

NO. 68314-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FOUAD AHMED,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A prosecutor may properly argue the law and inferences from the facts presented at trial. A prosecutor may properly challenge the credibility of the defendant's testimony. Where the prosecutor did not misstate the law or the jury's role, and where defense counsel did not object to any of the prosecutor's arguments, was the argument misconduct?

B. STATEMENT OF THE CASE

On August 31, 2008, at approximately 6:30 p.m., Officer Jennifer Morris was working in an undercover capacity with the Anti-Crime Team (ACT) in the Pine and Pike corridor of downtown Seattle. 1RP 28-30.¹ The Seattle Police Department had received numerous complaints from citizens and business owners regarding drug activity in that area. 1RP 29. On that particular day, the ACT team targeted the 200 block of Pine Street. 1RP 29. This specific street is well-known as a place to purchase crack cocaine. 1RP 31.

As part of the operation, Officer Morris was walking down the street when Said Elazmaoui approached her and asked her if she

¹ The Verbatim Report of the Jury Trial consists of two volumes referred to in this brief as 1RP (July 13, 2009); and 2RP (July 14, 2009).

wanted to have some "fun." 1RP 32-33, 56. When Morris asked what type of fun, Elazmaoui said they could get some dope.

1RP 33. Morris engaged by stating she was looking for rock.

1RP 33. "Rock" is a common street name for rock cocaine.

1RP 33.

After discussing Morris' interest in rock cocaine, Elazmaoui asked her to follow him to The Turf restaurant. 1RP 33. Elazmaoui went inside the restaurant to find someone that could sell him a rock. 1RP 33. Officer Morris waited outside. 1RP 33, 56-57.

Elazmaoui was not able to obtain any cocaine, so the two of them continued walking until they approached a coffee shop. 1RP 34-35. Sitting at a table on a patio was the defendant, Fouad Ahmed.

1RP 35. Elazmaoui sat next to Ahmed and the two spoke for about 30 seconds in a language Morris could not understand. 1RP 35, 57. After this conversation, Morris asked Elazmaoui if Ahmed had rocks. 1RP 35. Elazmaoui responded in the affirmative and asked Morris to sit down. 1RP 35. Morris sat down at the table next to Ahmed. 1RP 35-36, 59.

As soon as Morris sat down, Ahmed asked her if she had \$40.00 and Morris in return asked Ahmed directly if he had any rocks. 1RP 36, 59. Ahmed answered in the affirmative by showing

Morris two white rocks, that looked like crack cocaine, in his left hand. 1RP 36; 2RP 4-5, 7-9. In 2008, the street value for one rock of crack cocaine was about \$20.00. 1RP 24. Consequently, the street value for two rocks was \$40.00, the amount that Morris indicated she was willing to spend. 1RP 37.

Morris gave the \$40.00 to Ahmed, and took two rocks of crack cocaine from Ahmed's hand. 1RP 37-38. Morris walked out the door and Elazmaoui followed her. 1RP 38-39. The two men were arrested at the scene. 1RP 39. The rocks Morris purchased from Ahmed tested positive for crack cocaine. 1RP 39; 2RP 93.

During trial, Ahmed testified that he was seated at Seattle's Best Coffee when Elazmaoui joined him and told him to find a woman. 2RP 105. Ahmed indicated that Elazmaoui asked him for \$40.00 so that he could go "buy something," which turned out to be crack. 2RP 105-06. According to Ahmed, Elazmaoui came back and left the crack covered in a napkin, although he claimed not knowing it was crack cocaine. 2RP 106.

Ahmed also testified that Elazmaoui returned to the table with Morris, at which time Elazmaoui told Ahmed he would give him his \$40.00 back in exchange for Ahmed returning "the thing that I gave you." 2RP 106-08. Ahmed's explanation for the exchange of

the cocaine and the \$40.00 was that he had asked for his \$40.00 back and Elazmaoui told him to take the cash from Morris.

2RP 109. Ahmed further stated he was simply going to give Elazmaoui his "stuff back" and was surprised when Morris took it from his hand. 2RP 109-11. The jury convicted the defendant of one count of delivery of cocaine and this timely appeal followed.

