

No. 40484-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH L. GALLOWAY
Appellant.

FILED
APR 11 2010
CLERK OF COURT
JULIA M. BROWN
CLERK OF COURT
JULIA M. BROWN
CLERK OF COURT
JULIA M. BROWN

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Richard Hicks
Cause No. 09-1-01645-7

BRIEF OF RESPONDENT

John C. Skinder
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

pm 11-19-10

TABLE OF CONTENTS

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

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 14

 1. There was sufficient evidence to support Mr. Galloway's conviction for robbery in the first degree..... 14

 2. The deputy prosecutor's remarks were proper because they were all directly related to the evidence presented at trial and were reasonable inferences based on that testimony; in the alternative that the Court determines that the remarks were improper, they were not prejudicial to the level as to warrant a new trial. The defendant therefore waived his right to challenge the statements by failing to object at trial. 17

 3. Mr. Galloway's counsel was effective. 23

D. CONCLUSION..... 26

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 674 (1984) 23

Washington Supreme Court Decisions

In re Pers. Restraint of Andress
147 Wn.2d 602, 56 P.3d 981 (2002) 18

State v. Bencivenga,
137 Wn.2d 703, 974 P.2d 832 (1999) 15

State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 15

State v. Crane,
116 Wn. 2d 315, 804 P.2d 10 (1991) 18

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 14

State v. Gentry,
125 Wn.2d 570, 888 P.2d 1105 (1995) 21

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 25

State v. Hendrickson,
129 Wn.2d 61, 917 P.2d 563 (1996) 24

State v. Hill,
123 Wn.2d 641, 870 P.2d 313 (1994) 18

State v. Hoffman,
116 Wn.2d 51, 804 P.2d. 577 (1991) 21

<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989)	18
<i>State v. Kroll</i> , 87 Wn. 2d 829, 558 P.2d 173 (1976)	23
<i>State v. Mak</i> , 105 Wn. 2d 692, 718 P. 2d 407 (1986)	18
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	24
<i>State v. Pacheco</i> , 107 Wn.2d 59, 726 P.2d 981 (1986)	22
<i>State v. Pirtle</i> , 127 Wn. 2d 628, 904 P. 2d 245 (1995)	22
<i>State v. Reeder</i> , 46 Wn.2d 888, 285 P.2d 884 (1955)	17
<i>State v. Rose</i> , 62 Wn.2d 309, 382 P.2d 513 (1963)	17
<i>State v. Russell</i> , 125 Wn. 2d 24, 882 P.2d 747 (1994)	18, 21, 23
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	14
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) <i>cert. denied</i> , 523 U.S. 1008 (1998)	17, 24
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	23

Decisions of the Court of Appeals

State v. Fondren,
41 Wn. App 17, 25, 701 P.2d 810
review denied 104 Wn.2d 1015 (1985) 23

State v. Graham,
59 Wn. App. 418, 798 P.2d 314 (1990)..... 21

State v. Negrete,
72 Wn. App. 62, 863 P.2d 137 (1993)..... 23

State v. Walton,
64 Wn. App. 410, 824 P.2d 533 (1992)..... 15

Statutes and Rules

RCW 9A.56.190 15

RCW 9A.56.200 15

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence to support Mr. Galloway's conviction for robbery in the first degree?
2. Whether the deputy prosecutor's remarks were proper because they were all directly related to the evidence presented at trial and were reasonable inferences based on that testimony?
3. Was Mr. Galloway's counsel effective?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

On the night of Friday, September 4, 2009 and into the early morning hours of Saturday, September 5, 2009, Mr. Thomas Turner was driving Mr. Galloway's car and Mr. Galloway was in the front passenger seat; Mr. Turner and Mr. Galloway are good friends who had known each other 3-4 years.¹ [RP 113]. Early Saturday

¹ The trial court made the following observations, outside the presence of the jury, regarding Mr. Turner regarding objections by defense counsel regarding the State's use of leading questions,

THE COURT: All right. Some of these questions, both the first time you objected and this second time, are leading somewhat. Under Evidence Rule 611, however, in examining Mr. Turner, who is clearly adverse and what we call a hostile witness -- but by that I don't mean that he's hostile on the stand. He's been very appropriate, respectful and he's answered the questions, so he's not hostile that way. But he's hostile to the state's interest. He was someone who was the subject of a material witness warrant at an earlier time. He's here now even though he doesn't want to be. His counsel is in the courtroom. The State has offered him use immunity so that he can testify truthfully here, but he's not here because he wants to help the state. And so long as the leading doesn't get too far afield, I'm going to allow it under Rule 611 to keep things moving along here so we can get through this witness, but I'm not inviting Mr. Bruneau to just do everything by leading questions here.

