

71546-1

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NO. 71546-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HUD A. BERLIN,

Appellant.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
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I. ISSUES

1. At the start of closing argument, the prosecutor directed the jurors' attention to the courts instruction listing all of the elements the State had to prove for the jury to find defendant guilty of the charged crime. In summation near the end of closing argument, the prosecutor left out one element. Defendant did not object to the prosecutor's statement at trial. Has defendant preserved the issue of prosecutorial error for consideration on appeal?

2. Has defendant met his burden to establish prosecutorial error; that the prosecutor's conduct was improper and prejudicial; that any prejudicial effect had a substantial likelihood of affecting the verdict; and that any prejudicial effect was not cured by the court's instructions?

3. Has defendant met his burden to establish ineffective assistance of counsel; that counsel's representation fell below an objective standard of reasonableness; and that but for counsel's performance, the jury's verdict would have been different?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On November 28, 2012, Snohomish County Deputy Sheriff Dixon Poole observed a Hyundai Accent pull out of a driveway onto State Route 92 near Granite Falls. Deputy Poole knew that Hud Anthony Berlin, defendant, was associated with the Hyundai, and that defendant had an outstanding warrant for his arrest. Deputy Poole turned around and followed the Hyundai to the Lochsloy Store. The Hyundai was unoccupied when Deputy Poole arrived at the store. Deputy Poole parked on the side of the store and waited for backup to arrive. Deputy Poole observed the Hyundai drive by and recognized defendant as the driver. Deputy Poole pulled behind the Hyundai and followed it down the road. When the Hyundai's speed reached 40 mph in a posted 25 mph zone, Deputy Poole activated the emergency lights on his patrol car. When the Hyundai did not slow down, Deputy Poole activated his patrol car siren. Defendant failed to stop, continued driving, using both lanes, running stop signs, and speeding. Granite Falls Police Chief Dennis Taylor and Sheriff's Deputy Jason Tift joined the pursuit with the emergency lights and sirens on their patrol cars activated.

A high speed chase ensued through heavy traffic. RP 34-42, 46-61, 174-192, 252-255, 258-265.

The Hyundai attempted to take a corner too fast and ended up in the ditch. Chief Taylor pulled his patrol vehicle next to the driver's side door of the Hyundai and recognized defendant in the driver's seat. Defendant escaped out the passenger side door and fled on foot. Deputy Tift pursued on foot and recognized defendant as the fleeing suspect. Defendant claimed he was not the driver of the Hyundai. RP 61-62, 192-195, 265-268, 325-326.

B. PROCEDURAL HISTORY.

On May 20, 2013, defendant was charged with one count of Attempting to Elude a Pursuing Police Vehicle with the aggravating circumstance that his actions threatened physical injury or harm to one or more persons other than defendant or the pursuing law enforcement officers. CP 62-63.

On February 3, 2014, a jury found defendant guilty as charged of Attempting to Elude a Pursuing Police Vehicle and returned a special verdict that defendant's actions threatened physical injury or harm to one or more persons other than defendant or the pursuing law enforcement officers. Defendant timely appealed. CP 24, 36, 37; RP 411-414.

III. ARGUMENT

A. DEFENDANT HAS NOT PRESERVED THE ISSUE CONCERNING THE PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT FOR CONSIDERATION ON APPEAL.

Defendant alleges that the prosecutor left out the element of defendant's knowledge in closing argument. Brief of Appellant at 1, 5-8. Defendant ignores the totality of the prosecutor's closing argument and instead focuses solely on the prosecutor's summation statement, taking that statement out of context of the total argument and the jury instructions. The prosecutor began closing argument by directing the jury's attention to instruction 6, listing "each and every element that the state must prove with evidence beyond a reasonable doubt for you to find the defendant guilty." The prosecutor specifically addressed the fourth element; "That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop." CP 46 (Jury Instruction 6, WPIC 94.02); RP 368-370. During her summation near the end of closing argument, the prosecutor left out the fourth element. Defendant did not object to the prosecutor's statement. RP 386-387.

When a party fails to object, the party does not preserve for review any alleged error. State v. Hodges, 118 Wn. App. 668, 673,

77 P.3d 375 (2003). Generally, an appellate court will not consider theories or arguments different from those advanced at trial. State v. McDonald, 74 Wn.2d 474, 480, 445 P.2d 345 (1968). Parties may only assign error on appeal on the specific ground of the evidentiary objections they raised at trial. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Specific objections are necessary at trial so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect. Boast, 87 Wn.2d at 451.

In order to preserve error for consideration on appeal, the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). "Objections are required to prevent potential abuse of the appellate process." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Were a party not required to object, a party 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, 271–272, 149 P.3d 646 (2006). Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a

motion for new trial or on appeal. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Emery, 174 Wn.2d at 762.

“A case cannot be tried on one theory, and appealed on another.” State v. McDonald, 74 Wn.2d 474, 480, 445 P.2d 345 (1968). There can be exceptions to that rule, particularly in criminal cases, where the right to a fair and impartial trial or the preservation of some other fundamental right is involved. McDonald, 74 Wn.2d at 480-481. This case is not an exception. Defendant had a fair and impartial trial on the theory presented. The essence of defendant’s argument on appeal is: If this case had been presented differently the finder of the facts *might* have drawn a different inference from the evidence presented. Defendant’s effort to wage his appeal on a different theory should be denied.

B. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS IMPROPER AND PREJUDICIAL.

