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NO. 71096-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON,
Respondent,
v.
JASON ROMERO,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE D. KNIGHTLINGER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that a curative instruction could not have neutralized the prejudice. In closing argument, the prosecutor drew a reasonable inference that Romero intended to defend himself if discovered, as he had stored several butcher knives and a garden trowel at the entry to the crawlspace in which he was found. The prosecutor also briefly stated that a trespass was temporary, while arguing the defendant's intent to commit a crime in the church. Romero did not object to either statement. The jury was correctly instructed on the law and that the lawyers' remarks were not evidence. Has Romero failed to show that the alleged misconduct was so flagrant and ill-intentioned that it could not have been cured by an instruction from the court?

2. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result. The decision of whether and when to object is a strategic one. Defense counsel did not object to the prosecutor's statements and incorporated both into his own argument. Neither statement was so prejudicial that it

affected the outcome of the trial. Has Romero failed to establish ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Jason Romero by amended information with second degree burglary, with the aggravating factor that the victim of the burglary was present during the crime, and bail jumping. 1 RP 6¹; CP 10. Judge Carol Schapira presided over the jury trial. 1RP 6. Romero was found guilty as charged. 3RP 79. He was sentenced to a standard range sentence of 55 months.² 3RP 120-21; CP 81.

2. SUBSTANTIVE FACTS.

On January 11, 2012, members of the Living Hope Church of the Nazarene in Normandy Park discovered Jason Romero in a crawlspace. 1RP 170; 2RP 45-46. Ed Towle, a church volunteer, had decided to look around the church following reports that a

¹ The verbatim report of proceedings consists of three volumes, which will be referred to as follows: 1RP—August 29, September 3, and September 4, 2013; 2RP—September 5, 2013; 3RP—September 9 and 20, and October 18, 2013.

² Romero's offender score was 10 on the burglary charge and he faced a standard range of 51-68 months. CP 79. His offender score was 8 on the bail jumping charge for a standard range of 43-57 months. CP 79.

strange man had been inside the day before. 3RP 39-40, 43. The preceding day, Towle's grandson, Uzias Gutierrez-Hougardy, had been in the church and seen a strange man coming out of the bathroom. 1RP 124-25. The church was not open to the public that day, a Tuesday, and police were called. 2RP 126, 132, 137, 174. While numerous items appeared out-of-place, police could not locate anyone in the church. 1RP 127, 138-42, 146-57, 175-81; 2RP 7-13.

The following day, Towle and another church member further investigated. 2RP 43-44. Towle noticed an extension cord taped to the wall leading up into a crawlspace above the sound booth. 2RP 44, 82. That cord had not been there before and there were fresh scuffmarks in the same area. 2RP 44-45. Towle got a ladder, but before he could climb up into the crawlspace a male announced, "I'm coming down." 2RP 83. The man, later identified as Romero, came down from the crawlspace and lay on the floor of the church foyer until police arrived. 2RP 45-47.

In the crawlspace, officers discovered a backpack, an area made up with church blankets as a bed, and numerous items that had been relocated from other areas of the church. 1RP 165; 2RP 47-48, 86-90. Inside the backpack, which Romero identified as his,

police found a keyboard, a web camera, and other electronics. 2RP 28-29, 47-48. These items had been taken from the pastor's locked office. 2RP 82, 87-89. At the entry to the crawlspace, officers discovered a garden trowel, which had been taken from a locked, exterior shed. 2RP 49. They also discovered several butcher knives; all had been removed from the kitchen. 1RP 165; 2RP 24-25, 27-28.

Damage and disarray were noted in other areas of the church. The locked door into the main office had been kicked in, tearing the door frame off the wall. 2RP 32-33, 90-91. Half-eaten food had been left out in the kitchen. 1RP 156, 179; 2RP 9. Someone had showered in the pastor's shower. 1RP 152. The classroom had the pastor's autographed collector's baseball, a listening device, and other items that had been gathered from other areas of the church. 1RP 146-47, 149; 2RP 8, 96. In an attempt to prevent anyone from looking inside the church, chairs had been stacked in front of the windows in the adult classroom. 1RP 175-76; 2RP 96. The blinds had been pulled down on other windows in the kitchen. 1RP 178-80; 2RP 8.

Romero admitted he had been staying at the church since that Monday. 2RP 113. He had entered through an open kitchen

window. 2RP 71. Romero cooperated with officers. 2RP 117. He did not have permission to stay at the church. 2RP 100.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN CLOSING ARGUMENT.

Romero contends that two of the prosecutor's statements in closing argument constitute misconduct and warrant reversal. Romero did not object to either of these arguments. One was based on reasonable inferences from the evidence, while the other was a brief misstatement of the law. However, a curative instruction could have neutralized any prejudice.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of establishing that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). However, "If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the prejudice." Emery, 174 Wn.2d at 760-61. This requires a defendant to show that (1) a curative

instruction would not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id. The reviewing court's focus is on whether the resulting prejudice could have been cured. Id. at 762.

The supreme court has recognized: "the absence of an objection by defense counsel '*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). That court has noted, "[T]here is great potential for abuse when a party does not object because '[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.'" State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (quoting State v. Sullivan, 69 Wn. App. 167, 173, 847 P.2d 953 (1993)).

