statements in context, the arguments were not improper. The overall theme of the argument was whether the State’s evidence presented a consistent picture of the defendant’s guilt. The prosecutor argued that the video evidence and witnesses statements were consistent with one another. 8RP 281-282. The prosecutor further argued that the witnesses outside the store all gave a consistent version of events. 8RP 284-285, 290. Defendant fails to show how this argument is a comment on his right to remain silent. The prosecutor never talks about evidence that was not present at trial. The prosecutor is arguing about how the evidence adduced from given sources was all consistent and therefore, credible. 8RP 303-304. This is a proper argument.

The reason the State focused on the consistency of the evidence presented was to address comments made by defendant, acting as his own

attorney, throughout the entirety of the case. “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *State v. Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *Russell* at 85-6, citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

In the case at hand, defendant claims that the State commented on defendant’s right to remain silent by saying there was a consistent story that has not been contradicted. However, these statements cannot be viewed in a vacuum. They must be viewed in the context of the entire trial. From defendant’s opening statement until the very end of his closing argument, defendant makes repeated statements about there being inconsistencies in the State’s case.³ Defendant also is warned numerous

³ See 8RP 140, 155, 235, 241, 294, 9RP 5-9.

times about his improper comments and remarks when witnesses are trying to testify.⁴

The following are a few examples of the comments made by defendant during the course of the trial. In opening, defendant says, “He [referring to Chris] has no proof, just his word, his uncredible[sic] word, I will say that – because he’s *inconsistent* on everything.” 9RP 6 (emphasis added). After an objection, defendant says, “I will show that this Chris Comstock is *changing his statements over and over* to go along with this alleged fictitious assault ... he’s *untruthful*.” 9RP 6-7 (emphasis added). As Chris was testifying about the course of events after defendant left the store, defendant interrupted by saying, “So there’s *multiple inconsistencies* from these three different authority figures.” 8RP 140 (emphasis added). Defendant then asked Chris this question, “Do you know that following statements of that person who gave the *first inconsistent statement means the following statements of that person will be assumed to be false*.” 8RP 155 (emphasis added). During closing, defendant described Chris by saying, “Another *inconsistent statement* because that is all it is, is *inconsistent* with this guy.” 8RP 297 (emphasis added).

⁴ See 8RP 87, 119, 122-123, 128, 140, 144-145, 149, 151, 154, 155, 163, 164, 167, 180 181-182, 215, 228, 230, 235, 241, 254, 292-294, 296-299, 9RP 10.

The prosecutor's arguments, stated previously, were made to address the numerous improper comments and attacks by the defendant. If the court were to rule the remarks by the State were improper, it would not be grounds for reversal because the remarks were provoked and invited by defendant. The statements are in direct response to defendant's repeated comments that the State had inconsistencies in their case.

Defendant cannot meet his burden and show that the State was arguing that he should have testified. In *State v. Reed*, 25 Wn. App. 46; 604 P.2d 1330 (1979), the court held the prosecutor's statements in the case violated the defendant's right to remain silent because the statements made it clear that the only person that could offer a rebuttal was the defendant. Reed was hired to work on a farm and after he started work the owner of the farm was found beaten to death. *Id.*, at 47. Reed had departed without receiving his pay as soon as the body was found. *Id.*, at 47. Reed was later found in Oregon and was held in jail until his trial. Prior to the trial, Reed made plans with other inmates to escape. *Id.*, at 47. On the night of the escape Reed began to assault another inmate and during the assault said he was going to kill the inmate just like he killed the owner of the farm. *Id.*, at 47. During closing, the prosecutor made two comments the court took issue with: (1) "There is no contention that he was paid. Nobody has said, 'Yes, I was paid.' No one has said that. But

the evidence in this case has to be that he was not paid, because there is nothing to rebut that” and (2) while talking about the inmates who testified about the jail assault, the prosecutor states, “*and the other man offers no rebuttal.*” *Id.*, at 48-49 (emphasis added by court). This could only refer to defendant as he was the only one who did not testify about the jail assault. *Id.*, at 48-49. The court concluded these statements were not harmless because, the case was circumstantial, and an improper jury instruction was given. *Id.*, at 49.

