

65239-7

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No. 65239-7-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

WENDY MOSLEY, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether there is sufficient circumstantial evidence to prove Mosley was the person who opened a credit union bank account and then engaged in a check kiting scheme to defraud the bank.
2. Whether the trial court abused its discretion by admitting two photographs when witnesses were able to identify the subject matter of the photographs.
3. Whether the prosecutor's isolated statement during rebuttal argument was so flagrant and ill intended that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury when the statement was isolated, did not comment on Mosley's right to silence and could not have, in light of the instructions to the jury, impermissibly shifted the state's burden of proof.

B. FACTS

1. Substantive Facts

On March 26th, 2009 Wendy Mosley opened a bank account with Industrial Credit Union in Bellingham Washington with twenty-two dollars. RP 34, 45. In order to open this account, Mosley was required by the Credit union to verify her identity. Specifically, Mosley was required to provide her social security number, photo identification and proof of her address. RP 37. Bank records and the bank signature card filled out by Mosley confirmed she provided a copy of her driver's license, her social security card and a copy of a municipal court letter that verified her address when she opened her account. RP 43, 45, Supp CP __ (Ex. 1-4, 9

1/4/10). Mosley's signature card also listed her son Marcus Mosley as the person her account would be payable to in the event of her death. RP 38, 39.

The next day, Friday March 27th, 2009 Mosley endorsed and deposited three checks for \$250.00 written on her son Marcus Mosley's girlfriend Kelsey Bartell's bank account. RP 14, 15, Supp CP __ (Pl. Ex.4-8). Then on Saturday March 28th, 2009 Wendy Mosley deposited another two checks from Bartell, again for \$250.00 each. RP 14, 15, Supp CP __ (Pl. Ex.4-8). These checks were deposited with Mosley's endorsement at different branches of the Industrial Credit Union. RP 47-51, Supp CP __ (Pl. Ex.4-8). Industrial Credit Union subsequently determined that all five of the checks Wendy Mosley deposited from Bartell were written on an account with insufficient funds. RP 13. Nonetheless, during this same time frame, Mosley went to the Fred Meyer's branch withdrew \$500.00 and wrote multiple checks, including checks to her son Marcus Mosley and friend Samanda Dillard. RP 51. Christopher Juchmes, an account controller for ICU explained that in order for Mosley to withdraw money from her account at Fred Meyers, the teller would have verified Mosley's identity with picture identification and her signature. RP 76. Juchmes testified the withdrawal slip Mosley signed at Fred Meyers withdrawing \$500.00 matched the signature she

provided when she opened her account. RP 76-78. Juchmes telephoned Mosley and sent a letter regarding her concerning bank account activity but got no response. RP 73. On April 10th, 2009 Mosley's bank account was closed due to insufficient funds. Id.

Detective Ferguson was subsequently notified of a possible check kiting scheme by Industrial Credit Union. RP 4. Ferguson explained that in a check kiting scheme Person A has a bank account, passes checks to person B who then deposits checks knowing there is not enough money in A's account and then person B writes multiple checks to person's C, D and possibly E. RP 5. By writing these checks in amounts under \$250.00 person A, B and C, depositing and withdrawing from different branches of the same bank the parties are able to usually avoid detection. Banks, Ferguson explained don't usually place holds on checks of \$250.00 or less. RP 7, 56. Detective Ferguson explained that in Mosley's case, she also avoided detection initially by depositing checks from Bartell on Friday and Saturday knowing the money would not be counted until the following Monday. RP 14. Only because a teller became suspicious over the activity in Mosley's account were Mosley's deposit transactions eventually reversed by placing a hold on the funds in order to see if Mosley would show up at another branch to try to withdraw money. RP 34, 52-3. The bank subsequently confirmed Mosley did show up at

another branch trying to withdraw money and then repeatedly kept checking to see if the “hold” had been released so she could withdraw money. RP 53-4.

In addition to depositing bad checks and trying to withdraw cash, Wendy Mosley also began writing various checks to various individuals including her son, Marcus Mosley, Samanda Dillard and Josh Anderson. Marcus Mosley opened an account with Whatcom Educational Credit Union, Birchwood branch with \$5.00. RP 85. But then, later the same day Marcus Mosley deposited a check from Wendy Mosley at the Ferndale branch and then went to the Holly Branch and withdrew \$200.00 cash. RP 85. Marcus Mosley then repeated this process to withdraw another \$200.00 with another check from Wendy Mosley by depositing the check at the Birchwood branch and then going to the Bellis Fair branch with withdraw cash. RP85-87. Video surveillance at the Bellis Fair branch confirmed it was Marcus Mosley who withdrew the \$200.00 from that branch. RP 94-95. Mosley also wrote several checks, typically in the amount of \$250.00 to Samanda Dillard. RP 62-65. Similar to Wendy and Marcus Mosley, Dillard would deposit Mosley’s checks at one branch and then go to another branch and withdraw cash. RP 87-88.