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). On review, the

prosecutor's remarks are viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); accord State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

a. The Prosecutor Properly Argued Inferences From The Evidence Of Romero's Intent To Commit A Crime In The Church.

Romero's first claim of prosecutorial misconduct is that the prosecutor's argument on the defendant's intended use for the butcher knives and garden trowel found at the entry to the crawlspace was an improper inflammatory appeal to the jury. This argument should be rejected. The prosecutor's statements were reasonable inferences from the evidence and established one of the elements of the crime. If these remarks were improper, any prejudice could have been cured by an instruction. Romero has waived any error by failing to request such an instruction.

A prosecutor may draw reasonable inferences from the evidence presented at trial in closing argument. Fisher, 165 Wn.2d at 746-47. However, deliberate appeals to the jury's passion and

prejudice are prohibited. Russell, 125 Wn.2d at 89. For example, it was improper for the prosecutor to play upon the jury's fears of the defendant's future dangerousness by arguing, "If you have a reasonable doubt that he killed these women, let him go. . . There is no shortage of naive [sic], trusting, foolish young people in the cities of this country. . ." Id. Even so, reversal is required only where the statements were so inflammatory that no instruction could have cured the prejudice. Id.

In this case, the central issue was Romero's intent in unlawfully remaining in the church. 3RP 42, 62. Romero's attorney urged the jury to convict him of the lesser-included crime of trespass. 3RP 62, 69. To prove Romero committed second degree burglary, the State had to show Romero unlawfully entered or remained, *inter alia*, with intent to commit a crime therein. RCW 9A.52.030.

The prosecutor focused her initial closing argument on the crimes Romero committed or intended to commit while unlawfully remaining inside the church. 3RP 40, 42, 44, 45-46, 48-50. She argued that Romero's attempts to conceal himself within the church were evidence of his intent to commit a crime inside. 3RP 41, 46-47. Next, she recounted the evidence that Romero had

committed crimes in the church: by eating their food and showering without permission, kicking in the locked door to the office, and taking electronics. 3RP 48-50.

Lastly, she recounted the butcher knives and garden trowel found in the crawlspace that Romero had set up as an apparent living space. 3RP 52. The knives had been stored in the kitchen and the garden trowel had been kept in a locked, exterior shed. 3RP 53. Romero had relocated these sharp implements for no apparent legitimate reason. 3RP 53. The prosecutor argued that Romero gathered those items in order to potentially repel intruders.³ 3RP 53. Such an inference was reasonable given the placement of these items at the entry of the crawlspace. 2RP 24-25.

In its entirety, this portion of the prosecutor's argument was short; it occupies approximately one page of the transcript out of twenty-four pages of her initial closing argument. 3RP 38-62. It

³ The prosecutor argued:

Is it reasonable to think that the defendant was going to do some gardening or needed four butcher knives up there for some, you know, legitimate reason? It is reasonable to conclude that the defendant gathered those items in case somebody infringed on his newly-found space. And again, it is just another piece of evidence of intent to commit a crime therein.

3RP 53.

centered on the main issue of the burglary charge, intent to commit a crime, and showed that Romero had intended to commit the crime of assault, if necessary. The argument was not improper.

Romero attempts to compare these comments to the prosecutor's comments in State v. Pierce, 169 Wn. App. 533, 552-56, 280 P.3d 1158 (2012). Pierce is easily distinguished. In Pierce, the prosecutor made three egregiously improper arguments in closing: (1) a first person narrative of the defendant's thoughts leading up to the crimes, (2) a description of the murder that was not based on evidence, and (3) the imagined thoughts of the victims on the day they were murdered. 169 Wn. App. at 553. The majority of the prosecutor's comments were not based on evidence or reasonable inferences therefrom. Id. at 554-55. The argument was highly inflammatory and included repeated appeals to the jurors' sympathies, such as that the victim pleaded for mercy for himself and his wife. Id. at 555. As such, reversal was required.

By contrast, here, the prosecutor made a relatively brief argument that centered on the defendant's intent and reasonable inferences from the evidence. She never called upon the jury to place themselves in the shoes of the church members who discovered him. It was not improper.

Even if this Court were to conclude that the argument was improper a curative instruction could have alleviated any prejudice. Also, the trial court instructed the jury that the lawyers' remarks were not evidence, that they were to disregard any remark not supported by the evidence, and that they were not to base their verdict on sympathy or prejudice. 3RP 23, 25-26; CP 54-55. Jurors are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Any prejudice from this comment did not have a substantial likelihood of affecting the trial.

b. Any Prejudice From The Prosecutor's Brief Misstatement Of The Law On Trespass Could Have Been Cured By An Instruction.

Romero next contends that the prosecutor committed misconduct by misstating the law on trespass. While the prosecutor did incorrectly state that a trespass was only temporary, in context, she was properly arguing Romero's intent. Again, Romero failed to object, and a curative instruction could have corrected any prejudice. Reversal is not required.

