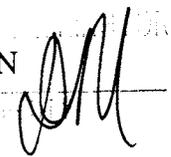


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STATE OF WASHINGTON
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NO. 39992-0-II

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

STATE OF WASHINGTON, Respondent

v.

JOHN CLARK POWELL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00952-0

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial Judge violated the appearance of fairness doctrine.

Counsel on appeal has shown no substantiation to reflect this supposed appearance of fairness violation. There are no concrete examples given, nor is there any explanation as to what it is exactly the defendant is trying to claim. The test is rather vigorous and the State submits the defendant has not met it.

The Appellate Court does not presume prejudice. State v. Dominguez, 81 Wn. App. 325, 328-30, 914 P.2d 141 (1996). “The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial.” Dominguez, 81 Wn. App. at 330. The Court considers allegedly improper or biased comments in context. See Wells v. Whatcom County Water Dist. No. 10, 105 Wn. App. 143, 158, 19 P.3d 453 (2001); In re Dependency of O.J., 88 Wn. App. 690, 697, 947 P.2d 252 (1997), review denied, 135

Wn.2d 1002 (1998). Nevertheless, the court presumes that a trial court properly discharged its official duties without bias or prejudice. In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). Thus, a defendant claiming a violation of the appearance of fairness doctrine must make a threshold showing of a trial court's actual or potential bias. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). And a defendant must provide specific facts supporting his allegation of bias. In re Davis, 152 Wn.2d at 692. But "judicial rulings alone almost never constitute a valid showing of bias." In re Davis, 152 Wn.2d at 692.

As set out in State v Perala, 132 Wn. App. 98, 113, 130 P.3d 852 (2006):

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.'" State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (*quoting State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)). In order to establish that the trial court's involvement in the matter violated the appearance of fairness, the claimant must provide some evidence of the judge's actual or potential bias. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). The critical

concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts." In re Marriage of Davison, 112 Wn. App. 251, 257, 48 P.3d 358 (2002) (*quoting Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355(1995))).

The State submits that there simply is nothing presented by the defense to call into question the Judge's impartiality or might lead a reasonable person to assume that the judicial proceedings were not valid.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a number of claims of prosecutorial misconduct. None of the suggested areas of misconduct were objected to by the defense at the time of trial, nor were they ever brought to the trial court's attention for possible remedy (if they were in fact violations). The State submits that there is nothing in the context of the total argument that should lead one to conclude that the prosecutor is trying to mislead the jury or that there is some type of misconduct on the part of the State. Further, it does appear that by the nature of the defense closing that there are some tactical

considerations being raised by the defense and this would explain why there was a lack of objections.

The thrust of the defense in its closing was that the person who was actually caught stealing the items, Mr. Mackey, was in fact the real culprit and that the other two girls, who testified that were also found with him and the defendant, had an opportunity to have time to make up a story.

[CLOSING BY DEFENSE COUNSEL]: So the suggestion by the State this morning was that the defendant chose to get Mr. Mackey involved. What you learned is that Mr. Mackey already has a theft conviction. Mr. Mackey has a conviction for trafficking in stolen property. All of that predates Mr. Mackey's knowledge or acquaintance with Mr. Powell. Mr. Powell didn't get Mackey involved in anything. Mackey already traffics in stolen property.

-(RP 408, L17-24)

Another area that the defense claims shows misconduct is a section suggesting that the defendant should have pled guilty. As previously indicated this fits into the discussion that the defense attorney was having with the jury concerning the attempt to railroad his client by the use of a known felon. A tactical decision was made not to object but rather to attack and this is how the defense attorney did it:

MR. BYRD (Defense counsel): You folks missed now three days of work up in the courtroom. The law

enforcement officer's been sitting at this desk, not on the streets. Sometimes I wonder if there's a budget czar. Who's looking at the limited resources we have as a society and taking these factors into consideration, in the interest of justice. That's what we're really here about.

And what we're really here about is substantial justice. Okay. And you've seen the jury instructions. My client has a right to a trial. He entered a plea of not guilty. That plea means he's saying I didn't do it. I've already testified I'm not guilty. You can't infer anything from the fact that he didn't get on the witness stand and say or give testify. You may not like it, but that's the law. He's already said I'm innocent, and he's presumed innocent.

-(RP 408, L1-16)

Both of these areas then tie in with further discussion with the jury concerning the nature of the evidence.

