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No. 36299-6-II

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

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

LAURA MOEURN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The State's first witness was Officer Steven Timmons of the Aberdeen Police Department. He testified that on January 13, 2007, he was dispatched to a fight in progress at the Captain's Corner Bar in Aberdeen, Washington. He stated that the dispatch was just after 1 a.m. (RP 5). On scene, he saw a number of people that he estimated to be approximately 15 or 20. When he arrived, the people appeared to be scattering. It seemed to the officer that they were running because he had arrived. (RP 6).

Officer Andy Snodgrass of the Aberdeen Police Department was already on scene. His police vehicle was directly in front of the officer. In front of the two police vehicles was a white vehicle. Officer Timmons also saw a man standing near the white vehicle. He was talking to Officer Snodgrass and pointed to a person, later identified as the appellant. Timmons did not hear what Mr. Vetter said. (RP 8).

Officer Timmons contacted the reporting party, who made the initial 911 dispatch call. He testified that she made an identification of the

person that she had seen strike the victim in this case. The officer stated that the appellant was wearing clothing that matched her description.

Next, Officer Andy Snodgrass with the Aberdeen Police Department testified. He was the first vehicle on the scene, and stated that two officers arrived shortly after he did. (RP 20). He testified that there were a number of civilians on the scene, but they took off running when he arrived. Officer Snodgrass had put the appellant in his patrol vehicle because a bystander had pointed him out as the assailant. (RP 21).

Officer Snodgrass also made contact with the victim, he observed that this person had blood all over his head and blood coming down his shirt. (RP 22).

Officer Snodgrass attempted to locate the weapon used in the assault, but was unable to find something that he believed would be evidence.

After this, Crystal Barnett approached his vehicle and identified the appellant as the person who had struck the victim in this case.

After this identification, the officer removed the appellant from his patrol vehicle and formally arrested him. The appellant stated merely, that he did not do it. (RP 26).

The State's next witness was Crystal Barnett. She stated that she lived at 713 West Curtis in Aberdeen, Washington. (RP 43). This residence was right next to the Captain's Corner Bar. She testified that on January 13, 2007, she witnessed the fight outside her window. She

described the view that she would have of the incident. (RP 44). Thereafter, she testified that she saw the board being swung and hitting the victim. (RP 46). She testified that she saw the person who swung the board, and made note of what he was wearing. She stated that no persons in the general vicinity were wearing the same type of outfit, a red tee-shirt and a gray hooded sweatshirt. (RP 47).

When asked about the description of the assailant, she described his clothes, his height and his build. She was able to later identify him when she saw him in the police car. (RP 49). She identified the appellant as the person who she saw swinging the 2x4. (RP 50).

Ms. Barnett's 911 tape was admitted into evidence and she was questioned about it. She was able to clarify that she stated to the 911 operator that the assailant was yielding a 2x4 and not a bat. (RP 53). Ms. Barnett was cross-examined by the defense counsel, and she maintained that at the time of the assault she saw the assailant. This person was the appellant. (RP 54).

Later, Steve Vetter testified. He explained that he was at the Captain's Corner Bar with Cody Ross and Clayton Wagner. (RP 76). He explained that at the end of the evening a fight broke out involving his friends and a number of other people. After this fight broke up, Clayton Wagoner was attempting to find his cell phone. While Mr. Wagner was looking for his cell phone, Mr. Vetter saw him get hit in the head with a wooden object. (RP 79). Vetter was approximately an arm length away

from Wagner when this occurred. When he turned and looked he saw a young man in his mid twenties wearing a red sweater holding a board. (RP 80). He described the board as a 2x4.

He saw this man try to climb into a small white Toyota or Chevy car. (RP 81). After this, the person that had struck his friend was apprehended by the police and put into a patrol vehicle. (RP 81).

Cody Ross then testified that on January 13, 2007, he was at the Captain's Corner with Clayton Wagner. (RP 88). He explained a series of events that resulted in a fight between Clayton and a number of patrons of the bar. He stated that he had broken up this fight and they were attempting to leave.

Mr. Wagner was attempting to find his cell phone, when he was struck by a 2x4. (RP 39). Mr. Ross was able to identify the appellant as the person who struck Mr. Wagner.

Clayton Wagner testified about the events that occurred on January 13, 2007. Wagner was able to remember being struck by a 2x4 but was unable to remember events after that. (RP 108).

He testified as to his injuries. He stated that he received stitches and a black eye and some bruises on his back. He was left with a scar that he was able to show to the jury. (RP 109).

ARGUMENT

(1) There was ample evidence that the appellant committed the crime charged.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing 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. *State v. Joy,* 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington,* 52 Wn.App. 478, 484, 761 P.2d 632 (1987) rev. den., 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Carmillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

At trial the State produced three witnesses that identified the appellant to varying degrees of certainty, as the assailant in this crime. By the case law above, the credibility of these witnesses must be assumed. Each of these witnesses saw a person strike Wagner with a 2x4. Two of them were able to identify the person yielding the board as the appellant in open court. The State must only produce substantial evidence to establish that the appellant committed this crime. The eyewitness testimony of these three persons is substantial evidence. The trier of fact chose to

believe these witnesses over the defendant's witnesses that claimed that he was not the person responsible. The Court of Appeals cannot second guess this factual determination.

(2) The State did not commit misconduct in its closing argument.

While presenting a criminal case, a prosecutor must seek a verdict free of prejudice and based upon reason, fairness, and the evidence. *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) "Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Id.* "Allegedly improper argument should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *Id.*

The United States Supreme Court addressed "prosecutorial misconduct" in *Namet v. United States*, 373 U.S. 179 (1963). In *Namet*, the Court recognized that some lower courts were of the opinion that error may be based upon a concept of prosecutorial misconduct. Such a claim was said to arise when the government made a conscious and flagrant attempt to build its case out of inferences arising from the use of testimonial privilege. In other words, such a claim did not arise out of mere negligence or out of "simple" trial error.