C. ARGUMENT

THE PROSECUTOR PROPERLY ARGUED THE LAW AND INFERENCES FROM THE FACTS PRESENTED AT TRIAL AND CHALLENGED THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY.

On appeal, Ahmed asks this Court to reverse his conviction because the prosecutor committed misconduct in closing argument. Ahmed's arguments should be rejected. The prosecutor did not commit misconduct. The prosecutor's remarks were not improper. Even if the court finds the comments improper, defense counsel did not object to any of the statements that Ahmed now claims were misconduct. Nothing the prosecutor said was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997).

"The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Even improper remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his statements. State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006).

In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). "Where the defense fails to object to an improper

comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they were made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. Id. at 53 n.2.

Ahmed claims that the prosecutor misstated the law as to the element of knowledge. First, a prosecutor's misstatement of the law or facts does not automatically justify reversal of a conviction. State v. Barajas, 143 Wn. App. 24, 38, 177 P.3d 106 (2007). Moreover, the prosecutor did not misstate the law.

As the jurors were instructed, in order to convict the defendant, the jury had to find beyond a reasonable doubt that Ahmed delivered a controlled substance and knew that it was a controlled substance. CP 23. The court defined the knowledge element as follows:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being

unlawful or an element of the crime. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 24.

Ahmed claims that the prosecutor improperly told the jury that Mr. Ahmed “doesn’t need to know that [sic] what was in his hand.” Brief of Appellant, 4. What the prosecutor actually argued, in full, was:

The defendant knew that the substance delivered was a controlled substance. We heard some testimony here late in the day. Did he know? Well, what is the definition of know? In this case, the jury instructions give it to you. It’s instruction number ten. The second sentence is: Is not necessary that the person know that the fact, circumstances or result as defined by law as being unlawful, in other words, he doesn’t need to know that what was in his hand, it was illegal to have in his hand, he just needs to know that it was there.

2RP 133. The prosecutor then clarified, “The law in this case on this particular element about knowledge is did you know that that, in this case, crack cocaine was in your hand?” 2RP 133. While the prosecutor’s comments may not have been as artful as desired, the prosecutor was properly reciting the law for the jury, as stated in the jury instructions and as applied to the facts in this case.

Ahmed argues that the prosecutor's alleged misstatement of the law was flagrant because it went to the "only element in dispute in this case" and "Nothing in the officer's testimony contradicts Mr. Ahmed's lack of knowledge." Brief of Appellant, 5. This is a mischaracterization of the testimony. The State presented ample evidence that Ahmed knew what was in his hand when he delivered it to the undercover officer. When the officer sat down at the table next to Ahmed, she had a short but critical exchange with the defendant:

Prosecutor: Who were you next to when you sat down at the table?

Officer: I was next to Ahmed.

Prosecutor: What happened after you sat down?

Officer: Ahmed asked me do you have \$40.

Prosecutor: And what was your response?

Officer: I replied that I did, and asked him if he had any rocks.

Prosecutor: And then what happened at that point?

Officer: He showed me his left hand, and he was holding a bag of chips in his left hand, but inside of his palm was two white rocks that looked to me to be rock cocaine.

1RP 36. The prosecutor's arguments properly drew inferences from this testimony and properly cited to the jury instructions and the definition of the knowledge element.

Ahmed also claims that the prosecutor improperly stated an opinion of the facts and misstated the jury's role when the prosecutor told the jury, "you can't be afraid of the truth." Brief of Appellant, 5. However, the prosecutor's comments need to be reviewed in the context of the entire case and the entire arguments of both counsel. The prosecutor first told the jury in closing, "There's [a] certain amount of human sympathy probably in all of us. But we can't turn our head. We can't ignore the facts. We can't ignore the evidence, no matter how uncomfortable it might make us feel." 2RP 134-35. Then in rebuttal, in response to defense counsel's arguments, the prosecutor said, "These facts, we can't get away from them. This evidence, we can't get away from it. It's tough. We can't be afraid of the truth in this case." 2RP 143.

