

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

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

C. ARGUMENT..... 1

 1. The State concedes that there was insufficient evidence produced at trial to prove beyond a reasonable doubt that Dixon received notice of the trial date on which she failed to appear..... 1

 2. The State did not shift the burden of proof by commenting in closing argument about the fact that the defendant had not called the passenger as a witness. 2

 3. The prosecutor did not impermissibly comment on the defendant's right to remain silent 7

D. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Belgarde,</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	5
<u>State v. Blair,</u> 117 Wn.2d 479, 816 P.2d 718 (1991).....	2, 4
<u>State v. Delmarter,</u> 94 Wn.2d 634, 618 P.2d 99 (1980).....	2
<u>State v. Dennison,</u> 72 Wn.2d 842, 435 P.2d 526 (1967).....	5
<u>State v. Easter,</u> 130 Wn.2d 228, 922 P.2d 1285 (1986).....	8
<u>State v. Montgomery,</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	4
<u>State v. Neidigh,</u> 78 Wn. App. 71, 895 P.2d 423 (1995).....	5, 8
<u>State v. Russell,</u> 125 Wn.2d 24, 882 P.2d 747 (1994).....	5, 6
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992).....	1

Decisions Of The Court Of Appeals

<u>State v. Barrow,</u> 60 Wn. App. 869, 809 P.2d 209 (1991).....	7
<u>State v. Contreras,</u> 57 Wn. App. 471, 788 P.2d 1114 (1990).....	3
<u>State v. Frederick,</u> 123 Wn. App. 347, 97 P.3d 47 (2004).....	2
<u>State v. Liden,</u> 118 Wn. App. 734, 77 P.3d 668 (2003).....	2

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence presented at trial to support a conviction for bail jumping.

2. Whether the prosecutor impermissibly shifted the burden of proof by commenting during rebuttal argument on Dixon's failure to call her passenger as a witness.

3. Whether the prosecutor, during rebuttal argument, impermissibly commented on the defendant's right to remain silent.

B. STATEMENT OF THE CASE.

The State accepts Dixon's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State concedes that there was insufficient evidence produced at trial to prove beyond a reasonable doubt that Dixon received notice of the trial date on which she failed to appear.

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).

"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, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury was instructed that it must find that Dixon knowingly failed to appear for trial on January 2, 2008. [Instruction No. 13, CP 34] The knowledge requirement is met with proof that the defendant received notice of the court dates. State v. Frederick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). Here the State proved that Dixon was to appear on December 31, 2007, but not that she had actual notice that her trial would begin January 2, 2008. [CP Exhibit 6] Under similar circumstances, this court has found that such evidence fails to prove the knowledge element of a bail jumping charge. State v. Liden, 118 Wn. App. 734, 739-40, 77 P.3d 668 (2003). Therefore, the State agrees that the bail jumping charge should be dismissed.

2. The State did not shift the burden of proof by commenting in closing argument about the fact that the defendant had not called the passenger as a witness.

Dixon argues that the State impermissibly shifted the burden of proof to her during rebuttal argument. However, not “any comment referring to a defendant’s failure to produce witnesses is an impermissible shifting of the burden of proof.” State v. Blair, 117

Wn.2d 479, 491, 816 P.2d 718 (1991). Here, Dixon did not testify. Neither party called as a witness the passenger who had been in her car when she was arrested. The State did not do so because the officer failed to write down the person's name or any other identifying information. [RP 23] During closing argument; however, defense counsel essentially blamed the passenger for possessing the methamphetamine and planting it in Dixon's purse [RP 63-65], thus presenting Dixon's story without the opportunity for the State to cross-examine her or the passenger.

When the defendant attempts to establish his theory of the case by alleging the corroborating testimony of an uncalled witness, the prosecutor is entitled to attack the adequacy of the proof, pointing out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory. This is particularly justified when the defendant bears a special relationship to a potential witness.

.
When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

As is apparent from the quotes above, the situation here does not fit squarely into the missing witness rule, which applies when a defendant testifies, nor did Dixon request a missing witness instruction.¹ Instead, she chose to exercise her right not to testify but to argue in closing that another person, whom she knew the State could not call, committed the crime. It is a fair inference that she had a closer relationship to, and a better ability to call as a witness, the person who was a passenger in her car than the State did. Although defense counsel had been unable to locate a witness—presumably the passenger—on December 26, 2007 [12/26/07 RP 3], there is nothing in the trial record to indicate that she had been unable to locate him in the interim before trial on March 12, 2008. While “[a] criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise,” State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008), the prosecutor here did not necessarily imply that Dixon had a duty to call witnesses, but did call the jury’s attention to the obvious—

¹ While Dixon argues that the State raised the missing witness issue, it was the defendant, in her closing, who argued that the passenger planted the drugs in her purse. “The missing witness doctrine must be raised early enough in the proceedings to provide an opportunity for rebuttal or explanation.” State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

that she was arguing a defense regarding which she had the apparent ability to produce evidence, but she had not done so.