[RP 116].

morning, Mr. Thomas received a phone call from Ms. Eboni Rennie requesting a ride. [RP 114]. Ms. Rennie and Mr. Turner had been in a sexual relationship in the past. [RP 142]. Ms. Rennie testified that she called Mr. Thomas and Mr. Galloway to pick her up because she was “too drunk to drive.” [RP 37]. When Mr. Thomas and Mr. Galloway arrived at the drinking establishment to pick up Ms. Rennie, they learned that she was with another female and another male who also wanted rides. [RP 118 and 143-144].

Mr. Turner did not know the “dude’s name” but recognized him from lifting weights at South Puget Sound Community College; regarding the female, Mr. Turner stated, “I know about Gook Dog, which you all call her Sara (Crain)”. [RP 118]. The male was identified at the trial as Mr. Timothy Nelson the victim in this case. [RP 6-33]. According to Mr. Turner, Ms. Rennie, Ms. Crain and Mr. Nelson all got into the back seat of the car; Mr. Galloway stayed in the front passenger seat”. [RP 119]. The plan was to go to “Gook Dog’s house” but an argument broke out between Mr. Galloway and Mr. Nelson first. [RP 119].

According to Mr. Turner, the argument escalated because Mr. Nelson told Mr. Galloway “you shut the fuck up, nigger”. [RP 120]. Again, according to Mr. Turner, Mr. Galloway became angry

due to the racial slur and told Mr. Turner to stop the car; Mr. Turner stopped the car and told Mr. Nelson to get out of the car. [RP 120-121]. Mr. Nelson did not want to get out of the car so Mr. Galloway exited the vehicle and opened the back door and ordered Mr. Turner out of the car. [RP 121]. According to Mr. Turner, Mr. Nelson ultimately got out of the car and took a swing at the defendant; the defendant promptly knocked him down with one punch. [RP 121]. Mr. Turner described the scene as follows:

He hit him when he fell down and then he kicked the victim and then hit him again because the victim was swinging and kicking in the air while he was on his back.

[RP 121].

Mr. Turner then testified as to what happened next:

Q. Tell me, did you get out of the car?

A. I got out and stood by the driver's side door.

Q. And what did you do then? Jeremiah got out of the car, hit this guy a few times and what did he do?

A. The victim?

Q. No, Galloway. What did he do?

A. He stepped back, and then that's when I said, "Jeremiah, come on. It's done. Let's go." And that's when Jeremiah went to go walk toward the car, and then the victim threw something black that hit Jeremiah in his face.

Q. You said the victim did what?

A. He threw something that was black that hit Jeremiah in his face.

Q. He drew something?

A. He threw.

Q. He threw something.

A. Yes.

Q. Black.

A. Uh-huh.

Q. That hit Jeremiah in the face.

A. Yeah.

Q. Black that hit Jeremiah in the face. All right. What was the black object?

A. I'm not positive, but I know for sure that it wasn't a wallet because I never seen Jeremiah pick up anything or make any actions toward grabbing anything.

Q. And so what did Jeremiah do then?

A. Jeremiah went toward the victim and he faked at him and then the victim just laid there and like he wasn't doing nothing, and then I was like, "Jeremiah, come on. Let's go, man. We've got to get out of here." And that's when Jeremiah got in the car.

[RP 122-123].

The State then impeached Mr. Turner with a taped statement that he had provided to law enforcement that the "black object" was, in fact, Mr. Nelson's wallet.² [RP 126-135]. Mr. Turner denied saying that the victim threw his wallet at Mr. Galloway. [RP 135 and 148-149]. As part of the impeachment, the State offered and played the audio recording of Mr. Turner's statement to Detective Johnstone; the relevant portion reads as follows³:

² Mr. Turner was also impeached with his prior conviction for theft in the first degree. [RP 154].