Case law does say that if other people were present at the incident that could have, but did not testify, at the trial then a comment about uncontradicted testimony is proper. “Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it.” *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926). If persons other than defendant could have conceivably testified, then statements about testimony being undisputed are permissible because this statement does not draw attention to the defendant not testifying. *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969).

The State may say that “certain testimony is undenied as long as he or she does not refer to the person who could have denied it.” *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995), citing *State v.*

Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). A statement about undenied testimony only becomes a violation of the defendant’s right to remain silent if the statement is “of such character that the jury would ‘naturally and necessarily accept it as a comment on the defendant’s failure to testify.’” *Id.* at 728-729, citing *Ramirez, supra*, at 336, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wn.2d 1013 (1979).

Ashby deals with a defendant that was charged with larceny because he purchased stolen goods. 77 Wn.2d at 33-34. The testimony in that case consisted of a co-defendant who stole the actual merchandise. *Id.*, at 34. The co-defendant testified that he sold the items to Ashby the day after they were stolen and told Ashby that they were stolen. *Id.*, at 34. In *Ashby*, the prosecutor stated in closing, “So I say it is not disputed that he sold those articles to the defendant, Mr. Ashby. Members of the jury, that testimony also is undisputed.” *Id.*, at 37. The court in that case held that the State did not make an improper closing argument. *Id.*, at 38. The statements were allowed because there was a potential that other people who did not testify could have testified at trial and the statements did not draw attention to the fact that the defendant did not testify. *Id.*, at 37-38.

This case is similar to *Ashby* and distinguishable from *Reed*. In this case, both the store clerk and loss prevention officer testified that there

were customers present at the time of the incident. 8RP 94, 97, 109. Defendant during questioning of the loss prevention officer acknowledged that a customer observed him urinating on the store. 8RP 147. The challenged arguments do not draw attention to the fact that defendant did not testify. Other customers were present and could have testified but did not. The State's argument about a consistent version of events could have referred to the other customers who were present at the time of the incident but did not. Defendant cannot show how the challenged argument refers to him not testifying in trial, and not the other customers. The State's argument, therefore, is permissible under case law and the conviction should be affirmed.

- b. Even If The Court Finds The State's Arguments Were Improper, They Do Not Rise To The Level Of "Flagrant And Ill Intentioned" And Therefore, The Conviction Should Be Affirmed.

Should the court determine that the State's arguments in closing and rebuttal was improper; the court must then look at the instructions given to the jury. When the court gives an instruction to the jury that the defendant does not have to testify and the jury cannot infer any prejudice or guilt against defendant, the jury is presumed to follow the instruction. See *State v. Kroll*, 87 Wn.2d 829, 837, 558 P.2d 173(1976) citing *State v.*

Ingle, 64 Wn.2d 491, 392 P.2d 442 (1964). Comments about undisputed evidence do not have a prejudicial effect on the defendant if the trial court instructs the jury that “Every defendant in a criminal case has the absolute right not to testify. You must not draw any inference of guilt against the defendant because he did not testify.” *Ashby*, 77 Wn.2d at 38.

In the instant case, the court gave an instruction about the defendant not testifying. “The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.” CP 217-258, Instruction No. 4. The jury is presumed to have followed this instruction. Defendant did not make any objection to the State’s arguments. No curative instructions were ever requested. Therefore, no prejudice can be shown by defendant in this case.

Appellant tries to manufacture this issue into a constitutional issue. However, the issue raised deals with statements made by the prosecutor during closing where the State was responding to defendant’s comments. Appellant is trying to shift the burden to the State because they cannot meet their burden of showing the statements were improper and prejudicial.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions below.

DATED: OCTOBER 24, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney

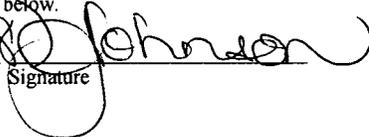
SCOTT R. PETERS
Deputy Prosecuting Attorney
WSB # 35469

08 OCT 27 PM 1:39
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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.

10/24/08 
Date Signature