

FILED

JAN 29 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30892-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROSE M. FAIRLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED

JAN 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30892-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROSE M. FAIRLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1
ISSUE PRESENTED.....1
STATEMENT OF THE CASE.....1
ARGUMENT.....1
CONCLUSION.....4

TABLE OF AUTHORITIES

WASHINGTON CASES

CITY OF BELLEVUE V. KRAVIK, 69 Wn. App. 735, 850 P.2d 559 (1993).....	4
LEWIS V. SIMPSON TIMBER CO., 145 Wn. App. 302, 189 P.3d 178 (2008).....	3
STATE V. BARROW, 60 Wn. App. 869, 809 P.2d 209 (1991).....	2
STATE V. CASTENEDA-PEREZ, 61 Wn. App. 354, 810 P.2d 74 (1991) <i>review denied</i> 118 Wn.2d 1007 (1991).....	2
STATE V. GREEN, 71 Wn.2d 372, 428 P.2d 540 (1967).....	3
STATE V. O'DONNELL, 142 Wn. App. 314, 174 P.3d 1205 (2007).....	2
STATE V. PADILLA, 69 Wn. App. 295, 846 P.2d 564 (1993).....	2
STATE V. SUAREZ-BRAVO, 72 Wn. App. 359, 864 P.2d 426 (1994).....	2

I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. Prosecutorial misconduct denied the appellant, Rose Marie Fairley, a fair trial.

II.

ISSUE PRESENTED

- A. Does one arguably improper comment by the prosecutor create an unfair trial worthy of reversal?

III.

STATEMENT OF THE CASE

For purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

The defendant is arguing for a new trial based on a single comment by the prosecutor in the prosecutor's closing argument. During closing argument, the prosecutor stated: "I, as a representative of the State, say it is probably reasonable because [defendant] had so many opportunities to

say, Okay, I am here; this is the reason I am here. Instead, she was hiding, because she knew that they got interrupted doing a burglary.” RP 101. There was no objection to the prosecutor’s statement.

Prosecutorial misconduct requires reversal only if there is a substantial likelihood that the misconduct affected the verdict. *State v. Padilla*, 69 Wn. App. 295, 846 P.2d 564 (1993), *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991). The State concedes that the prosecutor’s statement was likely error. However, such misconduct is not of constitutional magnitude. *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74 (1991) *review denied* 118 Wn.2d 1007 (1991).

The defendant must show prejudice. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994).

To raise prosecutorial misconduct on appeal when no objection was made at trial, the defendant must show that the alleged misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007). In this case, the prosecutor was arguing from the facts that had been elicited from the witnesses. There was nothing inherently inflammatory about the

prosecutor's remarks and the trial court could easily have given the jury an instruction to ignore the reference to being a representative of the State. The comment did not refer to any particular witness, so it could not be a comment on the veracity of a witness.

The defendant notes that it is typically error for a prosecutor to express a personal opinion about a defendant's guilt. It is also improper for a prosecutor to express a personal opinion regarding the credibility of a witness. However, neither one of those things occurred in this case. The prosecutor did not express an opinion about any witness' credibility. The prosecutor argued from the trial evidence pertaining to the section of closing argument protested by the defendant.

In testing the degree of error engendered by the remarks, their comparative impropriety, and their likely effect upon the jury, consideration must be given to whether they were inadvertent or deliberate, designed to inflame and prejudice the jury, or whether they unintentionally may have done so. Their prejudicial or inflammatory effect must be viewed in context with the earlier evidence and the circumstances of the trial in which they were made.

State v. Green, 71 Wn.2d 372, 381, 428 P.2d 540 (1967).

The defendant had to object to preserve the alleged error for review, but he did not. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 331 n. 22, 189 P.3d 178 (2008); *City of Bellevue v. Kravik*, 69 Wn. App.

735, 742, 850 P.2d 559 (1993). The court should not hear this allegation of error.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 29th day of January, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578

Deputy Prosecuting Attorney
Attorney for Respondent

FILED

JAN 29 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 30892-8-III
v.)	
)	CERTIFICATE OF MAILING
ROSE M. FAIRLEY,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on January 29, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Eric J. Nielsen
nielsene@nwattorney.net

and mailed a copy to:

Rose M. Fairley
414 W. Cherry St
PO Box 232
Walla Walla WA 99362

1/29/2013
(Date)

Spokane, WA
(Place)

Athleen H. Owens
(Signature)