MR. BYRD (Defense Counsel): ... So who are the most critical witnesses in this case? Who are the most critical witnesses in this case? This case comes down to three individuals: Angie, Michelle, and Mackey. That's what this case is all about. Okay.

So I'm somewhat at a – I'm kind of perplexed here because I witnessed this case here and I've seen the State utilize any level of evidence, any type of evidence, the most questionable, dubious, contradictory, self-serving evidence to try to secure a conviction in a court of law. As long as there is a pulse and somebody's still alive, they put that person up on the witness stand to secure a conviction. The State doesn't care who it uses or how it uses.

In this instance the evidence has been utilized, and it's been dubious, it's been contradictory, it's been self-serving to secure a conviction beyond a reasonable doubt. The evidence here and the manner in which the evidence was presented equals reasonable doubt. Between the testimony of the three witnesses we know someone is not telling the truth.

-(RP 413, L16 – 414, L11)

Another area raised by the defendant is a claim that the prosecutor was vouching for credibility of the officers. However, without an objection this becomes extremely difficult since the test must be by “clear and unmistakable” evidence that the prosecutor is expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995). The State submits that in the overall context of this closing argument there has been no vouching by the prosecutor, nor giving of his own personal opinion as to what he thinks or doesn't think about the nature and quality of the evidence.

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) (*citing* State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial

likelihood that the misconduct affected the jury's verdict. Carver, 122 Wn. App. at 306 (*quoting* Dhaliwal, 150 Wn.2d at 578). 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. Carver, 122 Wn. App. at 306 (*citing* Dhaliwal, 150 Wn.2d at 578). In addition, a prosecutor's improper remarks are not grounds for reversal if the defense counsel invited or provoked the comments; they are a pertinent reply to defense counsel's arguments and are not so prejudicial that a curative instruction would be ineffective. Carver, 122 Wn. App. at 306 (*citing* State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

But the trial court must have the opportunity to correct any 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, review denied, 81 Wn.2d 1006 (1972), cert. denied, 411 U.S. 985 (1973). If defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (*citing* State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)). The defendant bears 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) (*quoting* State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)), review denied, 140 Wn.2d 1006 (2000). In addition, the evidence against the defendant was overwhelming and the alleged prejudice from the prosecutor's remarks could not have affected the verdict. See State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985) (even a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error),

To raise prosecutorial misconduct on appeal when no objection was made at trial, the defendant must show that the alleged misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. State v. O'Donnell, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007). "It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). To the extent that the State examined Phillips about the agreement, there was no misconduct. State v. Green, 119 Wn. App. 15, 24, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004).

-(State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010))

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that he received ineffective assistance of counsel. This deals primarily with the lack of objections during the closing argument. As outlined previously, it appears tactical decisions were being made by the defense. Rather than piecemeal objections, the defense attorney felt the better way was to attack the nature and quality of the evidence. You had three witnesses, one of them a known felon and two others who were known friends of the felon. It appears that the defense theory was that they were ganging up on the defendant.

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance of counsel claim, the defendant must show that (1) his trial counsel's performance was deficient and (2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, the

defendant must show that his trial counsel's performance was so inadequate that he was deprived of his right to counsel and that there is a reasonable probability that the trial result would have been different, thereby undermining the Court's confidence in the outcome. Strickland, 466 U.S. at 694; In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If he fails to establish either deficient performance or prejudice, the Appellate Court need not address the other element because an ineffective assistance of counsel claim requires proof of both elements. But, even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." Strickland, 466 U.S. at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland*, 466 U.S. at 694).

The Court initially presumes that defense counsel's decisions regarding the manner in which to conduct a trial fall within the wide range of reasonable professional assistance. Pirtle, 136 Wn.2d at 487 (*citing*

Strickland, 466 U.S. at 689). In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, “exceptional deference must be given when evaluating counsel’s strategic decisions.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Because a presumption runs in favor of effective representation, the defendant must show that his trial counsel lacked legitimate strategic or tactical reasons for not objecting to the witness’s testimony. See McFarland, 127 Wn.2d at 336.