³ The trial court gave the following instruction to the jury regarding this evidence:
...Now, ladies and gentlemen, earlier I had admitted exhibit 18 A and for a limited purpose, and it's not substantive evidence in the case, but it went to whether or not the witness – the previous witness, Mr. Turner, had testified in accordance with an interview that he had with Detective Johnstone. By letting you listen to the actual interview between Detective Johnstone and Thomas Turner, even though I've admitted both Exhibit A and Exhibit 18 A, Exhibit A, the transcript, will not go back to the jury room with you. But you're being allowed to look at it so you can

Q. All right. And so he lets him out of the car, and what took place from there?

A. Well, I just told you that the guy approached him in a kind of inappropriate manner, and Jeremiah felt offended, struck the guy, I'm not sure where. I see the guy fall. He starts screaming like a little girl. Jeremiah says, "Give me what you got." And the guy made a gesture of his hand, and then I guess Jeremiah came up with a wallet.

Q. Okay, So you're saying that the victim, the guy on the ground, threw up his wallet to Jeremiah?

A. I guess, yeah.

Q. Okay. And off tape you said that Jeremiah kicks the victim once while he was down as well after he had punched him?

A. Yeah, when he was – while he made a kicking gesture, yeah.

Q. And you didn't see where that kick landed?

A. No I was –

Q. And you remained in the car during this entire incident; is that correct?

A. Yeah, and I slowly got out, whatever, but I didn't totally get out of the vehicle, like I stuck my head out and told Jeremiah to get back in the car.

[RP 190-191].

Mr. Galloway testified and admitted that he had a prior robbery in the second degree conviction and a prior gross misdemeanor theft conviction. [RP 209-210]. Describing the instant assault on direct examination, Mr. Galloway testified as follows:

listen to the actual recording and be clear about whatever it might contain. And I again want to remind you that this is what's being – this is being offered for what we call impeachment purposes, to test the witness's accuracy, not as substantive evidence of what actually occurred, because the witness could be right or could be wrong, but this is testing the witness's accuracy. [RP 187-188].

I think I was – I went to swing at him, but he jabbed, so we caught each other at the same time, but I came with the three piece and he only came with one jab, right? So I came two to the bottom and one up top and got him good in his nose and he fell down.

[RP 216].

Mr. Galloway denied kicking Mr. Nelson. [RP 216]. Mr. Galloway, when asked whether Mr. Nelson at any time threw something at him, he replied, “No, I didn’t notice him throwing anything at me”. [RP 216]. Mr. Galloway testified that after the assault, he, Mr. Turner and Ms. Rennie went to Mr. Galloway’s sister’s home. [RP 218].

Defense counsel then asked him what time they left the sister’s house and Mr. Galloway answered:

It was pretty early in the morning because I didn’t want two people around my sister’s kids, and we just went over there because T’s grandfather was in town, so he couldn’t go back to the house with people over there, and Eboni lives in Chehalis or Centralia, somewhere around there, so the closest route, because T was driving drunk, was my sister’s house, so that’s why we went over there.

[RP 218-219].

Mr. Galloway then attempted to explain why he tampered with a witness in a phone call⁴ from the jail in the following exchange:

Q. Do you remember why you made that call to Thomas?
A. Yes, I do.

4 The audio recording of the jail phone call was played in open court; Detective Johnstone identified the caller as Mr. Galloway and the recipient as Mr. Turner. The relevant portions read as follows:

CALLER: Hello.
RECIPIENT: Hello.
CALLER: Hey, what's the last time you got a hold of that – what's the last time you logged on to E Harmony?
RECIPIENT: I got that on date.
CALLER: Okay. Is she to show up to the date that was set up?
RECIPIENT: No.
CALLER: No?
RECIPIENT: No, she got a (garbled) out of state.
CALLER: Oh yeah? What about you?
RECIPIENT: Shit. I was about to come visit you I'm saying this weekend; see what's good about it.
CALLER: It's no good. Don't go to the date because they get a chance to –if they get a chance to rise up the private parts, you know what I'm saying, then somebody could get fucked, you know what I mean? But if they don't get a chance to bring up the private parts, then nobody can get fucked, dig?
RECIPIENT: Yeah
CALLER: But do you like have that bitch there?
RECIPIENT: No, I don't need to.
CALLER: Huh?
RECIPIENT: I don't need to.
CALLER: Oh. Hey, tell that bitch because I guess the dude came – the dude is in the area, if he got the same number, you know what I mean, tell him not to come to that date either.
RECIPIENT: Who?
CALLER: The nigger that was there with us that one night.
...
CALLER: Well, they – don't go that date that was set up. Have you even got confirmation you needed to come?
RECIPIENT: Yeah, they served me yesterday. I wasn't at home. They served my grandma.
CALLER: Well, then – well, don't go.
RECIPIENT: Yeah.
CALLER: But shit, I got to make some other moves. I'll get you later.

