IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN CLARK POWELL, Appellant.	No. 39992-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found John Clark Powell guilty of one count of second degree organized retail theft, contrary to former RCW 9A.56.350(3) (2006), and one count of possession of a controlled substance, methamphetamine, contrary to RCW 69.50.4013(1). Powell appeals both convictions based on five allegations of prosecutorial misconduct, including one instance where the prosecutor disparaged the defense attorney during the State's rebuttal argument. Powell also alleges that he received ineffective assistance of counsel and the trial court violated the appearance of fairness doctrine and erred in admitting hearsay testimony. In his statement of additional grounds (SAG),[1] Powell alleges two additional instances of prosecutorial misconduct and an additional violation of the appearance of fairness doctrine. In addition, he

[1] RAP 10.10.

contends that the jury pool was tainted by a prospective juror's comments during voir dire and that there was insufficient evidence to support the jury's verdict. We hold that both the defense counsel's and the prosecutor's conduct during closing argument denied Powell a fair trial. Accordingly, we reverse and remand for a new trial. Because the issues involving witness testimony are likely to arise at retrial, we take this opportunity to address them and hold that Vancouver Police Officer Eric Anderson's testimony was inadmissible hearsay.

FACTS

Background

On June 2, 2009, Powell, his niece, Michelle Powell, Michelle's[2] best friend, Angie Carey, and Michelle's boyfriend, Danny Mackey, drove from Longview, Washington, to Vancouver, Washington, to go shopping. That evening, the four arrived at a J.C. Penney in Vancouver. Powell parked and entered the J.C. Penney with Mackey while Michelle and Carey remained in the car. Powell returned approximately 10 minutes later, moved the car around to the side of the building, and waited with the engine running. A few minutes later, Mackey ran out of the store holding up his pants with one hand and carrying a pile of clothing in the other. Mackey jumped into the front seat of the car and threw the clothes onto the back seat. Powell drove away.

Shortly thereafter, the police pulled Powell over for a traffic stop. Mackey grabbed what was later determined to be a zippered bag containing methamphetamine out of the glove compartment and ran away. The police arrested Powell at the scene and the State subsequently charged Powell with second degree organized retail theft, contrary to former RCW 9A.56.350(3),

[2] Because John Powell and Michelle Powell share the same last name, we refer to Michelle Powell by her first name for clarity.

and possession of a controlled substance – methamphetamine, contrary to RCW 69.50.4013(1).

Procedure

Powell's three-day jury trial began on October 26, 2009. The State's first witness was Michelle. Michelle testified that she, Carey, and Mackey left Longview to go shopping in Clark County. The last stop was at a J.C. Penney. Powell parked the car in one of the parking spots in front of the store. Powell and Mackey went into the store while Michelle and Carey stayed in the car. After roughly five to seven minutes, Powell returned and moved the car to the curb outside of the store's side door and kept the engine running. Michelle saw Mackey run out of the store holding up his pants with one hand and carrying clothes in his other hand. Mackey ran straight towards the car. Michelle heard Powell say, "[W]hat are you doing or what is he doing?" 1 Report of Proceedings (RP) at 77. As they drove away, Powell and Mackey discussed trading the clothes for methamphetamine. About five or ten minutes later, a police car stopped Powell's car in a Taco Bell parking lot. Michelle saw Powell point to the glove box and say, "[M]y dope's in there." 1 RP at 79. Before the officer reached the car, Mackey grabbed the methamphetamine out of the glove box and ran out of the car. During trial, the State asked Michelle if she had talked to the police on the day of the theft. Michelle answered, "I told them exactly what I'm telling you except for maybe with my mind a little bit working better because it was right there." 1 RP at 82. Powell did not object to this line of questioning.

Carey's testimony regarding these events was substantially similar to Michelle's up to the point where the officer stopped Powell's car. Carey testified that the officer walked up to the car and asked for Powell's license and registration before Powell told Mackey that his dope was in the glove box and Mackey grabbed it and ran from the car. Carey confirmed that her testimony at

trial was consistent with the statement she gave the police.

