

NO. 74363-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

**STATE'S BRIEF ADDRESSING SUPPLEMENTAL
ASSIGNMENT OF ERROR MADE IN REPLY BRIEF**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. SUPPLEMENTAL ISSUE RAISED IN REPLY BRIEF.

Whether the prosecutor committed flagrant and ill-intentioned misconduct by commenting on the defendant's own testimony in order to argue that the defendant was not credible?

B. SUPPLEMENTAL STATEMENT OF THE CASE.

The court allowed the State to present testimony by Barnes about being assaulted by Pierce in jail as evidence of consciousness of guilt. RP 200-01. In the State's case in chief, Barnes testified that on December 13, 2012, he and Pierce were placed in the same holding tank prior to a court hearing. RP 2158-61. Suddenly, Barnes was knocked to the ground and found Pierce standing above him. RP 2161. Barnes was transported to the hospital for medical treatment and received eight stitches. RP 2161-62. A jail officer testified that Pierce was standing over Barnes and yelling at him. RP 2393-400.

Pierce testified about the assault as well. Pierce testified that he did not like Barnes. RP 3224. Pierce testified that prior to the events that led to Reed's death he saw Barnes "disrespecting" Lyons by "brandishing drugs" in Lyons' front yard during a barbeque, and as a result Pierce "had an altercation" with Barnes,

and stole his drugs. RP 3224-25. The following exchange occurred on direct examination:

Q: Since we are talking about Mr. Barnes, I understand that you assaulted him in – I guess you could call it jail?

A: Yes, I did.

Q: It was here in the courthouse on the 12th floor in the jail holding area?

A: Yes, it was.

Q: And why did you do that?

A: Because he lied. And the opportunity presented itself.

RP 3225-26. On cross-examination, Pierce testified as follows:

Q: And you attacked Scott Barnes, right?

A: Yeah.

Q: And you'd agree that's what it was, it was an attack?

A: Kind of. It made me feel better.

Q: He didn't try to attack you, right?

A: No.

Q: It made you feel better. Is that what you said?

A: Yeah.

In reviewing Pierce's testimony and addressing his credibility in closing argument, the prosecutor focused on the fact that Pierce admitted that he lied not only to the police about his involvement in the shooting, but lied to his friends and family as well. RP 3775-76. The prosecutor argued that Pierce's explanation for lying to his family was not credible. RP 3775. Pierce claimed that he lied to them about his involvement, not because he was guilty of assisting

in the robbery and murder of Reed, but because he was afraid they would stop supporting him if they found out he was, by his account, the victim of a shooting attempt. RP 3318. The prosecutor argued that it was not credible that Pierce lied to his family for this reason. Rather, Pierce lied because he was guilty. The prosecutor recounted:

This is a support network that didn't wash their hands of him, even though he had his other convictions that he talked about. This is a support network that didn't wash their hands of him -- wash their hands clean of him when he stole Scott Barnes' pin number and drained Scott Barnes' account and boastfully told them about it.

This is a support network that didn't wash their hands clean of him when he bragged about knocking out Scott Barnes, his codefendant, causing Barnes to be wheeled out in a wheelchair, causing him to need eight stitches, causing Pierce to break his own hand.

But telling them the truth, the truth that he was doing a favor for a friend, that he found himself in a bizarre situation, that he wound up the victim of a shooting, that would drive his support network away. Did those words really come out of his mouth on the stand? Did we really believe that? Is he the victim, or is he one of the robbers?

RP 3776. Pierce made no objection to this line of argument.

C. SUPPLEMENTAL ARGUMENT.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY CHALLENGING PIERCE'S CREDIBILITY.

Pierce has isolated a portion of the prosecutor's closing argument out of context to argue that he improperly used Barnes' testimony to argue that Pierce had a criminal propensity. This is not what happened. The prosecutor used Pierce's own testimony to argue that he was not credible. The fact that Pierce admittedly lied to his friends and family about his role was relevant to judging his credibility, and supported the prosecutor's proper argument that Pierce lied to his family because he was guilty of participating in the robbery.

In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant establishes that a prosecutor's statements are improper, the reviewing court must determine whether the defendant was prejudiced under one of two standards of review. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.

State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). If the defendant did not object at trial, he has waived the error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Id. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Id. (quoting Thorgerson, 172 Wn.2d at 455, 258 P.3d 43).

In this case, Pierce has failed to show that the argument was improper at all, let alone flagrant and ill-intentioned. The prosecutor was entitled to challenge Pierce's credibility. The argument at issue was not an argument that Pierce was a "criminal-type," but an argument that Pierce's testimony was not credible. It was not reasonable for Pierce to fear that his family would "cut him off" simply for being present at the scene of a shooting, when they were aware of other more serious misdeeds, such as assaulting Barnes, and continued to be supportive.

Moreover, it should be noted that to the extent propensity evidence was injected into the trial, it was injected by Pierce himself, and not by the State. Pierce volunteered on cross-

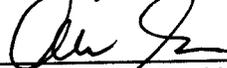
examination that his assault of Barnes "made him feel better." The jury certainly might have concluded from this testimony that Pierce enjoyed violence. But the testimony was not offered or elicited by the State.

Even if the State's brief reference to Pierce bragging about assaulting Barnes is viewed by this Court as improper, a curative instruction would have obviated any prejudicial effect. And there is no substantial likelihood that the statement affected the verdict. The evidence against Pierce was very strong, and he admitted to being present at the scene and armed. His credibility was eviscerated on cross-examination. The evidence of his assault on Barnes was properly admitted. There is no substantial likelihood that the prosecutor's comment about Pierce "bragging" about the assault, which the jury was able to witness themselves during Pierce's testimony, affected the verdict.

DATED this 24th day of August, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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Today I directed electronic mail addressed to Marla Zink, the attorney for the appellant, at Marla@washapp.org, containing a copy of the State's Brief Addressing Supplemental Assignment of Error Made in Reply Brief in State v. Karl Emerson Pierce, Cause No. 74363-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 24th day of August, 2017.

U Brame

Name:

Done in Seattle, Washington

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

August 25, 2017 - 9:24 AM

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Address:
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W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9497

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