[RP 163-176]

Q. And why was that?

A. Well, because we had had a talk, and I had had my DOC hearing about this charge, and it had come to my attention through the reports in the DOC hearing that he said that I had said "Give me what you got" to the defendant – or the –

Q. To Mr. Nelson.

A. Yeah, Mr. Nelson. And I was asking him – I asked him before that, "Why did you say that?" He was like, "I didn't." And I was like, "Well, the detective wouldn't just lie and put his job on the line." And then Thomas was like, "No, he twisted around my words." So this phone call was basically telling him well, then don't come because if they don't get to bring your words up, then they can't – they can't charge me with robbery one.

[RP 220-221].

Mr. Nelson testified that he had left the State of Washington shortly after the incident in September 2009 to attend college in California. [RP 6-7]. He testified that on September 4, 2009 that he had gone drinking with friends. [RP 7-9]. In the early morning hours of September 5, 2009, he lost track of his friends and realized that he did not have a ride. [RP 9]. He recognized Sara Crain who was at the same drinking establishment with a female friend. [RP 9-10]. He approached them and asked for a ride. [RP 10]. The other female, identified only as Eboni, had telephoned friends that she said would give them a ride. [RP 11]. The defendant and Mr. Turner picked them up; Mr. Nelson recognized both men from the gym at the South Puget Sound Community College. [RP 12].

Mr. Nelson began to worry for his safety because Ms. Rennie told Mr. Turner and Mr. Galloway that he had been flirting with her and “trying to get in her pants” and he thought they would be angry at him. [RP 14-15]. He tried to open the door while the car was moving to get out. [RP 15]. Another time, when the car was at a stop, he started to exit the vehicle but was punched between 5-7 times in the face before he could. [RP 16]. He fell out of the car and continued to receive blows as he lay on the sidewalk. [RP 17]. He did not recall being struck anywhere but his head and face; his nose was broken, his eyes swollen and there was “blood everywhere”. [RP 17, 19, and 205].

Mr. Galloway, Mr. Turner and Ms. Rennie eventually drove away leaving behind a bloodied Mr. Nelson and Ms. Crain; Ms. Crain called for help and an ambulance soon arrived. [RP 18-19]. He was treated at the hospital and diagnosed with a broken nose and facial abrasions. [RP 19 and 205].

Mr. Nelson realized that he was missing his black leather wallet. [RP 19-20]. He recalled that it was missing very soon after he had gotten up from the “beating”. [RP 20]. He looked for his wallet on the ground after the beating but could not find it. [RP 20]. Mr. Nelson stated that he had not been carrying any cash in his

wallet and that it only contained a Wells Fargo credit card, a bank card, his identification, Social Security card, Group Health medical card and some other cards. [RP 21]. He described the Wells Fargo card as “new” and that it still had the “black and red activation sticker because I had forgotten to take it off”. [RP 21]. The identification card was a pre-21 picture identification card which is vertical card as opposed to a horizontal card. [RP 25]. His wallet was ultimately found and returned to his bank but the pre-21 identification card and the Wells Fargo credit card were missing and had not been located by the time of the trial. [RP 23-24].

Mr. Nelson did not remember much after he started being beaten by Mr. Galloway and he did not have an independent recollection of anyone stealing his wallet as he lay on the ground. [RP 32]. Mr. Nelson stated, “I remember – remember trying to stand up, and every time I’d do that I’d get hit in the face or the head.” [RP 33]. Soon after the beating stopped, he realized his wallet was missing. [RP 33].