The issue was first addressed by the Washington Supreme Court in *State v. Nelson,* 72 Wn.2d at 282. In *Nelson*, the prosecutor called a

witness whom the prosecutor knew would claim his Fifth Amendment privilege against self-incrimination solely as a means of getting the government's theory of the case before the jury via the questions asked of the witness. The court stated that "the prosecutor called Patrick to the stand, and in the presence of the jury, asked 28 questions of Patrick outlining substantially in its entirety the State's theory of the case." *Id.* at 282. The "conduct of the prosecutor in placing Patrick on the stand, knowing that Patrick intended to claim his privilege against self-incrimination to questions relating to the alleged crime, and seeking to get the details of Patrick's purported confession before the jury by way of impermissible inferences drawn from the witness' refusal to answer the questions propounded, constituted a denial of Nelson's right to confrontation under the Sixth Amendment." *Id.*

In *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988), the defendant testified that he had some affiliation with the American Indian Movement (AIM). The prosecutor made several references to AIM in his closing argument. The court characterized the prosecutor's closing argument as follows:

> The remarks were flagrant, highly prejudicial and introduced "facts" not in evidence.
>
> A prosecutor cannot be allowed to tell a jury in a murder case that the defendant is "strong in" a group which the prosecutor describes as "a deadly group of madmen," and "butchers that kill indiscriminately." The prosecutor likened the American Indian Movement members to "Kadafi" and "Sean Finn" of the IRA. This court will not

> allow such *testimony*, in the guise of argument, whether or not defense counsel objected or sought a curative instruction. An objection and an instruction could not have erased the fear and revulsion jurors would have felt if they had believed the prosecutor's description of the Indians involved in AIM. This court cannot assume jurors did not believe the prosecutor's description. We have repeatedly explained that the question to be asked is whether there was a "substantial likelihood" the prosecutor's comments affected the verdict. *State v. Reed*, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984); *State v. Charlton, supra* at 664. There is a substantial likelihood this egregious departure from the role of a prosecutor did affect the verdict. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." 110 Wn.2d at 508-09.

A defendant's failure to object or move for a mistrial at the time a prosecutor in a case makes an allegedly improper statement is strong evidence that the argument was not critically prejudicial to the defendant. *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557 (1999) *citing State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). The fact that defense counsel did not object to the prosecutor's statement "suggests that is was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993). Absent a proper objection, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001).

To determine whether the remarks were prejudicial the court must analyze them in context, taking into consideration the total argument, the issues in the case, the relevant evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If the court is satisfied that the outcome of the trial would not have been different had the alleged error not occurred, given all the evidence, then the error is harmless. *Rogers*, 70 Wn. App. at 631.

A prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

The appellant first cites the jury instruction regarding reasonable doubt. It claims that *State v. Bennett*, 161 Wn.2d 303 (2007) found that this instruction was improper. The appellant misreads this case. Supreme Court in *Bennett* found that this WPIC instruction was the proper instruction to give and the instruction known as the Castle instruction was improper. The Castle instruction does not mention the "abiding belief language" that the appellant finds objectionable. This language was approved by the Supreme Court.

The appellant then goes on to quote the State's argument with liberal omissions. Most notably in the middle of the second quote the appellant leaves off of "Just say, what I believe?..." What was left out is the language the State used "when you walk out of here, you have to know you did the right thing. When somebody asks you, so, what

happened in there? Well, I voted guilty. And I did the right thing. That's an abiding belief.

The State's argument can be read by this court in total and should be judged based on its total content. Not the brief section that the appellant chose to quote.

Trial counsel did not object to the State's comments that the appellant claims are misconduct. The defendant's failure to object is strong evidence that the statements were not critically prejudicial to the defendant. The defendant has the burden to prove that the claim of misconduct so was flagrant and ill-intentioned that no curative instruction would have alleviated the prejudice of the defendant.

Stating to the jury that they need to know that they are doing the right thing was not flagrant, ill-intentioned misconduct on the part of the State. This language reinforces the certainty to which the jury must believe the defendant is guilty. This does not alleviate the State of its burden, but reinforces to the jury that this is not a decision that should be made lightly. The intent of this statement was to reaffirm to the jury the significance and importance of their duty and the necessity of moral certainty that reasonable doubt requires.

(3) The State concedes that this case should be remanded to the Superior Court in order to reevaluate the appellant's offender score.

CONCLUSION

The State presented ample evidence to convict the appellant of the crime charged. It is easy to second guess the strength and weight of the State's evidence from the totality of the trial transcript. But that is not the standard by which a jury verdict will be judged. The jury has a providence that cannot be circumvented by a higher court, that is determining the credibility of witnesses. Assuming that the State's witnesses were telling the truth, then the appellant is quite clearly guilty of this crime. Moreover, the State made no error in its closing argument, and if error is found by the Court of Appeals, this error was not intentional or ill-willed. It cannot be said that, but for this error, the outcome this trial would be different.

Respectfully Submitted,

By:

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent, v. LAURA MOEURN, Appellant.	No.: 36299-6-II **DECLARATION OF MAILING**

DECLARATION

I, Taylor K Wonhoff hereby declare as follows:

On the 28 day of February, 2008, I mailed a copy of the Brief of Respondent to Gregory C. Link; Attorney for Appellant; Washington Appellate Project; 1511 Third Avenue, Suite 701; Seattle, WA 98101, and Laura Moeurn; 5913 Olympic Highway; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

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