

NO. 45277-4-II

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

STATE OF WASHINGTON, Respondent

v.

RAUL THATER CASTRO, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00287-8

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERRORS

- I. THE STATE CONCEDES THE INFORMATION WAS INSUFFICIENT AS TO COUNT 1-THEFT IN THE FIRST DEGREE
- II. THE PROSECUTOR DID NOT COMMIT FLAGRANT OR ILL-INTENTIONED MISCONDUCT THAT DENIED CASTRO OF A FAIR TRIAL
- III. CASTRO'S CONVICTIONS FOR UNLAWFUL ISSUANCE OF A BANK CHECK WERE PROPERLY SCORED AGAINST EACH OTHER AS THEY DID NOT CONSTITUTE "SAME CRIMINAL CONDUCT"

B. STATEMENT OF THE CASE

Raul Castro (hereafter "Castro") was charged by information with Theft in the First Degree and two counts of Unlawful Issuance of a Bank Check. CP 1-2, 8-9. The facts at trial showed that Castro deposited one check for the amount of \$5,000.00 at a bank ATM on December 31, 2011. RP 108. Castro deposited a second check for the amount of \$5,000.00 at a bank ATM on January 1, 2012. RP 109. He deposited these checks into a bank account in his name. RP 118. At the time of his deposit, the entire amount of the checks was available for withdrawal from the bank. RP 110-12, 127. However, the checks Castro wrote were on a closed account and were returned as insufficient funds. EX. 1, 2, 4; RP 147-48. Many withdrawals were made after the first deposit on December 31,

2011, at a casino in La Center, Washington. RP 144. After the second deposit on January 1, 2012, more withdrawals were made at a casino in La Center, Washington. RP 145. The total amount of loss to the bank from these transactions was \$10,024.23. RP 146.

Castro spoke with Detective Tyler Chavers and admitted to him that he deposited \$5,000.00 two times at a bank and then took the money out at a casino and lost it. RP 88. Castro entered the State's Diversion Program and met with Sheila Vann multiple times throughout the process. RP 150-52. Castro signed a confession with Ms. Vann to the crimes charged. RP 156-57.

During closing arguments, the prosecutor stated,

Now, Defense is going to get up here they're going to try to point out insufficiencies or problems with the State's case, and that's what they do. That's—that's his job. That's what he's here for. But I want you to remember, the State doesn't have to prove the case beyond all doubt; it's beyond a reasonable doubt.

...Defense is going to get into semantics. They're going to try to get you to chase them down the rabbit hole.

RP 251-52.

The prosecutor also discussed witness Sheila Vann and her testimony, stating,

Sheila Vann is—works for the county. Her job is on the line. She had someone write a confession; they better know what's going on, they better understand it, or she can be in

trouble if she has an intoxicated person or someone who doesn't understand signing a written confession under penalty of perjury.

RP 254.

Regarding Sheila Vann, the prosecutor also argued,

If he's out, if he's on drugs, she can't let him sign this. She's a probation officer. She probably had a lot of clients try to tell her they weren't intoxicated, and she could tell if they were.

RP 262.

The prosecutor also argued the following:

The other part of the Instruction Number 1 I would like to highlight says, "As jurors, you are—" it's the very end of the instruction. It says, "As jurors, you are officers of the court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you," on the law. How much did we talk about the law in voir dire and about these instructions, about following the law? You must reach your decision based on the facts and the law, not on sympathy, not on prejudice or personal preference.

...

...I ask you—you to divorce yourself from emotion. I ask you to do it based on the facts and the law that were provided to you. Unequivocally, it was very clear today the Defendant took that money, and he didn't have the right to it. You cannot say 'not guilty' because you feel bad for him. That's not in our system of justice, and that's not in these instructions you all agreed to—to follow.

RP 256-57.

The jury convicted Castro of all three counts. RP 280-82; CP 41-43. At sentencing, the trial court counted each crime against each other for purposes of calculating Castro's offender score. RP 315. Castro was sentenced to a standard range sentence. RP 46-47. His appeal timely follows.

C. ARGUMENT

I. THE STATE CONCEDES THE INFORMATION WAS INSUFFICIENT AS TO COUNT 1- THEFT IN THE FIRST DEGREE

Castro alleges the information was insufficient to adequately inform him of the allegations involved in the Theft in the First Degree, specifically that two or more acts were part of a common scheme or plan which aggregated into a Theft in the First Degree. The State agrees this element is required to appear in the information in this case and as such, the case should be remanded for a retrial.