Ms. Rennie remembered Mr. Nelson trying to open the car door when the car was still moving. [RP 42]. She recalled Mr. Nelson being worried he was going to get “jumped” but did not recall why he thought he would be “jumped”. [RP 43]. A second

time she remembered him opening the door when the car was stopped and Mr. Nelson quickly exited the car. [RP 44]. She did not see what happened but the next time she saw Mr. Nelson he was lying on his back on the ground with his arms covering his face. [RP 44-45].

Ms. Rennie remembered leaving Mr. Nelson (with his hands still covering his face) and Ms. Crain on the side of the road and Mr. Turner drove Mr. Galloway and her to Mr. Galloway's sister's house. [RP 47-48]. In the morning, Mr. Turner and Mr. Galloway drove her back to her car. [RP 48]. She testified regarding the following conversation between Mr. Turner and Mr. Galloway:

Q. And did you notice any conversation between the defendant and his friend Mr. Turner?

A. Not necessarily.

Q. Well, they did talk, didn't they?

A. Yes.

Q. And did Mr. Galloway show anything to Mr. Turner?

A. I didn't see it very well.

Q. I didn't ask you that. Did Mr. Galloway show something to Mr. Turner?

A. Yes.

Q. What did he show him?

A. I wasn't exactly sure what it was.

Q. I didn't ask you that.

A. But it looked like –

Q. Ms. Rennie, please listen to my question. What was it that you saw Mr. Galloway holding?

A. It looked like two cards.

Q. Two cards. What did the two cards look like?

A. One of them looked like an ID and one of them looked like a credit card.

MR. SHACKLETON: I can't hear you.

A. One of them looked like an ID and one of them looked like a credit card.

Q. (By Mr. Bruneau) And what did you notice about the identification card?

A. I wasn't able to read it.

Q. No, but it was – it was different, wasn't it? You know the difference between a 21-year-old – excuse me, identification card, and a pre-21, don't you?

A. Yes.

Q. All right. So what did you notice about the identification card?

A. It was a vertical.

Q. Like a pre-21 card, right?

A. Yes.

Q. And the credit card that you saw, could you describe that please.

A. I vaguely remember it, but I just remember the color red.

Q. Any other color besides red?

A. Maybe a little bit of yellow.

Q. Do you remember a little bit of black?

A. It might have been mixed in with the red. I'm not sure. I don't remember.

[RP 49-50].

After refreshing Ms. Rennie's memory by allowing her to look at the taped statement she provided to Detective Johnstone, Ms. Rennie testified that the credit card was "reddish and black and it looked like it had a new activation sticker on it." [RP 51-52].

Ms. Rennie also testified that before the first trial date she met with Mr. Turner a week before and he encouraged her to do the "right thing". [RP 52-53]. Neither Ms. Rennie nor Mr. Turner appeared for that first trial date and material witness warrants were

issued. [RP 53]. Ms. Rennie testified that a warrant issued for her arrest and that warrant had something to do with why she was in court on the day she testified. [RP 53].

Mr. Howard Keck, an Olympia school teacher for the past 28 years, testified that he walks the west side of Olympia in the morning. [RP 72]. On September 5, 2009, he went walking and found a dark wallet near the mall on the corner of someone's lawn. [RP 73-75]. There was not an identification card in the wallet. [RP 74]. There were no credit cards in the wallet. [RP 74]. There was a bank card from Washington Mutual Bank and Mr. Keck believed the name on the card was Timothy Nelson. [RP 79]. Mr. Keck turned the wallet into the bank a few days later. [RP 74].

Detective Johnstone testified regarding his investigation into both the robbery charge and the tampering with a witness charge. [RP 97-108 and 162-181]. When Detective Johnstone interviewed the defendant during the investigation, the defendant acknowledged being with the parties described above on September 4 and 5 but denied that he had been involved in a fight and also denied that he had taken a wallet or any cards from a wallet. [RP 107-108, 234]. Mr. Galloway admitted that he told Mr. Turner to not come to court for the first trial date. [RP 230-232].

C. ARGUMENT.

1. There was sufficient evidence to support Mr. Galloway's conviction for robbery in the first degree.

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). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

RCW 9A.56.200 states that a person is guilty of robbery in the first degree if the person commits a robbery within and against a financial institution. A robbery is defined as the taking of property from a person by the threatened use of immediate force, violence or fear on injury. RCW 9A.56.190.

