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NO. 65938-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NINA ROSE SCOTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	1
C. <u>ARGUMENT</u>	6
1. SCOTT RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT	6
2. SCOTT'S COUNSEL PROVIDED EFFECTIVE REPRESENTATION	13
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 14, 15, 19

United States v. Necochea, 986 F.2d 1273
(9th Cir. 1993) 17

Washington State:

In re Pers. Restraint of Brett, 142 Wn.2d 868,
16 P.3d 601 (2001)..... 14

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004)..... 17

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 6, 7

State v. Fisher, 165 Wn.2d 727,
202 P.3d 937 (2009)..... 7

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006)..... 6

State v. Grisby, 97 Wn.2d 493,
647 P.2d 6 (1982)..... 7

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996)..... 14

State v. Horton, 116 Wn. App. 909,
68 P.3d 1145 (2003)..... 8, 11

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991)..... 15

<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	17
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	15
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	8, 11
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	8, 11
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985).....	8, 11
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	7, 12, 18
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	14
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	13

A. ISSUES

1. Whether defendant Nina Rose Scott's prosecutorial misconduct claim, raised for the first time on appeal, is waived because any prejudice caused by the prosecutor's statement could have been avoided by a proper objection and curative instruction.

2. Whether Scott has failed to show that she received ineffective assistance of counsel based on her attorney's failure to object to the challenged statement during closing argument.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Scott with Forgery. CP 1-4. The jury convicted Scott as charged. CP 37; 7RP 2.¹ The trial court imposed a standard-range sentence of 120 hours of community service. CP 73-78; 8RP 22-23.

2. SUBSTANTIVE FACTS

On May 1, 2009, Scott walked into the downtown Renton Bank of America to cash a check for \$3,284.00. 4RP 9; Ex. 8.

¹ The Verbatim Report of Proceedings consists of eight volumes, designated as follows: 1RP (8/4/10); 2RP (8/5/10); 3RP (8/9/10); 4RP (8/10/10); 5RP (8/11/10); 6RP (8/12/10); 7RP (8/13/10); and 8RP (8/27/10).

Scott handed the check to a teller, who turned around and gave it to the branch manager, Jason Shen, believing that it might be forged. 4RP 164. Shen looked at the check and immediately thought, "Oh my gosh, I can't believe someone is even trying this" because in his mind, it was "a no brainer" that the check had been altered. 4RP 179. The check contained at least three different types of handwriting, two different types of ink, and Scott's name written in the payee blank, which had either been "w[h]ite[d]-out" or "erased and rubbed so much" that it was "completely white," when it should have been light blue. 4RP 33, 166; Ex. 8.

As Scott waited, Shen compared the check to other checks written on the account and concluded that the handwriting on the check did not match the handwriting on the checks on file. 4RP 169. Shen called one of the account holders, Patricia Conger, to confirm that the check was fraudulent. 4RP 169. Conger told Shen that she did not transfer the money to Scott. 5RP 29. Conger shared the checking account with her sister, Michaele Turbak. 5RP 16, 27. Neither woman knew Scott or gave her permission to possess the check, which represented half of the yearly rental income from a condo that they jointly owned.

5RP 22-23, 29. Shen called the police upon confirming that the check was fraudulent. 5RP 169-70.

Renton Police Officer Thaddeus Kerkhoff responded to the bank and found Scott inside waiting for the check to be cashed. 4RP 11-12. Kerkhoff looked at the check and noticed that Scott's name was written in "really bad penmanship" and that it looked like a "fifth grade w[h]ite-out." 4RP 13, 78. Kerkhoff escorted Scott outside the bank where he arrested and advised her of her Miranda rights. 4RP 17.

Post-Miranda, Scott indicated that "some guy" named "Rob" had given her the check as a school loan, even though she was not currently in school. 4RP 17, 24. Scott denied knowing Rob's last name, address, or phone number, but suggested that he was waiting for her in the parking lot. 4RP 24-25. Scott did not know the account holders' first and last names, or their addresses. 4RP 24-25. During the questioning, Scott appeared "nervous" and "very fidgety," and laughed even though no one was making any jokes. 4RP 26. On the way to the station, Scott said that the guy who gave her the check told her that she had to "cash it by today," and that it was common for dancers like herself to receive money for school. 4RP 36.

The next day, Renton Police Detective Robert Onishi interviewed Scott in jail. 4RP 149-50. Scott gave a different account of how she received the check. She told Onishi that someone named "Matt," not "Rob," gave her the check and that he was a Native American male, 5'4" tall, in his 20s, with curly hair and a slender build. 5RP 36. Scott provided Onishi with Matt's phone number and a couple of places where he might be staying or hanging out. 5RP 26. Scott said that Matt had called her the day before and wrote her name on the check when they met. 5RP 37-38.