In a prosecutorial misconduct¹ claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Thorgerson, 172 Wn.2d at 442-443, citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned

¹ "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Sept. 24, 2014); American Bar Association Resolution 100B (Adopted 8/9-10/10), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Sept. 24, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Thorgerson, 172 Wn.2d at 443, citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Since the statements defendant complains about were not objected to at trial, they must be analyzed under the “enduring and resulting prejudice” standard. Russell, 125 Wn.2d at 86. “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); Russell, 125 Wn.2d at 85. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

1. Defendant Has Not Shown That The Prosecutor’s Statement During Closing Argument Was Either Improper Or Prejudicial.

In a challenge to a prosecutor’s statement during closing argument, the defendant bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defense

has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Here, defendant did not object to the challenged statement during the prosecutor's closing argument. Where there is no objection to alleged prosecutorial error during 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 resulting prejudice." Emery, 174 Wn.2d at 760-761; Stenson, 132 Wn.2d at 727. Nor did defendant request a mistrial. "The absence of a motion for mistrial at the time of the argument 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. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here, defendant ignores the portions of closing argument where the prosecutor directed the jury's attention to court's instruction on the elements the State musts prove, and the prosecutor's specific discussion of the fourth element; "That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop." CP 46 (Jury Instruction 6, WPIC 94.02); RP 368-370. Instead defendant focuses solely on the prosecutor's summation statement, taking that statement out of context of the total argument and the jury instructions. Brief of Appellant at 7. Defendant has not met his burden of showing that the prosecutor's comment in the context of the total closing argument, the issues and evidence in the case, and the jury instructions, was improper or prejudicial.

2. Defendant Has Not Shown That Any Prejudicial Effect Had A Substantial Likelihood Of Affecting The Verdict.

The prosecutor may attack a defendant's exculpatory theory. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The State is permitted to explain, clarify, or contradict evidence introduced by defendant. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Moreover, closing argument is, after all, argument. In that context, a

prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727; Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence); State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the conduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271-272, 149 P.3d 646 (2006) (were a party not required to object, a party 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); Swan,

114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). The reviewing court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 762. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) “no curative instruction would have obviated any prejudicial effect on the jury” and (2) the conduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict.” Emery, 174 Wn.2d at 760-761, citing Thorgerson, 172 Wn.2d at 455. The reviewing court’s focus is on whether any resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932). Here, defendant has failed to show that the prosecutor’s

comments engendered an incurable feeling of prejudice in the mind of the jury.

3. Any Prejudicial Effect Was Cured By The Court's Instructions.

Further, in the present case the court's instructions cured any potential prejudice stemming from the prosecutor's remarks. The statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The court may mitigate potential prejudice by so instructing the jury. Guizzotti, 60 Wn. App. at 296. In the present case, the trial court did instruct the jury:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 40 (Jury Instruction 1, WPIC 1.02). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any potential prejudice from the prosecutor's statement was obviated by the court's instruction to the jury. Defendant has failed to show how the prosecutor's comments engendered an incurable feeling of prejudice that affected the jury's

verdict. The prosecuting attorney's conduct does not constitute reversible error.

C. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). Here, defendant argues that he was denied effective assistance of

counsel by counsel not objecting to the prosecutor's statement during closing argument. Brief of Appellant at 1, 9-11. To prove that failure to object rendered counsel ineffective, defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226.

Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Here, defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance.

1. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), quoting Reichenbach, 153 Wn.2d at 130. Here, defendant simply presumes that counsel's representation was deficient. Brief of Appellant at 10. Conversely, the court employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130; McFarland, 127 Wn.2d at 335-336; Brett, 126 Wn.2d at 198; In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992); Thomas, 109 Wn.2d at 226.

Clearly, there were legitimate strategic or tactical reasons for not objecting to the prosecutor's statement during closing argument in the present case. The determination of which arguments to

advance in closing is a tactical decision susceptible to a wide range of acceptable strategies. State v. Israel, 113 Wn. App. 243, 271, 54 P.3d 1218 (2002). Not wanting to risk emphasis with an objection is a legitimate trial strategy or tactic. Davis, 152 Wn.2d at 714; State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object rather than calling added attention was legitimate tactical decision) review denied, 134 Wn.2d 1003 (1998); State v. Donald, 86 Wn. App. 543, 551, 844 P.2d 447 (1993) (not asking for limiting instruction to not reemphasize evidence is a valid trial tactic). Here, defense counsel's tactical and strategic decisions were well within the boundaries of reasonable performance. Defendant has not met his burden to rebut the strong presumption that there was no conceivable trial strategy or tactic for counsel's not objecting to the challenged statement during the prosecutor's closing argument. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

2. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 335. The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Here, again defendant simply presumes prejudice, he makes no effort to demonstrate actual prejudice. Brief of Appellant at 11. Since this court must assume that the jury followed its instructions, any misstatement of the law in the prosecutor's argument was not prejudicial. Even if counsel's performance is considered deficient, the defendant still has the burden of showing prejudice.

To satisfy the prejudice prong of the Strickland test, the defendant must establish that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In assessing prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like.

Grier, 171 Wn.2d at 34 (citations omitted).

As already pointed out, the jury instructions correctly set out the elements for the charged offense. CP 46 (Jury Instruction 6). The jury was expressly told to disregard any argument that was not supported by the law in the court's instructions. CP 40 (Jury

Instruction 1). This court cannot properly assume that the jurors accepted the prosecutor's arguments if the arguments contradicted the court's instructions. Defendant has not met his burden of showing that he was prejudiced by defense counsel's performance. He has not shown that but for counsel's performance, the jury's verdict would have been different.

Defendant's argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has not established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22. Defendant's claim of ineffective assistance fails.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied.

Respectfully submitted on September 25, 2014.

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