The combination of the direct evidence and circumstantial evidence in this case is extremely powerful. After the defendant beat the victim, breaking his nose, the defendant's best friend testified that the victim threw a "black object" at Mr. Galloway hitting him in the face. [RP 122-123]. Neither the victim nor Ms. Rennie nor Ms. Crain saw the victim throw anything. After the defendant and friends drove away, Mr. Nelson realized that his wallet was

missing. [RP 19-20]. Mr. Nelson was treated at the local hospital. [RP 19 and 205]. Still on the morning of September 5, Ms. Rennie saw Mr. Galloway show Mr. Turner a credit card with a red and black new activation sticker on it and a vertical pre-21 identification card. [RP 49-50]. These items matched the description that Mr. Nelson gave of the missing credit card and identification card from his wallet. [RP 21-24]. This is further supported by the fact that Mr. Keck found the missing wallet on the morning of September 5 but recalls that the wallet had no credit cards or identification cards in it. [RP 74]. Mr. Nelson confirmed that he has never seen the missing Wells Fargo credit card with the activation sticker still on it and the vertical pre-21 identification card since he was beaten by Mr. Galloway. All of these facts clearly and unequivocally support the jury's verdict that Mr. Galloway beat Mr. Nelson and stole his wallet, removed the credit card and the identification card and disposed of the wallet and its remaining contents. Clearly, the jury had sufficient evidence to support their verdict of guilty beyond a reasonable doubt.

2. The Prosecutor's remarks were proper because they were all directly related to the evidence presented at trial and were reasonable inferences based on that testimony; in the alternative that the Court determines that the remarks were improper, they were not prejudicial to the level as to warrant a new trial. The defendant therefore waived his right to challenge the statements by failing to object at trial.

The State maintains that all comments made by the prosecutor were proper because they all directly related to the evidence and were reasonable inferences based on the properly admitted testimony.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating the prosecutor's remarks or conduct was improper. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Counsel are prohibited from intentionally arguing facts not in evidence, but are permitted a reasonable latitude in arguing inferences from the evidence. *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963); *State v. Reeder*, 46 Wn.2d 888, 285 P.2d 884 (1955).

The appellate court, when evaluating a charge of prosecutorial misconduct, must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial because there is "a substantial likelihood the

misconduct affected the jury's verdict." *State v. Russell*, 125 Wn. 2d 24, 882 P.2d 747 (1994).

In deciding whether improper conduct warrants a new trial the court considers: 1) the seriousness of the irregularity 2) whether the statement was cumulative of evidence properly admitted and 3) whether the irregularity could have been cured by an instruction. *State v. Crane*, 116 Wn. 2d 315, 332-33, 804 P.2d 10 (1991) (superseded on unrelated grounds by *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002)). The trial court is in the best position to assess the impact of the irregularities. *State v. Mak*, 105 Wn. 2d 692, 726, 718 P. 2d 407 (1986), (overruled in part on other grounds, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994)). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

The appellant points to three statements in closing argument where he alleges that there was improper closing argument. All three of these examples are reasonable inferences from the testimony. The first two examples cited by the appellant concern the statement of Mr. Turner that he heard the defendant say, "Give

me what you got". [Brief of Appellant, page 12]. The testimony of Mr. Turner was fraught with inconsistency and much parsing of his words. Specifically regarding this single quote, Mr. Turner engaged in the following discussion on cross-examination by defense counsel:

Q. Now the prosecutor asked you if you had told the detective if Jeremiah said to the kid, "Give me what you got." And you said that wasn't what you said.

A. Yeah.

Q. Did you say anything that sounded like that to the detective?

A. Yes, I did.

Q. What did you say?

A. I said, "What you got?" in a fighting manner, but not in a "gimme what you got" manner. I didn't say that.

Q. But when he said it, you were able to interpret it as show me what you got or give me what you got as far as physical -

A. Yeah, in a fighting manner. As I said, Jeremiah still wanted to fight with the dude and he didn't want it to be over that quick.

[RP 147-148].

While Mr. Turner is clearly focused on how he interpreted his friend's comments after beating Mr. Nelson to the ground; there is no debate that the defendant said something along the lines of "what you got", "gimme what you got" or "show me what you got".

Indeed, the defendant not only tampered with Mr. Turner by telling him not to come to court but also by challenging Mr. Turner over the statements that Mr. Turner made to Detective Johnstone.