At trial, Scott testified that Matt had said "something weird" about where he had gotten the money to loan her. 6RP 15. Scott admitted that she was "skeptical" when Matt called to tell her that he had received the loan money. 6RP 78. Scott could not remember the exact terms of the loan, suggesting that they talked about her expenses and how much she could pay each month, and then she "kind of forgot about it." 6RP 78.

Scott denied looking at or examining the check before walking into the bank, suggesting "I think -- I think I remember giving a little bit of glance [sic] at it." 6RP 23. Scott did not know the exact loan amount when she tried to cash the check, and could

not remember when she learned its exact amount. 6RP 98-99. Scott admitted that she was almost 23 at the time of the incident, and had been living on her own for five years, paying rent and utilities. 6RP 68-69. She testified that she was familiar with checks and had previously written them to pay her cell phone bill. 6RP 74.

Following the incident, Scott denied ever following up with Matt about her arrest or having to spend the night in jail. 6RP 87. Scott said that she "wanted to hurt him," but that she did not want to talk to him. 6RP 88. Consequently, Scott did not pick up the phone when Matt called her after the incident. 6RP 88.

After being convicted, Scott moved for a new trial based on her late disclosure to her attorney that she suffered from bipolar disorder. 8RP 2-6. The court denied the motion, finding that there was "nothing" to suggest Scott was incompetent during the trial, and finding that defense counsel was "a very experienced, very competent, a very empathetic and patient attorney," who would have noticed if there was a mental health issue that seriously impaired Scott's ability to understand and participate in the proceedings against her. 8RP 10-13. The court specifically found that "substantial justice" had been done, and that there was

"nothing else" before the court to suggest that Scott had not received a fair trial. 8RP 15.

C. ARGUMENT

1. SCOTT RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.

Scott contends that the State committed prosecutorial misconduct by expressing a personal opinion about her guilt during closing argument. Scott's claim fails. The prosecutor's isolated reference to knowing that the check was altered was not a comment on Scott's guilt. Moreover, Scott waived this challenge on appeal by failing to object at trial. Scott cannot show that the prosecutor's singular statement was "so flagrant and ill-intentioned" that it created a lasting prejudice that could not have been remedied by a proper objection and curative instruction.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's comments were improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Comments are prejudicial only if "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Failing to object

to misconduct at trial and to request a curative instruction constitutes waiver on appeal, unless the misconduct is so "flagrant and ill-intentioned" that the resulting prejudice could not be neutralized by a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). Ordinarily, a defendant must move for a mistrial or request a curative instruction for an appellate court to consider alleged misconduct in closing argument. Id.

The State has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The prejudicial effect of a prosecutor's improper comment is not determined by looking at the comment in isolation, but by considering the comment in the context of the entire argument, the issues in the case, the evidence addressed in closing, and the jury instructions. Brown, 132 Wn.2d at 561. Juries are presumed to follow the trial court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

A prosecutor commits misconduct by expressing a personal opinion about either a witness's credibility, or a defendant's guilt or innocence. See State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant "a liar" and stated that defense counsel "did not have a case" and that the defense witnesses should not be believed because they drove fancy cars and lived out of town).

Prejudicial error occurs when it is "clear and unmistakable" that the prosecutor improperly expressed a personal belief, rather than argued an inference from the evidence. State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006). For example, a prosecutor committed reversible misconduct, by repeatedly stating, "*I believe Jerry Lee Brown*," the only witness linking the defendant to the crime, despite defense counsel's failure to object to the comments. State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (emphasis in original). Similarly, a prosecutor committed reversible misconduct by arguing, "*the State believes, this prosecutor believes*, that [the defendant] got up there and lied." State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (emphasis added).

Here, Scott complains of a single statement by the prosecutor during closing argument where she stated, "I know it's a bad check." 6RP 157. The statement occurred when the prosecutor disputed defense counsel's claim that Scott was a "patsy," who only glanced at the check before attempting to cash it:

Now, defense has tried to suggest to you that it's common in check cashing schemes [for] there to be a scam. The person who goes in and tries to pass the check, and then the mastermind waiting for them. Now, ladies and gentleman, I submit to you the defendant, she is no patsy. She is an educated adult. She told you that she finished high school early. She told you that she was almost 23 years old when this happened. That she's been living on her own since she was 18. She moved out then. That she's paid rent and utilities . . . That she had checks when she was little. That she would write her sister checks, and when she was 16 she would write checks to pay her cell phone bill. She says she even dealt with checks at work . . . The Defendant is an educated adult with the financial know how to pay her bills, to live on her own. So look at that check. *I know it's a bad check.* Is it reasonable that the Defendant never really looked at the check or that the Defendant thought this was a good check?