The trial court excused the jury after Carey testified. As the State discussed the remaining witnesses it hoped to present before the end of the day, the trial court asked, "Do you want to send the police officers back to the streets where they can do some good?" 1 RP at 142. The State responded, "I might need just to . . . get one officer on, just depends." 1 RP at 142. The trial court then took a brief recess. None of the officers testified until the next day.

Tiffany Barr, a sales manager for J.C. Penney, identified the stolen items valued at $434.96 from a receipt she rang up on the day of the theft. Barr narrated the store's surveillance video.[3] While showing Barr the video, the prosecutor asked, "So that was what you suspected as the culprits; correct?" 1 RP at 165. Powell objected to the word "culprits." The trial court sustained the objection and the prosecutor withdrew the question. Barr testified that the surveillance video showed Powell and Mackey walk into the store together and then walk through the fine jewelry department. A short time later, the surveillance video showed Powell exiting the store alone. The surveillance video of the store entrance showed Powell's car drive past the door and then showed Mackey running out of the store with the stolen clothes. Powell's cross-examination of Barr focused on the fact that the video did not show Powell helping Mackey select clothes to steal or committing any crime inside the store.

On the second day of trial, Officer Anderson testified that he responded to the shoplifting at the J.C. Penney after he received a report that a suspect ran out of the store with an armful of clothing and left in a teal Pontiac Sunfire.[4] Anderson contacted Barr who showed him the

[3] The record does not include a copy of the actual surveillance video. As a result, we are limited to review of the characterization of the surveillance video's contents by the witnesses' testimony.

[4] Three other officers testified at Powell's trial but the content of their testimony is not relevant to

surveillance video footage. While Anderson was waiting for Barr to make copies of the surveillance video, Anderson learned that another officer had detained a teal Pontiac Sunfire. He responded to the traffic stop in order to retrieve the stolen clothes. Using her cash register, Barr rang up the items and gave Anderson a receipt showing the total value of the stolen merchandise to be $434.96. During his testimony, Anderson narrated the same surveillance video the prosecutor showed to the jury during Barr's testimony. During cross-examination, Anderson admitted that the surveillance video did not show Powell engaging in any criminal activity. The prosecutor began the State's redirect examination with the following colloquy:

> [PROSECUTOR] Did you receive information later on in your investigation about what Mr. Powell may have done with Daniel Mackey?
> [ANDERSON] Yes, sir.
> [PROSECUTOR] Based on your—
> [DEFENSE]: I'm going to object to beyond the scope of cross-examination.
> [PROSECUTOR]: Your Honor, Counsel is trying to paint a picture that [Powell] was completely innocent. Nothing is in a vacuum obviously. The officer was still conducting his investigation.
> . . . .
> [ANDERSON] I then went to get clothing so that could be brought back so we could determine at least a dollar amount of items that were taken from the store. At that point I very briefly was told that—
> [DEFENSE]: Objection. Hearsay.
> [PROSECUTOR]: I asked him what information he received and this is information that he received.
> THE COURT: From his fellow officers?
> [PROSECUTOR]: He's about to answer, Your Honor.
> [ANDERSON] Well, by Officer Donaldson, the possi—
> [DEFENSE]: I'm going to object.
> THE COURT: Overruled as to fellow officer rule.
> [DEFENSE]: I don't know what the fellow officer rule is, Your Honor.
> THE COURT: A fellow officer is permitted to communicate information to another officer and that officer can use that information in court in order to describe why he took what actions he took based upon the information he received from his fellow officers.

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the issues raised in Powell's appeal.

> [DEFENSE]: I'll maintain a standing objection to the use of the fellow officer rule.
> THE COURT: Duly noted.
> [PROSECUTOR]: Please continue.
> [ANDERSON] That everybody in the car, or at least multiple people in the car, had a plan to steal clothes from J.C. Penney's.