Samantha Henthorn, of Whatcom Educational Credit Union explained she discovered Wendy Mosley had a public My Space web page

and that there, she discovered pictures depicting Wendy Mosley and Samanda Dillard together. RP 90-93. One of the photos of the two had a caption that stated, “Samanda’s girl for life.” RP 20-1. Henthorn was able to identify Dillard in the picture from the photo identification Dillard provided when she opened her bank account. Industrial Credit Union lost approximately \$537.00 dollars on Mosley’s account and in all, Mosley wrote approximately \$4,400.00 dollars worth of bad checks on her account. RP 57-58, 75.

2. Procedural facts

Wendy Mosley was charged with one count of unlawful issuance of bank checks and one count of second-degree theft. CP 56-57. The jury found Mosley guilty as charged and the sentencing judge thereafter imposed a standard range sentence of 90 days. CP 18, 27. Mosley files a timely notice of appeal. CP 2.

C. ARGUMENT

1. Circumstantial evidence was sufficient to identify Mosley as the person who committed the charged offenses.

Mosley contends the evidence presented below is insufficient to support her conviction for unlawful issuance of bank checks and theft in the second degree. Br. of App. at 10. Specifically, Mosley contends, relying on State v. Huber, 129 Wn.App. 499, 119 P.3d 388 (2005), there is

insufficient evidence in the record to identify her as the person who committed the charged offense. Contrary to Mosley's argument there is ample circumstantial evidence in the record to support the jury's conclusion that Wendy Mosley committed the charged offenses because the jury had documentary and photo evidence to connect Wendy Mosley to her crimes. Under these circumstances, Mosley's claim is without merit.

In reviewing a challenge to the sufficiency of the evidence, the issue is "whether, after examining the evidence in the light most favorable to the State, 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, 338-39, 851 P.2d 654 (1993). In applying this standard, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 339.

The prosecution has the burden of proving beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Huber, 129 Wn.App. 499, 501, 119 P.3d 388 (2005). Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person or ordinary judgment of the identity of the person should be received and evaluated. *Id. citing State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The State must demonstrate by evidence independent of the

documents that the person named in the documents is the same person being tried for the offense. *Id.*

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Deference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). The [trier of fact] “is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference.” State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (*quoting State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

Mosley claims, as in State v. Huber that the state presented insufficient evidence to prove she was the person who committed the charged offenses. Br. of App. at 11. The defendant in Huber was charged with bail jumping but relied solely on documentary evidence to prove identity. The issue presented in that case was whether the evidence was sufficient to show the person on trial was the same person who failed to appear for court. The court reversed for insufficient evidence because there was no evidence, no photos, testimony etc, to connect Huber to the documents.

In contrast, the court in State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974), affirmed the defendant's conviction after rejecting a sufficiency of the identification argument there were numerous references in the testimony to the defendant and to 'Jimmy Hill' that tied the defendant to the charged conduct. Id at 560.

The Hill court stated:

Although we do not recommend the omission of specific in-court identification where feasible, we are satisfaction that the evidence as it developed in the instant case was adequate to establish the defendant's identity in connection with the offense for which he stood accused.

Id.

The jury in this case expressly found the Mosley identified in court was the Mosley who committed the charged offenses and there is substantial evidence in the record to support this jury finding. First, the jury knew Wendy Mosley's identity was verified by the credit union when she opened her bank account. As explained by the bank, Mosley was required and did provide photo identification, namely her driver's license, social security number and a letter verifying her address in order to open her account. The jury could compare the copy of the photo identification provided by the person who opened the credit union bank account with the defendant in the court room to determine if this was the same person. Contrary to Huber, where a physical description on a warrant was