Defendant told you, and she admitted on cross examination, that she knows and understands checks. She knows what they mean. She knows how to write them. She told you that she didn't see a checkbook or any other checks when Matt was writing her name on the check.

6RP 156-57 (emphasis added).

While the challenged statement is poorly worded, it concerned an issue - the fact that the check was falsely altered - that was undisputed. In opening statement and closing argument, defense counsel conceded that the check was "obviously" altered, and argued that the critical question for the jury to resolve was whether Scott looked at the check long enough to know that it was altered. 3RP 161, 171-72; 6RP 161, 174. The prosecutor never offered her personal opinion on this issue.

In fact, looking at the closing argument as a whole, the evidence presented, and the issues in the case, the prosecutor properly argued the issues that were in dispute, specifically whether Scott knew that the check was altered and whether she looked at the check. The prosecutor's comments before and after the challenged statement were properly focused on arguing that Scott knew it was a bad check based on her manner while testifying, inconsistent statements, and unreasonable claims. See 6RP 149-50 (quoting Scott's uncertain answers, "I don't remember. I don't think so . . . I'm trying to remember," and pointing out the multiple ways that Scott "changed her story"). Immediately prior to making the challenged statement, the prosecutor relied on the witnesses' testimony, who universally and unequivocally agreed

that the check was altered, to argue that any reasonable person who looked at the check would reach the same conclusion, based on the check's mismatched handwriting, different ink, and apparent white out. 6RP 154-55; Ex. 8.

Given the context in which it occurred and the prosecutor's closing argument as a whole, it is not "clear and unmistakable" that the prosecutor was expressing a personal belief that Scott was guilty of forgery. McKenzie, 157 Wn.2d at 54. The prosecutor's isolated statement occurred in the larger context of arguing that Scott's claims were unreasonable. The prosecutor's inartful comment is a far cry from other prosecutorial misconduct cases where prosecutors have repeatedly and explicitly professed that the defendant was lying, or that a witness was telling the truth. Reed, 102 Wn.2d at 145; Sargent, 40 Wn. App. at 343-44; Horton, 116 Wn. App. at 921-22.

Nonetheless, even assuming the prosecutor's poorly worded statement was improper, a curative instruction advising the jury to disregard the prosecutor's statement would have remedied any potential prejudice. Scott's failure to object, move for a mistrial, or request a curative instruction, "strongly suggests" that the

challenged statement did not appear "critically prejudicial" at the time it occurred. Swan, 114 Wn.2d at 661.

Here, the challenged comment was not "critically prejudicial" because defense counsel conceded in opening statement that the check was "obviously" altered, and even elicited further testimony during the officers' cross-examination about the "obvious" alteration of the check. 3RP 161; 4RP 58 (asking Kerkhoff, "it's the worst check anybody in the Renton Police Department has ever seen attempted to be passed?"); 5RP 116 (asking Onishi "it is obviously an altered check, wouldn't you agree?"). Given that the check contained at least three different types of handwriting, two different types of ink, and Scott's name scrawled across the top of apparent white-out, it would have been nearly impossible for defense counsel to maintain credibility with the jury and not concede that the check was forged. Ex. 8; see also 4RP 14 (Kerkhoff calling the check "the most horrific altered check I have ever seen. It was that obvious.").

Because defense counsel conceded the same point that the prosecutor inartfully made in the challenged statement, Scott cannot show that there is a "substantial likelihood" that the prosecutor's statement affected the jury's verdict. Although the prosecutor's poorly worded statement addressed an element of the

charge, it was undisputed. The prosecutor did not express any personal opinions about the disputed issues in the case, specifically whether Scott knew it was an altered check and looked at it. In fact, nowhere else did the prosecutor use the same phrase.

Scott cannot show that the prosecutor's singular statement was "so flagrant and ill-intentioned" that *no* curative instruction would have eliminated its prejudicial effect. See State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008) (holding that the trial court's curative instruction remedied the prejudice caused by the prosecutor's improper and repeated argument that the defendant was not entitled to "the benefit of the doubt"). Any prejudice caused by the prosecutor's statement could have been avoided by the court instructing the jury to disregard the prosecutor's statement. Scott cannot show that the prosecutor's isolated comment deprived her of a fair trial. Scott has waived this claim of error on appeal.

2. SCOTT'S COUNSEL PROVIDED EFFECTIVE REPRESENTATION.

Scott argues that she received ineffective assistance of counsel at trial because her lawyer failed to object to the

challenged statement in closing. Scott's claim lacks merit. Scott's counsel reasonably and legitimately chose not to object to the prosecutor's statement based on counsel's concession in opening statement that the check was "obviously altered." 3RP 161. Scott cannot show that there is a reasonable probability that she would have been acquitted but for defense counsel's failure to object to the prosecutor's isolated statement in closing argument.