While it is misconduct for a prosecutor to misstate the law, reversal is required only if the misconduct had a substantial likelihood of affecting the verdict. Warren, 165 Wn.2d at 28; State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (reversal required where prosecutor incorrectly stated that accomplice liability applied, and jury's question showed it considered the issue in determining defendant's guilt).

Here, the prosecutor made the brief comment that a trespass was only temporary. This was incorrect. RCW 9A.52.070 ("A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully. . ."). But, the argument overall focused on the defendant's intent to commit crimes within the church. The prosecutor stated:

Now the defense attorney would like you to believe that this was just a trespass; that the defendant was just trespassing. *He didn't intend to commit any crimes inside the church.*

But this isn't a trespass. A trespass is temporary. A trespass is cutting through your neighbor's yard to get to the bus stop quicker. *A trespass does not involve remaining unlawfully with the intent to commit crimes or actually committing crimes.*

3RP 43 (emphasis added). The brief misstatement was immediately preceded and followed by a *correct statement of the law*: that a trespass did not involve intending to commit or committing crimes.

The prosecutor continued by contrasting what one would expect to see if the defendant had simply trespassed to find a warm place to stay with what the defendant had done inside the church. 3RP 43. She argued that the fact that the defendant kicked in the pastor's office door, took valuables and put them in his backpack in the crawlspace, and rifled through the church's possessions showed that the defendant had committed crimes. 3RP 43. Therefore, he was guilty of the greater charge of burglary. 3RP 43.

Again, Romero failed to object. His counsel instead used the prosecutor's argument to argue that the prosecutor was incorrect and that she had not proved the burglary charge. 3RP 63-64. The incorporation of the argument weakens Romero's claim that it denied him a fair trial. See Russell, 125 Wn.2d at 89.

If Romero had objected, the court could have provided a curative instruction that could have corrected any prejudice. The trial court correctly instructed the jury on the law that trespass included unlawfully entering or remaining and to disregard any

arguments not supported by the jury instructions. 3RP 29-31; CP 65-66. The brief misstatement did not substantially affect the trial.

2. ROMERO'S COUNSEL WAS EFFECTIVE.

Romero contends that if this Court finds that the prosecutor's remarks were improper, but could have been cured by an instruction, then his counsel was ineffective for failing to object. This claim fails. Romero's counsel was effective.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687, 108 S. Ct. 2052 (1984)). The first prong of the test "requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

The second prong of the test requires a showing that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. Id. If one prong has not been met, a reviewing court need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

Here, Romero's counsel did not object because the majority of the arguments were not improper. Moreover, counsel incorporated into his own argument the prosecutor's comment that was improper, that a trespass was temporary. He argued:

The State says, 'Oh, well if you are some-place for too long, that is not criminal – that is not criminal trespass.' That is wrong, flat-out wrong.

You can stay in a place – maybe where you're not supposed to be – and that is a crime – but it is still just criminal trespass.

There is a fire extinguisher up there. There is [sic] Gatorade bottles up there. Everything that points to the creation of a living space.

3RP 63-64. He also incorporated the prosecutor's argument that Romero had gathered implements to potentially repel any intruders

from his newly-found space.⁴ This was an effective and legitimate strategy. See State v. Rafay, 168 Wn. App. 734, 833, 285 P.3d 83 (2012) (counsel not ineffective for not objecting to codefendant's counsel's comment in closing argument because whether and when to object falls squarely within the category of tactical decisions); see also Cunningham v. Wong, 704 F.3d 1143, 1159 (9th Cir. 2013) (counsel's decision not to object was a reasonable strategic decision).

Romero relies on State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). In Horton, counsel was ineffective for failing to comply with evidence rules in order to impeach the victim *and* for not objecting to the prosecutor's improper statements in closing. Id. The State conceded that the statement was improper and counsel

⁴ Defense counsel argued:

Now the State has made much ado about garden implements, knives and those sorts of things, and what was he going to do with that sort of stuff?

Again, Jason's inaction speaks volumes.

On the day he comes down from the ceiling, 'Please don't hurt me, I'm coming down.'

He comes down the ladder, undirected, lays down on the floor in the foyer.

Now here we have a person that Ms. Meyer wants you to believe is there to commit a crime and he, Jason, comes down out of the ceiling and lays down on the floor in the foyer with the front door right there.

3RP 64.

was ineffective for failing to object. Id. Such is not the case here. Instead, Romero's counsel ably represented him throughout the trial and his decisions not to object were legitimate trial strategy.

Romero cannot show that he was prejudiced by any of counsel's alleged errors. There was no prejudice because the majority of the prosecutor's statements were not improper and an objection was not necessary. The one brief misstatement of the law, that a criminal trespass was temporary, was strategically used by defense counsel. Therefore, Romero has not shown that he was prejudiced by any of his counsel's alleged errors.

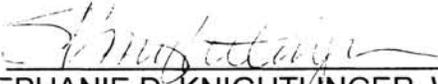
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Romero's convictions.

DATED this 10th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHANIE D. KNIGHTLINGER, WSBA #40986
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Jared Steed, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Jason Castillo Romero, Cause No. 71096-6, 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 15th day of October, 2014.

U Brame

Name
Done in Seattle, Washington

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