A defendant has the right to be fully informed of the crime he is alleged to have committed. *State v. McCarty*, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000). This Court reviews a challenge to an information de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). An information must contain all the essential elements of a crime. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A two-prong test is

applied to determine if an information is sufficient: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudice by the inartful language which caused a lack of notice?” *Id.* at 105-06. If the first prong of this analysis is not met, prejudice is presumed and the conviction is reversed without considering whether there was any prejudice to the defendant. *State v. Goodman*, 150 Wn.2d 774, 788, 83 P.3d 410 (2004).

Theft in the First degree requires proving that the defendant committed theft of property or services exceeding \$5,000.00 in value. RCW 9A.56.030(a)(1). When two or more thefts make up a common scheme or plan, the multiple thefts can be combined to reach an amount over \$5,000.00. RCW 9A.56.010(21)(c). This is how the State proved Castro committed Theft in the First Degree.

In *State v. Rivas*, 168 Wn.App. 882, 278 P.3d 686 (2012), this Court found that for malicious mischief, if the State is proving the necessary amount of damage by aggregating multiple acts of malicious mischief, this must appear in the information. *Rivas*, 168 Wn.App. at 890. The Court in *Rivas* found the information that did not allege common scheme or plan was deficient and omitted an essential element for the crime. *Id.* The Court found the proper remedy in *Rivas* was to reverse and

allow the State to recharge the defendant by amended information and retry him as a reversal of a conviction based on an insufficient charging document is without prejudice. *Id.* The same result is compelled here. There is little difference between a malicious mischief and a theft, and both statutes contain provisions regarding aggregation of separate acts to constitute a higher degree of the crime, thus making the common scheme or plan an essential element. *See id.*

As the State failed to include all essential elements of this act of Theft in the First Degree in the charging document, this conviction should be reversed and remanded to allow the State to recharge Castro by an amended information that alleges common scheme or plan.

II. THE PROSECUTOR DID NOT COMMIT FLAGRANT OR ILL-INTENTIONED MISCONDUCT THAT DENIED CASTRO OF A FAIR TRIAL

Castro alleges prosecutorial misconduct for statements the prosecutor made during closing argument. The prosecutor did not commit misconduct during closing argument, and any potential misconduct was not so flagrant and ill-intentioned as to have denied Castro a fair trial. Castro's claim of prosecutorial misconduct is without merit.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgeron*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a

claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper

comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn.App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law; to tell a jury to acquit, you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn.App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Castro's case, any potential misstatement by the prosecutor did not affect the jury verdict. Castro was not denied a fair trial. The closing argument must be taken in the entire context of which it was given. Castro alleges prosecutorial misconduct for statements the prosecutor made allegedly discussing facts not in evidence, arguing against jury nullification, and disparaging the defense attorney. Castro's claims fail.

Even if there was prosecutorial misconduct for improper argument, a case will not be reversed because of an improper argument of law "unless such error is prejudicial to the accused and only those errors which may have affected the outcome of the trial are prejudicial." *Davenport*, 100 Wn.2d at 762 (citing *State v. Estill*, 80 Wn.2d 196, 200, 492 P.2d

1037 (1972) and *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). This court should inquire as to whether the improper argument influenced the jury and whether it could have been cured by instructing the jury to disregard the remark. *Id.* at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)). If there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, the defendant was denied a fair trial. *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981). But if a curative instruction would have obviated any prejudicial effect on the jury, then the case should not be reversed. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2011) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Castro did not object and did not request a curative instruction. This goes far in showing the context of the prosecutor's argument was not improper and was not flagrant or ill-intentioned. Further, any potential improper statements by the prosecutor were not flagrant and ill-intentioned. Surely a curative instruction would have cured any improper argument made.

Castro relies upon *State v. Johnson*, 158 Wn.App. 677, 243 P.3d 936 (2010) in support of his argument that a prosecutor improperly bolsters the credibility of a witness by arguing facts not in evidence and that such improper argument requires reversal. Br. of Appellant, p. 10-11. However, the *Johnson* case cited to by defense is a prosecutorial

misconduct case involving a fill in the blank argument and a puzzle analogy. *Johnson*, 158 Wn.App. at 683. This case did not involve bolstering of a witness' credibility, nor an argument regarding facts not in evidence. It is of little help in analyzing the issues in Castro's case.

Castro also relies upon *State v. Jones*, 144 Wn.App. 284, 183 P.3d 307 (2008) to support his contention the prosecutor committed misconduct by arguing facts not in evidence. However in *Jones*, the prosecutor engaged in several instances of misconduct and the Court did not analyze whether each individual instance of misconduct would have caused reversal, but rather found the cumulative effect of the prosecutor's many instances of misconduct caused reversal. *Jones*, 144 Wn.App. at 300-01.

A prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Castro failed to object when the prosecutor argued regarding witness Sheila Vann's credibility. This error is waived unless the statements were such flagrant and ill-intentioned misconduct that a curative instruction would not have cured the prejudice. *Id.* at 443. In *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012), the Court found the prosecutor committed flagrant and ill-intentioned misconduct by introducing a photograph to the jury during closing argument when this photograph had not been admitted into evidence, portraying the defendant

in a negative light and had the word “guilty” super-imposed over the defendant’s face. *Glasmann*, 175 Wn.2d at 705-06. This case differs greatly from the facts at issue in *Castro*.

Even assuming without conceding that the prosecutor here committed misconduct by telling the jury that witness Sheila Vann would have suffered repercussions in her employment by taking a confession from an intoxicated individual, this misconduct did not rise to the level of flagrant and ill-intentioned misconduct as seen in some of the cases *Castro* relies upon in his brief. In *Jones, supra*, the prosecutor committed many, many instances of misconduct which cumulatively prejudiced the defendant. *Jones*, 144 Wn.App. at 300-01. Here, the prosecutor’s statements, though ill-advised, would have been cured by an instruction to the jury.

In *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), a prosecutor committed misconduct by arguing facts not in evidence during her closing argument. The prosecutor argued reasons why the child victim did not disclose sex abuse for several years, however there was no evidence admitted at trial to support the prosecutor’s arguments regarding why the victim failed to disclose for many years. *Warren*, 165 Wn.2d at 945. The Supreme Court in reviewing the prosecutor’s misconduct found that the defendant could not show he was prejudiced by these comments.

Id. at 946. The facts in *Castro* are much more on par with the conduct of the prosecutor in *Warren*, and the facts of this case merit the same result. *Castro* has been unable to show that a curative instruction could not have remedied any misconduct by the prosecutor.

Further, the jury had already been instructed that the arguments of counsel were not evidence and that they were to rely upon their memories for the evidence. CP 17. Juries are presumed to follow instructions, and therefore we must presume the jury followed the instruction to rely only upon the evidence presented at trial in evaluating the case. *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998) *cert. denied*, 525 U.S. 1157 (1999).

Castro also alleges misconduct for the prosecutor's statements regarding what the defense attorney may argue or what his job is. In *State v. Warren*, the prosecutor also improperly argued that defense counsel's argument was a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing." *Warren*, 165 Wn.2d at 946. The Supreme Court found that these comments were improper, but that they were not so flagrant and ill-intentioned that no instruction could have cured them. *Id.* (citing to *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) and *State v. Gonzales*, 111 Wn.App. 276, 45 P.3d 205

(2002)). The statements made by the prosecutor in Castro's case fail to rise to the level of the statements the prosecutor made in *Warren, supra*. The prosecutor here said that the defense attorney was going to point out insufficiencies or problems in the State's case and that's what they do. RP 251. The prosecutor also indicated the defense attorney would argue semantics and try to get the jury to chase him down a rabbit hole. RP 252. Though ill-advised, these statements are not as flagrant as those comments made by the prosecutor in *Warren*. As the Court in *Warren* found the statements, though improper, could have been cured by an instruction to the jury, the State contends the same result should issue here. The prosecutor's statements were not so flagrant and ill-intentioned as to require reversal of Castro's convictions.

Finally, Castro argues the prosecutor committed misconduct by arguing to the jury that they could not nullify if they felt bad for the defendant. However, the prosecutor did little more than reiterate the instruction to the jury that the trial court had already given on not allowing emotions overcome their rational thought process. CP 18. In fact, just prior to the statement Castro takes issue with the prosecutor stated,

The other part of the Instruction Number 1 I would like to highlight says, "As jurors, you are—" it's the very end of the instruction. It says, "As jurors, you are officers of the court. You must not let your emotions overcomes your rational thought process. You must reach your decision

based on the facts proved to you and on the law given to you,” on the law. How much did we talk about the law in voir dire and about these instructions, about following the law? You must reach your decision based on the facts and the law, not on sympathy, not on prejudice or personal preference.

RP 256.

The prosecutor’s argument is little more than a discussion of this general instruction and also on the instructions that tells the jury they have a “duty” to convict if convinced beyond a reasonable doubt. *See State v. Brown*, 130 Wn.App. 767, 771, 124 P.3d 663 (2005) (holding an instruction telling the jury they had a “duty” was a proper statement of the law and that the power of jury nullification is not an applicable law to be applied in that case). The prosecutor’s statements were clearly not misconduct, and even if they were improper, an instruction would have cured the issue. Castro’s complaints of misconduct and prejudice are meritless.