A prosecutor, who is an advocate for the State, is “entitled to make a fair response to the arguments of defense counsel. . . . 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 a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), citing to State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

At trial, Dixon did not object to the comments she now challenges, ask for a curative instruction, or move for a mistrial.

Without a proper objection, request for a curative instruction, or a motion for mistrial, the defendant cannot raise the issue of misconduct on appeal unless it was so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice.

State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). See also State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

When a defendant claims that the State has engaged in improper argument, the defendant bears the burden of establishing that the

comments were improper as well as prejudicial. Russell, *supra*, at 85. An appellate court reviews the allegedly improper arguments in the context of the total argument and the instructions given, and will not reverse for a prosecutor's argument that was improper but invited by defense counsel's argument unless it was so prejudicial that a curative instruction would be ineffective. Id., at 85-86. A defendant who fails to object to an improper remark waives the error unless the remark is so flagrant and ill intentioned that it causes an enduring prejudice that could not have been neutralized by an admonition to the jury—in other words, if there was a substantial likelihood that the alleged misconduct affected the verdict. Id., at 86.

Here the challenged remarks were made in rebuttal to defense counsel's argument. The jury was correctly instructed that the lawyers' arguments were not evidence and that it was to disregard any remark not supported by the evidence or the law [Instruction No. 1, CP 29], that the defendant is presumed innocent, and that the defendant bears no burden of proving that a reasonable doubt exists. [Instruction No. 3, CP 31] It was made clear to the jury that it could find there was reasonable doubt, even in the absence of any defense witnesses. Dixon has not claimed

that her counsel was ineffective for failing to object to the comments, ask for a curative instruction, or move for mistrial. Because the remarks were not so “flagrant and ill intentioned” that no instruction would have cured any possible prejudice, the result would have been the same even if these remarks had not been made. “Counsel’s arguments were not of a nature to overcome the jury’s ability to perform its function.” State v. Barrow, 60 Wn. App. 869, 879, 809 P.2d 209 (1991).

3. The prosecutor did not impermissibly comment on the defendant’s right to remain silent.

Dixon challenges one statement in the prosecutor’s rebuttal argument as a comment on the right to remain silent: “Did the defendant make any statement that ‘he put that in my purse’? No.” The State concedes that this was an improper remark. However, under the same argument and authorities cited in the previous section, this court should find the remark to be harmless error.

Strong policy reasons support the use of harmless error analysis. “A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.” (Cite omitted.) A reversal should occur only when the reliability of the verdict is called into question.

Neidigh, *supra*, at 78-79. The State bears the burden of showing that the error was harmless. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1986).

In this case, the evidence was that Dixon was jittery when stopped by the officer and that the methamphetamine was found in her purse, which had been in the car near her right hand. There was no evidence whatsoever that the passenger had planted the drugs in her purse. The officer testified that he had kept the passenger in sight while dealing with other matters at the scene, until he searched the passenger and his backpack and let him leave. The jury was properly instructed that the defendant had no duty to testify. [Instruction No. 7, CP 33] The remark was made in rebuttal argument in response to defense arguments, and the point was not belabored. It is not reasonable to think that this one statement was so persuasive as to cause the jury to ignore the jury instructions and convict based on the prosecutor's argument. The remark should be deemed harmless error.

D. CONCLUSION.

The State concedes that there was insufficient evidence produced to support a conviction for bail jumping. The prosecutor's remarks on rebuttal were permissible under the circumstances of

this case, or were harmless error. The State respectfully asks this court to reverse the conviction for bail jumping but to affirm the conviction for possession of methamphetamine.

Respectfully submitted this 16th day of October 2008



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 37553-2-II, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

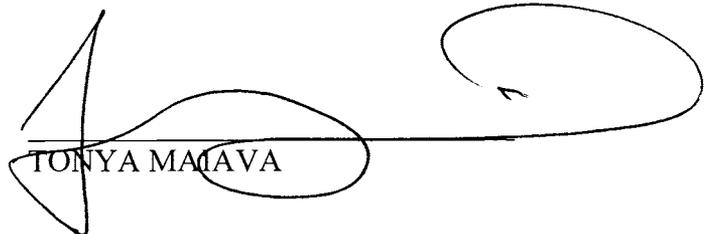
FILED
COURT OF APPEALS
DIVISION II
08 OCT 17 AM 11:17
STATE OF WASHINGTON
BY _____
DEPUTY

TO:

MANEK R. MISTRY
BACKLUND & MISTRY
203 EAST FOURTH AVE, SUITE 404
OLYMPIA WA 98501

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of October, 2008, at Olympia, Washington.


TONYA MATAVA