The defendant testified on direct examination and further muddied the water about what exactly Mr. Turner heard the defendant say to the prone and beaten Mr. Nelson:

Q. Do you remember why you made that call to Thomas?

A. Yes, I do.

Q. And why was that?

A. Well, because we had had a talk, and I had had my DOC hearing about this charge, and it had come to my attention through the reports in the DOC hearing that he said that I had said "Give me what you got" to the defendant – or the –

Q. To Mr. Nelson.

A. Yeah, Mr. Nelson. And I was asking him – I asked him before that, "Why did you say that?" He was like, "I didn't." And I was like, "Well, the detective wouldn't just lie and put his job on the line." And then Thomas was like, "No, he twisted around my words." So this phone call was basically telling him well, then don't come because if they don't get to bring your words up, then they can't – they can't charge me with robbery one.

[RP 220-221].

A reasonable inference from the testimony of the Mr. Turner and Mr. Galloway is that the defendant did say "gimme what you got", but, assuming for the sake of argument that "what you got" was the only statement of the defendant supported by the testimony, there is no prejudice suffered by the appellant. In fact, it is difficult to see what the prejudice would be as the three possible versions of this statement are so similar.

Defense counsel did not object to any of the remarks at trial. A defendant's failure to object to a prosecutor's improper remark

constitutes a waiver unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been cured by an instruction to the jury. *State v. Russell*, 125 Wn. 2d 24, 882 P.2d 747 (1994); see also *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d. 577 (1991).

The third statement that the appellant relies upon to support his argument that the closing argument was improper also on page 12 of the appellant's brief is:

Ladies and Gentlemen, we had a victim beaten and his wallet taken. Turner said that he saw the wallet tossed to the defendant.

[RP 269].

Again, this is a reasonable inference from the properly admitted testimony of Mr. Turner. As detailed above, Mr. Turner testified that after the victim was on the ground, the victim threw something black at Mr. Galloway that hit him in the face. [RP 122]. As the testimony from Mr. Nelson was that the wallet was black, it is a fair inference from the testimony that Mr. Turner saw Mr. Nelson throw his wallet at Mr. Galloway.

It is recognized by Washington courts that counsel will present competing interpretations of trial testimony. *Graham*, 59

Wn. App. 418, 798 P.2d 314 (1990). It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. *State v. Pacheco*, 107 Wn.2d 59, 71, 726 P.2d 981 (1986). As these statements make clear reference to the testimony before the court, any inferences from these statements fall within the scope of allowable interpretation.

In the alternative, if this Court finds any of the prosecutor's remarks improper, none of the statements are improper to the level that would require a reversal of the defendant's conviction and remand for a new trial. Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Pirtle*, 127 Wn. 2d 628, 672, 904 P. 2d 245 (1995). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Id.*

All of the disputed remarks were made in the larger context of a proper argument which focused on the evidence presented at trial and the law according to the court. The jury instructions

directed the jury to follow the law as stated by the judge. This included the instruction not to consider any arguments by the attorneys as evidence, and “the jury is presumed to follow the court’s instructions.” *State v. Swan*, 114 Wn.2d 613, 622, 790 P.2d 610 (1990), citing *State v. Kroll*, 87 Wn. 2d 829, 835, 558 P.2d 173 (1976); *State v. Fondren*, 41 Wn. App 17, 25, 701 P.2d 810, review denied 104 Wn.2d 1015 (1985). Jury instructions minimize any potential prejudice resulting from an improper remark. *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993).

Because the statements were not prejudicial and defense counsel did not object at trial, the defense waived the right to challenge the statements of the prosecutor. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *Russell*, 125 Wn. 2d 24, 86, 882 P.2d 747 (1994).

3. Mr. Galloway’s counsel was effective.

To establish ineffectiveness of counsel, Mr. Galloway must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 674

(1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The Court starts with a strong presumption of counsel's effectiveness. *Id.*, at 335. Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Trial counsel was effective in this case. First, he requested and was granted a limiting instruction by the trial court regarding portions of the impeachment of Mr. Turner [See above Footnote #3]. Next he made the following argument in his closing statement:

You also have Thomas Turner. Thomas Turner's testimony, it's clear I think both from what he said on the stand and the tape that you heard, Thomas Turner probably doesn't like prosecutors very much and probably doesn't like police officers very much. It's clear he doesn't talk very well to them, and in all frankness, they don't talk particularly well back to him. Definitely not the best communication.