All criminal juries are instructed both at the beginning and the end of trial that, "It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the trial." WPIC 1.01, 1.02. They are also instructed that, "You must reach your decision based on the facts proved to you and on the

law given to you, not on sympathy, prejudice, or personal preference." WPIC 1.02. The jury's job is to decide the facts by deciding what evidence is true and what evidence is not. The truth is not irrelevant in a criminal trial, or the verdict, as Ahmed seems to believe.

Similar claims were made in two recent cases: State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), and State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). In Warren, the prosecutor repeatedly misstated the burden of proof in closing argument over the defense objections by telling the jury that the defendant should not receive "the benefit of the doubt." 165 Wn.2d at 23-24. Nonetheless, the Supreme Court affirmed the defendant's convictions, finding misconduct, but also finding that the error was cured by a court instruction. Id. at 28. Significantly, the court did not find that the prosecutor's statement that "this entire trial has been a search for the truth" was improper. Id. at 25, 27-28. Unlike in Warren, the prosecutor in the present case did not misstate the burden of proof.

In Anderson, the prosecutor argued that "by your verdict you will declare the truth about what happened" and made repeated requests that the jury "declare the truth." 153 Wn. App. at 424.

Division Two held that the prosecutor's argument was improper because it misstated the jury's role; the jury's job was not to solve the case or declare what happened, but to determine if the allegations were proved beyond a reasonable doubt. Id. at 429. Nonetheless, the court found that the argument was not so prejudicial as to require reversal where there was no objection at the time. Id. at 432. In this case, the prosecutor never instructed the jury to "declare the truth."

The jury could not make a proper determination of whether the allegations were proved beyond a reasonable doubt without making a determination as to whether the evidence presented to them was true. The comments made in the present case were a reminder to the jury to not let passions or prejudice outweigh their evaluation of the evidence. The prosecutor's argument was not like the arguments that were disapproved of in Warren or Anderson, and was not misconduct.

Even if misconduct, it was not flagrant and ill-intentioned misconduct causing prejudice that no curative instruction could have alleviated. Ahmed's failure to object strongly suggests that the comment did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Ahmed's claim of misconduct was waived when he did not object to the argument at trial.

Lastly, Ahmed claims that the prosecutor improperly commented on his personal opinion as to the credibility and guilt of Ahmed. When a defendant chooses to testify at trial, the prosecutor is free to draw inferences about the defendant's credibility, just as counsel may draw inferences regarding the credibility of any other witness. Portuondo v. Agard, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000).

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). However, misconduct occurs only when the statement is a clear and unmistakable expression of a personal opinion, such as "I believe D.G." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor may argue reasonable inferences from the facts concerning witness credibility. Warren, 165 Wn.2d at 30.

As the prosecutor argued, "The defendant has opened the door. The defendant has called into question his own credibility, his own stake in the game, his own skin when he's up there testifying.

And it's okay as jurors to look at that when making your decision. It's okay to ask what's in it for him?" 2RP 144.

None of the statements challenged by Ahmed constitute a clear and unmistakable expression of the prosecutor's personal opinions. Moreover, even if misconduct, it was not flagrant and ill-intentioned misconduct causing prejudice that no curative instruction could have alleviated. Ahmed's failure to object strongly suggests that the comment did not appear critically prejudicial in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Ahmed's claim of misconduct was waived when he did not object to the argument at trial.

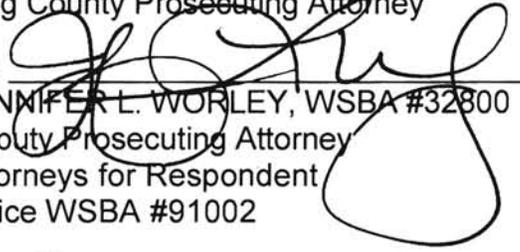
D. CONCLUSION

For the reasons cited above, this Court should affirm Ahmed's conviction.

DATED this 5 day of October, 2012.

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 Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. FOUAD AHMED, Cause No. 68314-4-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.

Betty A. Huddleston
Name

Done in Seattle, Washington

10/8/12
Date