

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JERRY PATRICK SILVA,
Appellant.

No. 39513-4-II

UNPUBLISHED OPINION

Van Deren, J. — A jury convicted Jerry Silva of unlawful delivery of a controlled substance. On appeal, he argues that the prosecutor engaged in misconduct during closing argument, that the trial court erred in not giving a curative instruction regarding that misconduct, and that the trial court erred in not dismissing the case or granting a mistrial because of that misconduct. Concluding that the prosecutor’s closing argument does not constitute misconduct and that the trial court did not abuse its discretion, we affirm.¹

On November 6, 2008, Puyallup Police narcotic detectives arranged to have a confidential informant make a controlled purchase of methamphetamine at a designated residence. Puyallup Police Detective Sergeant Donald Gill, who was working undercover, gave the informant \$120 in

¹ A commissioner of this court initially considered Silva’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

marked bills and, after searching her car for weapons, drugs or other money, drove with her to the residence. As Gill, Puyallup Police Detective Walter Anderson, and Puyallup Police Detective Ken Hill watched, the informant walked to the house. After three to five minutes, she returned to the car and gave Gill a small bag of what later tested positive for methamphetamine. The confidential informant told Anderson that she had purchased the methamphetamine from Silva. The purchase was not recorded by either video or audio equipment and none of the detectives could see into the house where the purchase reportedly occurred.

The State charged Silva with unlawful delivery of methamphetamine. The detectives and the informant testified as described above. Silva's brother testified, "[I w]atch[ed Silva] paint my house" on November 6, 2008,—the date the State alleged the delivery occurred. Report of Proceedings (RP) (June 24, 2009) at 235. During closing argument, Silva's counsel noted that the detectives could have arranged to record the transaction between the informant and Silva, either by placing recording devices on the informant or by recording the transaction from where they were watching and, because they had not done so, argued, "I submit to you that is reasonable doubt right there." RP (June 24, 2009) at 274.

In rebuttal, explaining why Gill chose not to use a camera to record the transaction, the prosecutor argued:

Detective Gill didn't have a camera, but maybe if he had one, he would have been dead. That's a non-issue. That's not doubt. They made a decision. And I would submit to you, in determining the decision-making of Sergeant Gill, I want you to think about how long he told you he's been in this business, and the fact that he's still able to walk in here today. He's been undercover all those years, and he's still here.

Now, [Silva's counsel] said since he's in an undercover role, he deals with high pressure situations. Maybe he's -- I don't know. Maybe he's been deceptive. Well, he let his guard down here. He actually talked about his mother. He talked about how he feels when he's walking down the street. He actually let down his guard.

Here's a guy who, on a daily basis, is with drug dealers, who if they found him out, God knows what would happen to him. Yes. Does that make him untrustworthy? No. He made a life or death situation – [sic]

RP (June 24, 2009) at 292-93.

Silva's counsel objected on grounds of prejudice. The trial court overruled the objection but cautioned the prosecutor. The prosecutor continued:

And when he arrived there, he was careful.

Now, there was a question. Why didn't Gill see the defendant walking? He didn't. He told you what he saw. He saw her walk up to the building, and he said at one point he was approached. He told -- you, look, he told you what he observed. He can't make it up. He told you what he observed, okay? Would it be better if he had s[een] it? Yes. Would it be better if we had a film crew from Channel 7 filming everything? Yes. But because they didn't, that doesn't mean it's doubt. That does not equate to reasonable doubt.

No matter how many ways [Silva's counsel] says that this investigation could have been conducted, it doesn't mean that this one was wrong, because you know what happened at the end of this investigation? One, two, three officers returned home to their families.

RP (June 24, 2009) at 293-94. Silva's counsel objected again on grounds of "[a]ppeals to prejudice." RP (June 24, 2009) at 294. The trial court sustained this objection and instructed the prosecutor to "refrain from that type of argument." RP (June 24, 2009) at 294.

After the jury retired to deliberate, Silva's counsel asked the trial court to give the jury a curative instruction about the portion of rebuttal to which the court had sustained her objection. She also moved to dismiss or, in the alternative, for a mistrial, based on prosecutorial misconduct during the rebuttal argument. The trial court denied the motions and declined to bring the jury back into the courtroom to give a curative instruction about what the court "consider[ed] to be slightly improper argument." RP (June 24, 2009) at 299.

The jury convicted Silva as charged.

First, Silva argues that, in the rebuttal argument, the prosecutor committed misconduct by

appealing to the passion and prejudice of the jury. *State v. Perez-Mejia*, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). To establish reversible prosecutorial misconduct, the defendant must demonstrate both that misconduct occurred and that a substantial likelihood exists that the misconduct affected the jury's verdict. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *In Re Det. of Sease*, 149 Wn. App. 66, 81, 201 P.3d 1078, *review denied*, 166 Wn.2d 1029 (2009). We review the argument in the context of the total argument, the evidence in the case, and the jury instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Within that context, we conclude, that while the prosecutor strayed into appealing to the passion of the jury on behalf of Gill and the other detectives, Silva has not demonstrated a substantial likelihood that the improper portion of rebuttal argument affected the jury's verdict. The principal issue at trial was the confidential informant's credibility, not the detectives' credibility. We conclude that Silva has not demonstrated reversible prosecutorial misconduct.

Second, Silva argues that the trial court erred in not giving the requested curative instruction. But she did not ask for that instruction when the court sustained her objection. Instead, she asked for it some five minutes later, after the jury had retired to deliberate. The trial court did not abuse its discretion in declining to bring the jury back into the courtroom to give a curative instruction under these circumstances. *State v. Fisher*, 130 Wn. App. 1, 18, 108 P.3d 1262 (2005).

Finally, Silva argues that the trial court erred in denying his motions to dismiss or, in the alternative, for a mistrial. Because the prosecutor's misconduct did not rise to the level of reversible prosecutorial misconduct, the trial court did not abuse its discretion in denying Silva's motions. *Fisher*, 130 Wn. App. at 21-22.

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We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record. RCW 2.06.040.

Van Deren, J.

We concur:

Armstrong, J.

Worswick, A.C.J.