

COURT OF APPEALS
DIVISION II

NO. 40256-4-II

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

STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

PATRICK DOCKERY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney
for Grays Harbor County

BY: 
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STATEMENT OF THE CASE

The respondent stipulates that the appellants statement of the facts of this case are sufficient to litigate the claimed issues on appeal.

1. **THE RESPONDENT DID NOT COMMIT MISCONDUCT IN QUESTIONING THE APPELLANT OR MAKING CLOSING ARGUMENT**

The appellant first claims prosecutorial misconduct. While presenting a criminal case, a prosecutor must seek a verdict free of prejudice and based upon reason, fairness, and the evidence. *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) “Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Id.* “Allegedly improper argument should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Id.*

The United States Supreme Court addressed “prosecutorial misconduct” in *Namet v. United States*, 373 U.S. 179 (1963). In *Namet*, the Court recognized that some lower courts were of the opinion that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government made a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of “simple” trial error.

A defendant's failure to object or move for a mistrial at the time a prosecutor in a case makes an allegedly improper statement is strong evidence that the argument was not critically prejudicial to the defendant. *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557 (1999) citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The fact that defense counsel did not object to the prosecutor's statement "suggests that is was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993). Absent a proper objection, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001).

To determine whether the remarks were prejudicial the court must analyze them in context, taking into consideration the total argument, the issues in the case, the relevant evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If the court is satisfied that the outcome of the trial would not have been different had the alleged error not occurred, given all the evidence, then the error is harmless. *Rogers*, 70 Wn. App. at 631.

A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The specific claim in this case is that the State commented on the defendant's exercise of his right to remain silent pursuant to the United States Constitution. The defendant chose to leave the scene of the crime before police arrived.

Flight from the scene of the crime is a admission of guilt by conduct. *State v. Freeburg*, 105 Wash.App 492, 497, 20 P.3d 984, 987 (2001). Evidence of flight is admissible if it creates a "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *Id.*

In this case the State commented only on the defendant's choice to leave the scene. Given the fact that the defendant claimed self defense, such information is high probative. If the appellant was defending himself then he would most likely be the victim of a crime and not a suspect. It is clear from the facts of this case that the police would soon arrive and investigate what took place. The appellant left because he knew that he was guilty of assaulting a man with the man's own crutch.

Even if this Court believes that this evidence would have been rule inadmissible, if the appellants would have made a proper objection, then there is still a good faith argument that it is admissible. No objection was made so it is the appellant's burden to prove that the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. How can the appellant meet this

burden when the state has a legitimate argument that the evidence was admissible?

2. TESTIMONY REGARDING ACTIONS OF THE DEFENDANT PRIOR TO THE ASSAULT IS WITHIN THE RES GESTAE OF THE CASE

The Appellant next claims that testimony as to actions on his part a few minutes before the crime was an improper description of a prior bad act. This testimony is admissible because it is relevant as to the defendant emotional state at the time of the crime. From this agitated state the jury could conclude that he was in fact the initial aggressor.

The res gestae exception to ER 404(b) allows evidence of other crimes or bad acts to complete the story of the crime or to provide the immediate context for events close in both time and place of the charged crime. *State v. Lillard*, 122 Wash App 422, 432, 93 P. 969, 974 (2004). The acts that the appellant now objects were both close in time and place to the charged crime and gives context to it.

Minutes prior to an altercation in the street the defendant grew visibly frustrated to the point that he slammed a door. This illustrates to the jury the defendant mental state as he left the school and just prior to confronting the victim in this case.

Moreover the appellant did not object to the testimony. It has been stated that “[t]he decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763; 770 P.2d 662 (1989). But, only in the most egregious circumstances when

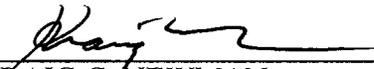
the testimony is central to the State's case, will the failure to object to testimony justifying reversal. *Id.*

CONCLUSION

Based on the argument above this Court should deny the appellant's claims of error and affirm his conviction. Flight from the scene of a fight is probative to the issue as to who was first aggressor, therefore eliciting testimony to this fact was not improper. And, the conduct of the appellant just prior to the crime is part of the res gestae of the event.

DATED this 8 day of November, 2010.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Sr. Deputy Prosecuting Attorney
WSBA #33270

KCN

FILED
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DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 8th day of November, 2010, I mailed a copy of the **Brief of Respondent** to Peter B. Tiller, The Tiller Law Firm, Corner of Rock and Pine, P. O. Box 58, Centralia, WA 98531, and Patrick Dockery, 5172 State Rt. 12, Elma, WA 98541, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 8th day of November, 2010, at Montesano, Washington.

Barbara Chapman