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NO. 66223-6-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

(King County Superior Court Cause No. 09-1-05312-6 SEA)

CITY OF AUBURN,

Petitioner,

v.

RONALD J. CRAWFORD,

Respondent.

REPLY BRIEF OF PETITIONER

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A. IDENTITY OF PETITIONER

The Petitioner, City of Auburn, hereinafter referred to as the City, is the prosecuting jurisdiction of the case on review before this Court.

B. PETITIONER'S REPLY TO RESPONDENT'S BRIEF

The City respectfully submits the following as its Reply to the Brief of Respondent, Ronald Crawford [hereinafter the Defendant]:

C. ARGUMENT

The Defendant argues that the comments of the trial prosecutor about which he complains were not provoked. The Defendant asserts that since the prosecutor's comments were made in initial closing argument, they were not provoked. The Defendant reiterates statements from the rebuttal portion of the Petitioner's closing that the RALJ, as follows:

MR. BOESCHE: Folks, this case isn't about DNA; it's not about fingerprints. That's not where the evidence comes from in this case. It comes from his own daughter. That's where the evidence comes from in this case. *And how do we treat her as that source of evidence? What do we do with his own daughter? What did he do at the scene? What's he doing to her today? Throw her to the wolves.* Throw her under the bus. When the police officers arrive to try to investigate, what does the Defendant do? What does he tell the officers? She's the problem. She's a runaway. She stays out all night.

MR. JOHNSON: Objection, Your Honor. He's making arguments from evidence that was not

submitted. There was no testimony that my client ever spoke to the police other than the lines were given.

MR. BOESCHE: Officer [inaudible] testimony.

THE COURT: It's argument. I'll -- the objection will be overruled.

MR. BOESCHE: *So that's what he says. Blames it on her. Dad, I want you to get these people out of the house. I can't make them leave; you go make them leave. You call 911. You do it.*

What are we doing today? Blaming her. You heard the arguments from the Defense. Many of the arguments are really insulting to the intelligence, and I won't go into most of those. But it's really unfortunate that that's what's happening here. His own daughter is the source of the evidence. She's being fed to the wolves in this case by her own father.

And there is an emotional impact in this case. You know what that emotion is that you're feeling, that sort of anger, that sort of aspect to the evidence, that feeling that you get? You know what that is? That's you being convinced beyond a reasonable doubt that he's guilty. That's exactly what that is.

VIP 306-308 [CP 218-220] (emphasis Defendant's).

Brief of Respondent, pages 1-2.

What the Defendant did not note was that the Defendant did not testify at all during the trial. It was defense counsel who, during closing argument, threw blame at the Defendant's daughter – blaming her for

complaining that her own father was smoking crack cocaine with several of his friends in the house in which she was a resident, and when she complained to him, he had lit a crack pipe, inhaled, and then blew the smoke in her face. (CP 245-246.)

How had the defense counsel [previously] addressed the issues in his argument – an argument to which the prosecutor responded? Defense counsel said:

MR. JOHNSON: The City says . . . it was paraphernalia. And there's a simple way of at least establishing that this man used any of those items. First off, if any of these items were placed in his mouth or handled, there would have been some DNA left over. No DNA evidence was presented. Now, you know, that can be kind of expensive in a misdemeanor case. We're in Municipal Court.

. . . .

Now, as far as Heidi, yes, her testimony was all over the place. And, granted, it's his daughter. I don't think there's many of us here who would ever want to see a family member hurt or put through the judicial system, et cetera. Let's look at what Heidi presented. We know that she's had a history of run -- running away. That was brought out during the City's case. When she's talking to the 911 operator she's asking about if there's any warrants out for her from a diff -- you know, all these court -- different courts. She was angry that another woman was wearing her clothes. Now, remember what her testimony was, her father's response to that was. Why is she wearing my clothes, dad? Because she had nothing to wear. Now, that's kind of a rational response to providing clothing, possible shelter to another person if they were without. But, she's upset about this. She wants that

person and the others, understandably, to get lost. But, she's also fighting with her father that morning over her relationship with a man, a man with a 16-year-old, that's inappropriate, and dad threatened her with that. But, I think the phrase she said was "statutory rape."

So, is it really beyond the realm of possibility that a 16-year-old girl getting into a fight with her father about the different things, given her background, given some -- the situation there [inaudible], and that after actually living first-hand the process of the police coming into one's house, you know, I've always said this before, that, you know, the government is not a very good houseguest. You know, you invite them into your house, but when you want them to leave, they don't necessarily leave. They don't necessarily get out of your life when you want them to. And I think Heidi learned that lesson [inaudible]. She's had time to reflect, time to calm down. She's not a 16-year-old emotional teenage girl in a fight with dad. She's had some time to reflect, think about what was said. That statement that's provided here was written by a police officer who wants to make an arrest. No agenda? No purpose there behind that? Don't know. . . .

(CP 214-217.)

Defense counsel's argument *did* endeavor to blame the Defendant's daughter -- attempting to direct criticism on her to distract attention to the actions of the Defendant. Were the prosecutor's comments in response to such statements? YES. Did these statements cross a line of what is considered misconduct? No.

As noted in the City's arguments in its initial Brief, a defendant

claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). The appellate courts review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Here, the Defendant can do neither.

