

No. 47602-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH M. DONNETTE-SHERMAN

Appellant.

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

The Honorable Judge Erik Price
Cause No. 13-1-01173-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State's closing argument improperly shifted the burden of proof to the defendant or undermined the presumption of his innocence.
2. Whether Donnette-Sherman received ineffective assistance of counsel because his attorney failed to object to the prosecutor's argument.
3. Whether the trial court violated the defendant's right to a public trial by taking challenges for cause at sidebar.

B. STATEMENT OF THE CASE.

The State accepts Donnette-Sherman's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State's closing argument did not improperly shift the burden of proof to the defendant or undermine the presumption of innocence.

Donnette-Sherman challenges several portions of the State's closing argument, claiming that he was denied his right to a fair trial by several of the statements made by the prosecutor. Those statements, even taken out of context, do not constitute misconduct nor did they in any way prejudice the defendant.

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 State

v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “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. “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). 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).

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. State v. Russell, 125

Wn.2d 24, 87, 882 P.2d 747 (1994). 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). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). "When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable." State v. Miles, 139 Wn. App. 879, 890, 62 P.3d 1169 (2007).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a "substantial likelihood" that the jury was

affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The concern is less with what was said or done than with the effect likely to result from what was said or done.

Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?"

State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012), quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

Remarks that touch upon a defendant's constitutional rights are not per se incurable. The reviewing court is to consider the likely outcome had the defendant timely objected. Emery, 174 Wn.2d at 763.

a. Shifting the burden of proof.

Donnette-Sherman argues that the statements of the prosecutor about the lack of evidence that force was justified or lawful somehow shifted the burden of proof to him, and that the jury could conclude that his actions were justified. Appellant's Opening Brief at 7. That simply does not logically follow. The prosecutor's full argument seems to be walking through the self-defense instruction as he does with other instructions. The prosecutor is using his case and the facts presented at trial through Deputy Brooks and Mr. Boyles to support his case. Even if these comments were somehow construed as implying that Donnette-Sherman had failed to show self-defense, it would not be error.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. State v. Thorgerson, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). But the mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense. State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009). A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. State v. Killingsworth, 166 Wn.

App. 283, 291-92, 269 P.3d 1064, *review denied*, 174 Wn.2d 1007 (2012). It may be misconduct for the prosecutor to say in closing argument that the defense failed to present witnesses or explain the facts of the case, or argue that the jury should find the defendant guilty just because he did not present evidence to support his theory of the defense. State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). That didn't happen in Donnette-Sherman's case. It is not misconduct for the prosecutor to argue that the facts support a conclusion that a State witness was being truthful and that self-defense does not make sense within the facts presented. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009).

The rule announced by this court in *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), that "Surely the prosecutor may comment upon the fact that certain testimony is undenied without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his" is still good law.

State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969).

Because Donnette-Sherman failed to object to alleged burden shifting at trial, he must establish that the misconduct was

so flagrant and ill-intentioned that an instruction would not have cured the prejudice. Emery, 174 Wn.2d at 760-61. The focus is on whether the prejudice could have been cured and less on whether the conduct was flagrant and ill intentioned. Id. at 762. Here, even if there had been any prejudice from the prosecutor's comments, an instruction to the jury to disregard them would easily have cured it. There was no error.

b. Harmless error.

Donnette-Sherman argues that his constitutional rights were violated and the court should analyze the prosecutor's argument under the more stringent constitutional harmless error standard. Appellant's Opening Brief at 5. Washington courts, however, do not apply the constitutional harmless error standard to improper prosecutorial arguments, even those undermining the presumption of innocence. Johnson, 158 Wn. App. 677, 686, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011); Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008).

The State maintains that there was no error at all. However, even if any of the prosecutor's statements were error, it is most unlikely that they had any effect on the outcome of the trial. An error is harmless "unless, within reasonable probabilities, had the

error not occurred, the outcome of the trial would have been materially affected.” State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Donnette-Sherman has not shown how the prosecutor's statement had any effect on the outcome of the trial. Therefore, there was no error.

2. Defense counsel was not ineffective for failing to object to the prosecutor's closing argument.

Donnette-Sherman claims that his trial attorney was ineffective for failing to object to the arguments which he now challenges for the first time on appeal.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, 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). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v.

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (1993), *citing to Strickland*, 466 U.S. at 689.

Donnette-Sherman argues that there could be no tactical reason for defense counsel to refrain from objecting, but the fact that the argument was not objectionable is the most likely reason he failed to do so. In addition, he quite likely was reluctant to draw the jury's further attention to these unfavorable facts.

