

No. 43333-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID DOYLE FLYNN,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 11-1-01608-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the prosecutor, in closing argument, misrepresented the State's burden of proof, and by doing so committed prosecutorial misconduct.

B. STATEMENT OF THE CASE.

The State accepts Flynn's statement of substantive and procedural facts, adding the following:

Both Deputy Ben Elkins and Deputy Carrie Nastansky testified at trial that a digital scale had been taken from Flynn's person when he was searched pursuant to his arrest. 01/09/12 RP 36-37, 80. In neither instance did the defendant object. The scale was admitted into evidence without objection. 01/09/12 RP 80.

C. ARGUMENT.

The prosecutor correctly stated the State's burden of proof during closing argument.

Flynn claims that during closing argument, the prosecutor, while discussing the term "abiding belief," misstated the State's burden of proof such that it constituted prosecutorial misconduct.

The jury was instructed as to reasonable doubt in Instruction No. 3.

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden

of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 56, 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)*. (WPIC)

During the State's initial closing argument, the prosecutor explained to the jury that the State had the burden of proof. 01/10/12 RP 131. The portions that Flynn objects to occurred during the State's rebuttal argument. Following are relevant portions of that argument.

Ladies and gentlemen, I get another shot at talking to you, and that's because the State again has the burden of proof here. [Defense counsel] says I'm trying to shift that burden to the Defense, but once again, I think I've said it two or three times before, the State has the burden of proving each and every element beyond a reasonable doubt.

01/10/12 RP 147

[Defense counsel] used a phrase, “beyond a moral certainty,” but that’s not the definition of reasonable doubt. A reasonable doubt, according to jury instruction number three, is one for which a reason exists and may arise from the evidence or lack of evidence. It’s such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you’re satisfied beyond a reasonable doubt.

It doesn’t say anything about moral certainty. It does talk about an abiding belief in the truth of the charge. And that’s tough language. That’s abiding belief. What’s an abiding belief? I sometimes hear from a jury, well, we think you did it—this is after an acquittal. We think he did it; we just don’t think there is enough proof beyond a reasonable doubt. I submit to you, if you think he did it, that’s an abiding belief in the truth of the charge.

01/10/12 RP 151-52. Defense counsel objected; the court overruled the objection.

I guess what I heard is [the prosecutor] reading from the instruction on reasonable doubt, and I would ask the jury to look at that instruction when you attempt to understand the burden of proof in this case.

In terms of shifting burden here, I’ve heard a lot of argument. I haven’t heard anything from the State that asks the jury to shift the burden to the Defense. So I’m going to overrule the objection to that.

01/10/12 RP 152-53. The prosecutor continued:

So if you have an abiding belief in the truth of the charge, that means that you believe that he did it. You've heard all of the evidence, and after hearing all the evidence, if it's your belief that he did this, you've got an abiding belief in the truth of the charge, the charge being possession with intent to deliver.

01/10/12 RP 153.

This argument correctly states the burden of proof. The prosecutor's argument was directly tied to the court's instructions and relied on the "abiding belief" language in Instruction No. 3. That language was taken directly from WPIC 4.01, which has been expressly approved in a number of appellate decisions. See State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995); State v. Lane, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988) (cited with approval in Pirtle); State v. Price, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982).

The prosecutor did not analogize an abiding belief to anything such as completing a puzzle, as was disapproved in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011). Nor did he equate the burden of proof to making an everyday decision, disapproved in State v.

Anderson, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Flynn argues that the prosecutor's argument should be read as "even if there is not enough proof to convince you beyond a reasonable doubt, if you think the defendant did it you can convict." The argument should properly be read as "if you have an abiding belief in the truth of the charge, then the State has met its burden of proving the elements of the crime beyond a reasonable doubt." The prosecutor's argument was, as the trial court ruled, an accurate statement of the law.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to Pirtle, 127 Wn.2d at 672). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an

enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *Id.* The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor’s remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *Id.*, at 85. While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel’s arguments. *Id.*, at 87. See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State’s case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

Here the jury was properly instructed and the prosecutor did not misstate the law. There was no error.

D. CONCLUSION.

The prosecutor's closing argument did not misstate the State's burden of proof and there was no prosecutorial misconduct. The State respectfully asks this court to affirm Flynn's conviction.

Respectfully submitted this 22^d day of January, 2013.



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THURSTON COUNTY PROSECUTOR

January 22, 2013 - 8:47 AM

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