insufficient to support the jury's finding of identification, the photo identification provided by the person who opened the bank account, Wendy Mosley, spoke for itself. Additionally, Detective Ferguson testified that the person in court was the same person he found and identified as Wendy Mosley during his criminal investigation of this check writing scheme. RP 16. The jury could also compare Wendy Mosley's distinctive signature on the bank signature card signed when she provided her photo identification and opened her account, to the many bad checks she wrote and endorsed and, to the withdrawal slip (where Mosley also had to verify her identity by providing photo identification) to determine if the person in court, who opened the credit union account was the same person who proceeded to write bad checks and defraud the bank. Finally, Detective Ferguson also confirmed to the jury that the Wendy Mosley he contacted during his investigation and who was being tried for this check writing scheme was Marcus Mosley's mom and was also friends with Samanda Dillard; both persons confirmed to be involved in this same check writing scheme. And, contrary to Mosley's argument, there was testimony that Marcus Mosley was identified from video surveillance during one of his fraudulent banking transaction. These facts, taken in the light most favorable to the state, demonstrate the state provided more than mere documents to prove the Wendy Mosley in court committed the

charged offenses. Collectively, this evidence circumstantially supports the jury's determination that Mosley committed the charged offenses.

Mosley's claim should therefore be rejected.

2. The trial court did not abuse its discretion by admitting photographs from Wendy Mosley's public my space page.

Next, Mosley argues the court improperly admitted two photos without laying the proper foundation pursuant to ER 901. Br. of App. at 14. The record demonstrates the trial court did not abuse its considerable discretion by admitting two photographs when two of the state's witnesses were able to identify the subject matter of the photographs, Wendy Mosley and Samanda Dillard. ER 901 provides:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ER 901 outlines ten methods of authentication but makes clear these methods are illustrative only and do not preclude the use of other methods of authentication. The rule requires only that the proponent of the evidence make a prima facie showing that the evidence is authentic- is what it purports to be. State v. Danielson, 37 Wn.App. 469, 681 P.2d 260 (1984).

Traditionally, testimony by a witness with direct knowledge of the subject matter sufficiently provides authentication/foundation for admissibility. State v. Tatum, 58 Wn.2d 73, 360 P.2d 754 (1961). A photograph however, can also be identified indirectly, without direct evidence of identification of the principle subject of the photograph. *Id.* Photographs are liberally admitted and, any defects or deficiency in the photograph goes to weight and not admissibility of the photo. State v. Tatum, 58 Wn.2d at 73; State v. Payne, 25 Wn.2d 407, 171 P.2d 227 (1946). The trial court has broad discretion with respect to the admission of photographs. State v. Tatum, 58 Wn.2d 73.

Mosley contends the trial court abused its discretion admitting two photographs taken from Wendy Mosley's public "My Space" social networking web site that depicted her with friend Samanda Dillard because no witness had any first hand knowledge of the circumstances of the photo or, of what either Wendy Mosley or Samanda Dillard looked like. See, Br. of App. at 15. Mosley is wrong. Whatcom Educational Credit Union account specialist Samantha Henthorn and Bellingham Police Detective Ferguson sufficiently authenticated the two photographs at issue for admissibility.

First, Henthorn testified she found the photographs on Wendy Mosley's public my space account, an account that was open to the public

and showed both Mosley's Bellingham profile and what appeared to be personal photographs. Henthorn testified she recognized Dillard in several of Mosley's photograph from the photo identification Dillard provided when she opened her Educational Credit union account. Similarly, detective Ferguson testified he recognized both Samanda Dillard and Wendy Mosley as the persons depicted in the photos. Ferguson explained he recognized Wendy Mosley based on his previous contacts with her and that she was the same person he had identified as Wendy Mosley in the courtroom. RP 25. This testimony sufficiently authenticated these two photographs for admissibility. The trial court therefore did not abuse its discretion by admitting these two photographs.

3. Prosecutor's comment in rebuttal argument taken in context was harmless and does not warrant reversal.

Finally, Mosley contends the prosecutor improperly commented on her right to silence during rebuttal argument and that this comment also impermissibly shifted the burden of proof. Br. of App. at 16. The prosecutor's argument was isolated, not objected to and in the context of the remaining argument, overwhelming evidence and instructions to the jury, was harmless. Reversal therefore, is not warranted.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial

effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (court gives deference to the trial court's ruling on motion for mistrial "because the trial court is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant").¹

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); State v. Russell, 125 Wn.2d 24, 28, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1)

¹ suggests that a constitutional harmless error analysis should be applied in this context. However, the court in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) declined to apply that test and applied the test requiring a showing of prejudice in a case where the defendant argued, and the appellate court found, that the prosecutor "sought to undermine the State's burden of proof beyond a reasonable doubt." *Id.* at 26 n.3, 26-27.

there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86.