Even had counsel objected, it is unlikely the court would have sustained the objections and therefore Donnette-Sherman cannot show prejudice. The bottom line is that defense counsel did not render ineffective assistance

3. The trial court did not violate Donnette-Sherman's right to a public trial by taking challenges for cause at sidebar because the courtroom was not closed.

Donnette-Sherman argues that his right to a public trial, guaranteed by both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court heard and decided challenges for cause and excused five jurors at sidebar. The court made a record of that sidebar, with no objection from either party. RP 30-34.¹

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of

¹ Unless otherwise noted, references to the Verbatim Report of Proceedings are to the single volume of trial transcript dated April 21 and 22, 2015.

Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). “Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011).

When addressing a public trial question, reviewing courts follow a three-part analysis:

First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified.

State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State’s motion, because an undercover police officer was testifying and he feared public exposure would compromise his work. The Supreme Court found

that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
4. The court must weigh the competing interests of the proponent of the closure and the public.
5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id. (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

[A] “closure” occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

A closure can also occur when part of the trial is held somewhere other than the courtroom, such as when prospective jurors are questioned in chambers. Love, 183 Wn.2d at 606.

Donnette-Sherman’s argument presumes that the sidebars constituted a closure of the courtroom, but under these definitions, the courtroom was never closed and there was no requirement for a Bone-Club analysis.

In Love, the for-cause challenges were taken at the bench, presumably out of the hearing of the jury pool and any other spectators but on the record. There was minimal discussion.

THE COURT: Any for-cause challenges?

[DEFENSE]: Fifteen.

THE COURT: Fifteen? Any objection?

.....
[STATE] I think that’s—the state has no objection to No. 15 being struck for cause.

THE COURT: Mm-hm. Any others?

[DEFENSE]: Number 30.

THE COURT: Number 30?

[STATE]: Yeah. No objection.

Love, 183 Wn.2d at 602. The record of voir dire disclosed the responses of Jurors 15 and 30 that supported being struck for cause. Id.

The court in Love followed its previous decisions that the public trial right attaches to jury selection, including challenges for cause. Love, 183 Wn.2d at 606. It affirmed, however, because Love failed to show that the courtroom was closed. Id.

Donnette-Sherman argues that Love is not controlling in this case because there was no transcripts in this case. Appellant's Opening Brief at 17. Donnette-Sherman acknowledges that the court did make a record of the side bar conversation; this record contained for more information about the challenges for cause than did the actual transcript in the Love trial. RP 30-34. During this record each party agreed with the recollection of the court. It should also be noted the reason for the challenges for cause are clearly supported by the jury voir dire transcript.

Donnette-Sherman argues that the Love decision relied upon the fact that the sidebar discussion was "on the record." Appellant's Opening Brief at 17. First, it cannot be said that the

Love opinion relied so heavily on a transcript of the exchange at sidebar that the lack of such a transcript would turn the sidebar into a courtroom closure. The court in Love said

Yet the public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial missing in cases where we found closures of jury selection.

Love, 183 Wn.2d at 607.

Second, as noted above, the record made by the court following the sidebar contains all of the information that would have been included in a transcript. The public should be able to reasonably rely on the accuracy of a record agreed to by both parties and the judge. Not only was that record made in open court, but the transcript is also publically available.

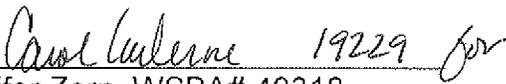
A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-

Club analysis. There was no violation of Donnette-Sherman's right to a public trial.

D. CONCLUSION.

Based on the above arguments and authorities, the State respectfully requests that this court affirm the convictions of Joseph Donnette-Sherman for Assault in the Second Degree while armed with a deadly weapon.

Respectfully submitted this 28th day of March, 2016.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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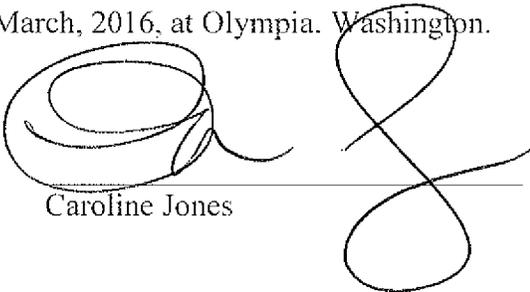
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--AND TO--

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

Dated this 28 day of March, 2016, at Olympia, Washington.


Caroline Jones

THURSTON COUNTY PROSECUTOR

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