But as the judge told you, what was said on that tape, what you heard on that tape, cannot be considered for you as substantive evidence, meaning

that what you heard on that tape, what he told the police officer at the police station, you cannot consider as proof as to whether or not the state has proven the case. You cannot consider what – that information on that tape in deciding whether the evidence has been proven beyond a reasonable doubt. What you have to use is the testimony that he said on the stand. You can use that tape to determine whether or not you think he's truthful or not, but you cannot, whatever he said to the detective at that police station, and the judge will correct me if I'm wrong, you cannot use that as evidence in support of whether or not the state has proven what they are required to prove.

[RP 278-279].

As shown above, defense counsel again reiterated to the jury that they could not use that impeachment of Mr. Turner as substantive evidence. But defense counsel also had to confront the state's arguments and he did so forcefully. He again explained to the jury the difficulties with relying on Mr. Turner's testimony as follows:

Mr. Bruneau is right. Much of what Thomas Turner says is not very credible, and I would suggest that that is particularly not credible. Mr. Bruneau wants you to believe that and the statement that Mr. Galloway supposedly said, "Give me what you got," despite the fact that Mr. Nelson, Ms. Crain, and Ms. Rennie didn't hear any of that or see any of that. Mr. Bruneau on the other hand doesn't want you to believe anything else that Mr. Turner tells you. Members of the jury, that's cherry picking. That is he wants you to take some, but not some of the other. And it's understandable, yes, he wants to do that. He's an advocate. He wants you to believe the things

that a witness says that supports his case, but completely disregards the stuff that doesn't support the case. But in this instance what he wants you to believe is not only cherry picking, but cherry picking that none of the other witnesses, the witnesses who are at a better advantage to see and hear don't see and hear at all.

[RP 280-281].

This record does not support the appellant's contention that his trial attorney was deficient and fell below an objective standard of reasonableness. Defense counsel pursued a sound strategy of focusing his defense on the taking of the wallet and that the state failed to prove such a taking beyond a reasonable doubt. Interestingly, this is the same argument that Mr. Galloway now makes on appeal. However, the jury, after hearing from all of the witnesses and weighing their credibility, rejected the defense arguments and found the defendant guilty of both robbery in the first degree and tampering with a witness as charged.

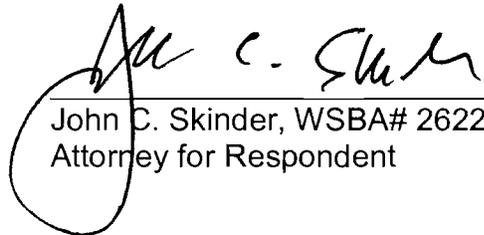
D. CONCLUSION

Based on the direct and circumstantial evidence in this case, there was clearly sufficient evidence to support the jury's findings. Next, the prosecutor's statements in closing argument relied on the testimony of the witnesses in drawing reasonable inferences as to the criminal act. Further, the remarks in this case fail to meet the

high threshold, as reflected in past case law, of "flagrant and ill-intentioned prejudice" sufficient to require a new trial. Finally, Mr. Galloway's trial counsel was effective in his defense of Mr. Galloway.

The State therefore respectfully asks this court to affirm the defendant's convictions and sentence.

Respectfully submitted this 19th day of November 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

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

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

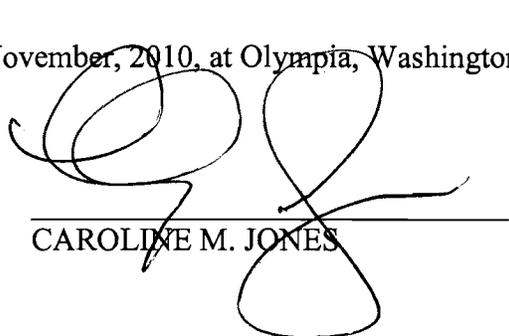
NOV 19 2010
COURT OF APPEALS
DIVISION II
TACOMA, WA

--AND--

THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

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

Dated this 19 day of November, 2010, at Olympia, Washington.



CAROLINE M. JONES