During closing arguments both the prosecutor and Mosley's attorney reminded the jury that the state had the burden of proof and Mosley had no burden whatsoever. RP 112, 115. Mosley argued that although the state successfully proved Mosley's bank account was used for fraudulent purposes, they had not proven/identified that it was Wendy Mosley who was responsible for the fraudulent activity. RP 116. In response, the prosecutor commented "Mr.Hendrix didn't tell you what the defense was. He didn't say it wasn't her. I was listening pretty closely. I didn't hear that he said I didn't prove that. Maybe it could have been someone else, may have been, could have been, even had been her son Marcus Mosley....' RP 118. The prosecutor then continued, explaining how the evidence the state presented demonstrated Wendy Mosley was the person not only responsible for opening the credit union bank account but

also the person responsible for participating in an elaborate check kiting scheme to fraudulently obtain money.

It wasn't until after closing arguments that Mosley moved for a mistrial asserting for the first time that the prosecutor's isolated comment at the beginning of rebuttal shifted the burden of proof. RP 124. The trial court noted it wished Mosley had timely objected so he could have instructed the jury to disregard the comment but because there was no objection and the state repeatedly argued that Mosley had no burden of proof, the court was compelled to deny the request. *Id.*

Mosley asserts the trial court erred. Mosley asserts that as in State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990) the prosecutor's comments impermissibly shifted the burden of proof. In contrast to the prosecutor in this case, the prosecutor in Cleveland argued:

“Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.”

Cleveland at 647-8.

The Cleveland court determined the prosecutor's comments were improper because they inferred Cleveland had a duty to present favorable evidence if he could. The court nonetheless determined this improper argument was harmless because the jury was properly instructed that the

state carried the burden of proof and in context to the arguments presented, the comments were not particularly persuasive. As in Cleveland, the prosecutor's references in this case, to the extent they could be construed as shifting the burden of proof, were harmless. The reference itself was isolated – a misguided attempt to assert the state's evidence was uncontroverted. And unlike Cleveland, the prosecutor's reference in this case did not suggest in any meaningful way that the defense had a burden to produce any evidence. Therefore, as in Cleveland, error if any, was harmless. Particularly, where Mosley failed to timely object and give the trial court the opportunity to neutralize any potential prejudice with a curative instruction.

Mosley also argues that, as in State v. Burke, 163 Wn.2d 204, 217 P.3d 1 (2008), the prosecutor's statement during rebuttal improperly commented on her right to silence. A prosecutor violates a defendant's Fifth Amendment rights if the prosecutor makes a statement "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" State v. Ramirez, 49 Wn.App. 332, 336, 742 P.2d 726 (1987), (*quoting State v. Crawford*, 21 Wn.App. 146, 152, 584 P.2d 442 (1978), *review denied*, 91 Wd.2d 1013 (1979)). The prosecutor may however, say that certain testimony is

undenied as long as he does not refer to the person who could have denied it. Ramirez at 336.

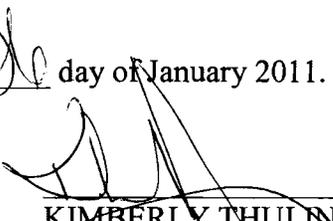
The record reveals the prosecutor was not commenting on Mosley's failure to testify but was trying to point out, however inartfully, that the state's evidence was uncontroverted. In Burke, the defendant was charged with rape of a child in the third degree. Burke asserted in his defense that he reasonably believed his victim was 16 years old. The state responded in argument that if that were true, Burke should have told police that during his first interview or when the victim's sister called the next day. The court determined this argument invited the jury to infer guilt from Burke's termination of the interview with police.

The isolated statement in argument in this case in contrast to Burke, taken in context to remaining argument and instructions to the jury did not invite the jury to infer guilt based on Mosley's failure to testify. Regardless, in light of Mosley's failure to object to the statement during closing, the instructions to the jury and remaining argument, error if any, was harmless.

D. CONCLUSION

Based on the foregoing, the State respectfully requests this court affirm Mosley's convictions for unlawful issuance of bank checks and theft in the 2nd degree.

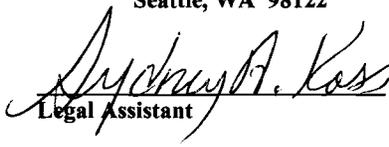
Respectfully submitted this 26 day of January 2011.


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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, addressed as follows:

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Date