III. CASTRO’S CONVICTIONS FOR UNLAWFUL ISSUANCE OF A BANK CHECK WERE PROPERLY SCORED AGAINST EACH OTHER AS THEY DID NOT CONSTITUTE “SAME CRIMINAL CONDUCT”

Castro argues his convictions for Theft in the First Degree and two counts of Unlawful Issuance of a Bank Check comprise the “same criminal conduct” and should have all been scored as one point. The State contends that each count of Unlawful Issuance of a Bank Check is based

on separate conduct, occurring on a separate date at a separate time, and therefore those are not “same criminal conduct” and should be scored against each other for purposes of determining Castro’s offender score for sentencing. Further, the issue of whether these crimes constitute the “same criminal conduct” as the Theft is now moot as the State has conceded in section I of the argument that the Theft conviction should be reversed and remanded for retrial.

RCW 9.94A.589(1)(a) provides that “‘Same criminal conduct’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). This statute is construed narrowly and disallows most assertions of “same criminal conduct.” *State v. Flake*, 76 Wn.App. 174, 180, 883 P.2d 341 (1994). There are three factors which must be present for two crimes to be considered “same criminal conduct:” 1) committed at the same time and place; 2) involve the same victim; and 3) require the same criminal intent. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

To determine whether the two crimes committed involve the same criminal intent purposes for determining “same criminal conduct,” the court must examine each statute and compare them to determine whether the required intents are the same or different for each crime. *State v.*

Hernandez, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). When a defendant's intent objectively changes from one crime to the other, the two crimes do not contain the same criminal intent. *State v. King*, 113 Wn.App. 243, 295, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). To determine where two crimes constitute "same criminal conduct," a reviewing court should look to whether one crime furthered the other, or whether both crimes were part of a scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). If one crime can be said to have been completed before commencement of the second, then the two crimes involved different intents and do not constitute the same criminal conduct. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997).

It is clear from the record that the checks were not both written on the same date and at the same time. The first check was deposited on December 31, 2011. RP 108. The second check was deposited on January 1, 2012. RP 109. Castro admits that the withdrawals of the money from the bank did not occur at the same time and place. Br. of Appellant, p. 16. Castro then argues that they still constitute same criminal conduct as they were a continuing course of conduct with a single, overarching objective. *Id.* Castro cites to *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998) to support this contention. However, in *Williams*, the

court was discussing whether the crimes required the same criminal intent, and not whether the crimes occurred at the same time and place. There are three factors that must be met in order for two crimes to be considered “same criminal conduct” and the same time/place factor is a separate factor from same intent. The State does not contest that these two crimes required the same overall intent on Castro’s part nor that the victim was the same. However, it is clear from the facts at trial that these two counts did not occur at the same time. They occurred on different days, during different transactions. In *State v. Young*, 97 Wn.App. 235, 984 P.2d 1050 (1999) this Court found that forgeries which occurred on separate days did not occur at the same time for “same criminal conduct” purposes. *Young*, 97 Wn.App. at 241. In *Young* the Court stated, “Our courts have held that successful transactions on different days may be counted as separate offenses even when, as here, they involved the same crime and the same victim and were committed at the same place.” *Id.* (citing to *State v. Lewis*, 115 Wn.2d 295, 797 P.2d 1141 (1990)).

Castro’s two convictions for Unlawful Issuance of a Bank Check were committed on different days and therefore did not occur at the same time for purposes of a “same criminal conduct” analysis. These two counts were properly scored against each other at Castro’s sentencing. This case should be remanded for proceedings given the State’s concession in

section I, and for eventual re-sentencing at which point the trial court should consider a “same criminal conduct” argument if there is a subsequent Theft conviction upon retrial.

D. CONCLUSION

The State concedes the information was insufficient to inform Castro of the State’s theory of aggregation of two separate thefts to elevate it to a Theft in the First Degree. As such, Castro’s conviction for Theft in the First Degree should be reversed and remanded for retrial. Castro’s convictions for Unlawful Issuance of a Bank Check should be affirmed as the prosecutor did not commit prejudicial misconduct in his arguments. These two convictions for Unlawful Issuance of Bank Checks were properly scored against each other for purposes of calculating Castro’s offender score because they did not constitute “same criminal conduct.”

DATED this 16th day of April, 2014.

Respectfully submitted:

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