When trial counsel’s actions involve matters of trial tactics, we hesitate to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And this court presumes that counsel’s performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

As set forth in State v Hermann, 138 Wn. App. 596, 605, 158 P.3d

96 (2007):

To establish ineffective assistance of counsel, the defendant must show that the attorney's performance was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We accord deference to counsel's performance in order to "eliminate the distorting effects of hindsight" and, therefore, we presume reasonable performance. Strickland, 466 U.S. at 689; State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001), *aff'd*, 147 Wn.2d 515, 55 P.3d 609 (2002). A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is a claim that the court violated the defendant's rights of confrontation. The primary part of this was that he claims that information received by Officer Anderson is never explained to the jury as to where this information came from and therefore can be nothing but hearsay. The defendant claims that he was harmed by this statement because it served to bolster the testimony of Mr. Mackey, the felon who testified against him.

The State submits that this matter was information imparted by law enforcement and was not being offered for the truth of the matter stated, but merely to explain the steps that officers took in furthering their investigation. When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible. See, e.g., State v. Williams, 85 Wn. App. 271, 280, 932 P.2d 665 (1997) (holding that officer's statement to another that he smelled alcohol on the breath of the defendant was not offered to prove the truth of the matter, but to show why the officer then requested the defendant to perform a Breathalyzer test, and was not inadmissible hearsay).

The circumstances here are similar to those in State v. Kirkman, 159 Wn.2d 918, 925, 155 P.3d 125 (2007), a child rape case where a detective testified that before he interviewed the victim, he elicited the victim's promise to tell the truth. On appeal, the defendant argued that the officer had vouched for the victim's credibility. Although the issue in Kirkman was whether the testimony amounted to manifest error of constitutional magnitude, the court's analysis is helpful because it focused on whether the testimony was error at all, not the possible level of harm: “[the detective's] testimony is simply an account of the interview protocol he used to obtain [the victim's] statement.” Kirkman, 159 Wn.2d at 931.

Thus, the testimony “merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses.” Kirkman, 159 Wn.2d at 931 (alteration in original) (*quoting* State v. Demery, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001)). Similarly here, the testimony merely sets the context for the jury to evaluate the testimony. The trial court did not abuse its discretion in admitting the evidence.

The other concern raised by the defense (not being able to identify who the individual was that gave the officer the information) is in fact an error because the officer does identify the person who he received this information from.

ANSWER (Officer Anderson): When I was at J.C. Penney's and we were trying to figure this out, I was at one location and other officers were in another location and trying to figure out what was going on.

MR. BYRD (Defense Counsel): Same objection.

THE COURT: Duly noted. You may proceed.

ANSWER: I then went to get clothing so that could be brought back so we could determine at least a dollar amount of items that were taken from the store. At that point I very briefly was told that –

MR. BYRD: Objection. Hearsay.

MR. VU (Deputy Prosecutor): I asked him what information he received and this is information that he received.

THE COURT: From his fellow officers?

MR. VU: He's about to answer, Your Honor.

ANSWER: Well, by Officer Donaldson, the possi-

MR. BYRD: I'm going to object.

THE COURT: Overruled as to fellow officer rule.

MR. BYRD: I don't know what the fellow officer rule is, Your Honor.

THE COURT: A fellow officer is permitted to communicate information to another officer and that officer can use that information in court in order to describe why he took what actions he took based upon the information he received from his fellow officers.

MR. BYRD: I'll maintain a standing objection to the use of the fellow officer rule.

-(RP 256, L19 – 257, L18)

As it is made clear in the discussion with the officers, this was an attempt to gather information to continue the search for possible suspects and to explain to the jury what attempts were taken to resolve this matter.

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VI. CONCLUSION

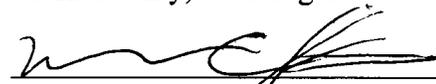
The trial court should be affirmed in all respects.

DATED this 11 day of Aug, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

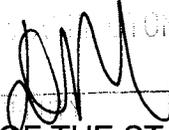

MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

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STATE OF WASHINGTON

BY _____



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

STATE OF WASHINGTON,
Respondent,

v.

JOHN CLARK POWELL,
Appellant.

No. 39992-0-II

Clark Co. No. 09-1-00952-0

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Aug 12, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Anne Mowry Cruser
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Kalama WA 98625-1500

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DOC # 910742
Airway Heights Corr. Center
PO Box 1899
Airway Heights, WA 99001-1899

DOCUMENTS: Brief of Respondent

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


Date: Aug 12, 2010.
Place: Vancouver, Washington.