The Defendant cites only one case in his Response Brief, to wit: *State v Jackson*, 150 Wn. App. 877, 209 P.3d 553 (2009), a case that reiterated the same concepts argued by the City in its initial Brief of Petitioner. In that regard, *Jackson* noted that the court reviews prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Additionally, the *Jackson* court found that if defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *See State v. Fisher*, 165 Wn.2d at 747; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

At any rate, in addition to the fact that the prosecutorial conduct complained of in *Jackson* was not similar to what is before this court the court in *Jackson* rejected the defendant's prosecutorial misconduct arguments and upheld the defendant's conviction.¹ Rather, the court found that (1) the prosecutor did not vouch for credibility of police officers; (2) the prosecutor's arguments did not impermissibly shift burden of proof; (3) the prosecutor did not impermissibly comment on defendant's privilege against self-incrimination; (4) the prosecutor did not engage in misconduct by stating that he wanted jurors to ask themselves what reason the state trooper would have to lie or make something up; and (5) the prosecutor's unobjected-to statement that *he thought*² the defendant's girlfriend, who testified that she was driving the car, "might have ulterior motives," was not flagrant and ill-intentioned misconduct that no jury instruction could cure.

As in *Jackson*, the comments made by the prosecutor in the matter

¹ It should be noted that in *Jackson*, the court vacated the defendant's sentence and remand for resentencing, unrelated to prosecutorial misconduct, based, instead, on a miscalculation of the defendant's offender score and based on a need to address the question of whether Jackson was on community custody when he committed the current offenses. The court affirmed the conviction on all other grounds. *Jackson*, 150 Wn. App. at 893-94.

² In *Jackson*, the court noted that it is problematic for a prosecutor to express his or her opinion, though the court concluded that this was not objected-to, and the statement was made in the context of recounting evidence and reasonable inferences from the evidence could support the jury's conclusion that Jackson was not credible. At any rate, the court concluded that the comments were not flagrant and ill-intentioned misconduct such that no jury instruction could cure any defect. Ultimately the court found no reversible error. *Id* at 889. However, in this case, no such prosecutor opinions were expressed.

before this Court do not support the Defendant's arguments. Looking at examples of what the courts have said regarding claimed prosecutorial misconduct, it is clear that the prosecutor's comments in this case do not amount to misconduct. For example, a prosecutor may comment disparagingly on a defense argument *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997); *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), but may not disparage defense counsel or argue in a manner that impugns counsel's integrity. See *State v. Warren*, 165 Wn.2d 17, 29–30, 195 P.3d 940 (2008). In that regard, the prosecutor did comment disparagingly on defense counsel's argument, the prosecutor did not impugn counsel's integrity. The prosecutor's comments were focused on the argument, not defense counsel, even though he was the source of statements and arguments to which the prosecutor responded.

In *Warren*, the court noted that [even] remarks disparaging defense attorneys in general and calling defense argument a “classic example of taking these facts and completely twisting them ... and hoping that you are not smart enough to figure out what in fact they are doing” were not so flagrant and ill intentioned as to be incurable. *Id.* Also, in *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993), the court noted that the remark that defense counsel “is being paid to twist the words of the witnesses” was curable. And in *Lindgren v. Lane*, 925 F.2d 198, 204 (7th

Cir.1991) a single reference to “defense counsel’s argument being the ‘tricks’ and ‘illusions’ of a ‘magician’” was not so egregious as to warrant relief sought by the defendant.

Here, the prosecutor’s comments were fact/argument-based, not directed at the defense counsel’s character or integrity. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the evidence. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Improper remarks by the prosecutor are not grounds for reversal if invited or provoked by defense counsel “unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Finally, it must be noted that a jury instruction was given to the jury that that the attorneys’ arguments were not evidence and to disregard any comment that did not comport with the evidence or the law the court had given [Jury Instruction No. 1 (CP 387-88)], an instruction the jury is presumed to follow. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008) (citing *State v. Weber*, 99 Wn.2d 158, 165 - 66, 659 P.2d 1102 (1983)). Additionally, the trial court is in the best position to most effectively determine whether prosecutorial misconduct prejudiced a defendant’s right to a fair trial, and thus the appellate courts trial court

ruling deference on appeal. *State v. Luvane*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

D. CONCLUSION

The statements made by the prosecutor to the jurors do not amount to prosecutorial misconduct as they were neither improper nor prejudicial. The statements were in direct response to argument of defense counsel. The Defendant has not met his obligation to show such and the Defendant did not [adequately] object, nor did he request a curative instruction. Additionally, even if (for the sake of argument) statements made by the prosecutor during initial closing argument could be construed as inappropriate, Jury Instruction No. 1 would have taken care of that defect. The appellate courts rightfully grant prosecutors even greater latitude in rebuttal arguments when responding to defense arguments.

For all of these reasons, and the reasons stated in the City's Brief of Petitioner, the prosecutor's comments are not misconduct, there is no basis for reversing and remanding for re-trial, and the defense challenge alleging prosecutorial misconduct must fail. To be fair, in this case, the Superior Court's erroneous ruling regarding prosecutorial misconduct should be reversed.

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Respectfully submitted this 17th day of November, 2011.

A handwritten signature in black ink, appearing to read 'D. B. Heid', written over a horizontal line.

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NO. 66223-6-1

CERTIFICATE OF SERVICE
OF REPLY BRIEF OF
PETITIONER

King County Superior Court
Cause No. 09-1-05312-6

I, Megan B. Stockdale hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Reply Brief of the Petitioner concerning the above entitled matter to:

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by mailing in the United States Mail, postage prepaid, to the above mailing address, and by sending the same to the above e-mail address, on the 17th day of November, 2011.

SIGNED at Auburn, Washington, this 17th day of November 2011.

Signature



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