Ineffective assistance of counsel claims present a mixed question of law and fact that are reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) her attorney's conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

There is a strong presumption that counsel has provided effective representation. Strickland, 466 U.S. at 689. Courts are "highly deferential" when scrutinizing counsel's performance because it "is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. There is a "wide range" of reasonable performance and courts recognize that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, as discussed in the preceding section, Scott has not shown that the prosecutor's isolated statement about the check at

issue was a "clear and unmistakable" expression of the prosecutor's personal belief that Scott was guilty. Thus, Scott has not shown that her counsel's failure to object to the statement amounted to deficient performance.

Nonetheless, defense counsel legitimately and reasonably chose not to object to the prosecutor's statement because the fact that the check was altered was not in dispute. In opening statement, Scott's counsel conceded that the check was "pretty obviously altered" and argued that the "question" for the jury to decide was whether Scott looked at the check long enough to realize it. 3RP 161, 171-72. Defense counsel reiterated this statement in closing, recognizing that the check was "obviously forged" and contending that "obviously the issue is did she know or didn't she know." 6RP 161, 174. In light of the noticeable alteration of the check - the three different types of handwriting used, the two different types of ink, and the apparent use of white out in the payee line - Scott's counsel had no choice but to concede that the check was "obviously altered," and to claim that Scott never looked at it.

Further, defense counsel strategically used the obvious alteration of the check to argue that Scott must not have looked at

the check because if she had, she would have known that it was a bad check:

What might you think from what she did that she didn't know? Well, if this check is so obviously forged, and it is pretty bad . . . If she looked at it, and if she had half a brain in her head why would she take it into the bank and offer it?

6RP 174. Scott's counsel capitalized on the obvious alteration of the check to resolve the critical disputed issue in the case, whether Scott knew the check was altered. Thus, Scott's counsel had a legitimate reason not to object to the challenged statement.

Moreover, the "decision of when or whether to object is a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defense counsel's decision not to object during closing argument is within the "wide range of permissible professional conduct." In re Pers. Restraint of Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004). Lawyers usually do not object during closing argument "absent egregious misstatements." Id. (quoting United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993)).² Scott's counsel made a legitimate, tactical decision not to object to the prosecutor's statement in light of the

² Scott's counsel did object, however, during closing argument when the prosecutor argued that the defendant had a personal interest in the outcome of the litigation. 6RP 151-52.

overwhelming evidence that the check was altered, and the defense strategy of using the obvious alteration of the check to argue that Scott never looked at the check and therefore never knew that it was altered.

Even assuming that defense counsel's failure to object fell below an object standard of reasonableness, Scott has not shown a reasonable probability that, but for counsel's failure to object, the results of the trial would have been different. The challenged statement occurred once during the prosecutor's nearly 30-minute closing argument. Supp. CP __ (Sub 70C, Jury Trial). Prior to closing argument, the court properly instructed the jury that the "lawyers' statements are not evidence" and that they must base their decision on "the testimony and exhibits." CP 41. Defense counsel echoed this instruction in closing, reminding the jury that they could not "presume [Scott's] guilty because she's charged. That she's guilty because the officers thought she was. That she's guilty because Ms. Relyea thinks she is. None of those things are evidence in the case." 6RP 181. The jury is presumed to have followed the court's instructions, and Scott offers no reason to believe that the jury did not follow them. Swan, 114 Wn.2d at 662.

The prosecutor's statement, "I know it's a bad check" paled in comparison to the witnesses' characterizations of the check at trial. See 4RP 14, 78 (Off. Kerkhoff calling it "the most horrific altered check I have ever seen" and suggesting it's "like a fifth grade w[h]ite-out"); 4RP 179 (Shen saying "it's a no brainer this check has been altered"); 5RP 21 (Turbak likening the check's handwriting to "child script"); 5RP 50, 116 (Det. Onishi calling it "one of the, probably the worst, check forgeries"). Moreover, the prosecutor's statement only addressed the alteration of the check, a point that Scott had necessarily conceded in light of the evidence. The prosecutor never suggested that the jury should convict Scott based on the prosecutor's belief that she lied or was guilty.

Scott cannot show that counsel's performance fell below an objective standard of reasonableness, or that she was prejudiced when counsel failed to object to an isolated statement by the prosecutor in closing argument. Counsel's failure to secure Scott's acquittal should not be used to second guess her performance. Strickland, 466 U.S. at 689. Given the record and the strong presumption in favor of counsel's performance, the Court should find that Scott has failed to carry her burden of demonstrating ineffective assistance of counsel.

D. CONCLUSION

For the reasons stated above, the Court should affirm Scott's conviction.

DATED this 10th day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Respondent's Brief, in STATE V. NINA R. SCOTT, Cause No. 65938-3-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.



Name
Done in Seattle, Washington

08/10/11

Date