2 RP at 256-57.

Mackey testified that on the way from Longview to Vancouver, he and Powell created a plan to steal clothes and exchange them for methamphetamine. At the J.C. Penney, Powell walked through the store with Mackey and showed him which clothes to steal. Powell also told him to run out the fire exit door, but Mackey ran out of the front door instead. After the police stopped the car, Powell told Mackey that his dope was in the glove box. Mackey grabbed the dope and ran. Powell's cross-examination focused on questioning Mackey's credibility based on inconsistencies in his testimony, previous theft convictions, and past drug use. On redirect, the State asked Mackey if his testimony was consistent with his prior statements to the police to which Mackey answered, "Yeah, it's pretty close." 2 RP at 344.

The State rested its case and Powell made a "half-time motion for dismissal."[5] 2 RP at 359. The trial court denied the motion. Powell rested his case without testifying or presenting witnesses. The prosecutor began the State's closing argument by stating,

> The Defendant made a choice. He chose to get Daniel Mackey involved in this scheme. He wanted to go down to Vancouver, and he made the choice to recruit Daniel Mackey into this shoplifting scheme at J.C. Penney. Daniel Mackey made the choice to assist him. They also made the choice to use methamphetamine on that day and obviously possess methamphetamine on that day.
>
> Daniel Mackey made the choice to accept responsibility. He knew that he was caught. He made the choice to cooperate with the police. He made the

[5] A half-time motion to dismiss is a motion made at the close of the State's case in which the defense alleges that the State has failed to present a prima facie case.

choice to come back here and testify.

3 RP at 387. The prosecutor told the jury that Michelle's, Carey's, and Mackey's testimonies had a "ring of truth" because their statements were consistent with each other and with what they told the police. 3 RP at 394. The prosecutor also explained the definition of accomplice liability by analogizing to a getaway driver in a robbery scheme. Powell objected to this analogy, but the trial court overruled the objection. Powell's closing argument focused on the fact that the surveillance video did not show Powell committing any crime inside of the store and the inconsistencies between the witnesses' testimonies. At one point during his closing argument, defense counsel directly accused the State of hiding additional surveillance video evidence:

> Now, I'm kind of concerned—I have some questions with this J.C. Penney's video. This J.C. Penney's video—and this is the only evidence that's been presented in court—it's not circumstantial or anything. . . . This is a store that was built in 2009, opened in 2009. One would presume it has a state-of-the-art video surveillance system.
>
> Well, what did we see? We saw somebody walk into a store and we see somebody walk down an aisle and then we see somebody leave with nothing in their hands: Mr. Powell. And then we see somebody else leave with something in their hands. Now, I'm kind of wondering to myself, how in the world could a state-of-the-art, brand new store not be able to show and protect, have a surveillance system that protects all the merchandise inside the store. . . .
>
> . . . *They didn't want you to see what was happening in that store,* who was doing what.

3 RP at 410-11 (emphasis added). Then defense counsel concluded his closing argument by telling the jury,

> So I'm somewhat at a—I'm kind of perplexed here because I witnessed this case here and I've seen the State utilize any level of evidence, any type of evidence, the most questionable, dubious, contradictory, self-serving evidence to try to secure a conviction in a court of law. As long as there is a pulse and somebody's still alive, they put that person up on the witness stand to secure a conviction. The State doesn't care who it uses or how it uses.
>
> In this instance the evidence has been utilized, and it's been dubious, it's been contradictory, it's been self-serving to secure a conviction beyond a

reasonable doubt.

3 RP at 413-14.

In rebuttal, the prosecutor paraphrased "a piece by either a retired or an experienced criminal defense attorney." 3 RP at 424. Specifically, the prosecutor told the jury,

> [F]rom his perspective as a criminal defense attorney, if the facts are on my side, I argue with the facts. If the law is on my side, I argue with the law. If neither the facts nor the law are on my side, I argue with everybody. I argue with the judge, with the witnesses, with the prosecutor, with the cops, whoever.
>
> I put the cops on trial. I put the State's witnesses on trial. I put the investigation on trial. *I focus on every inconsistency that the prosecution's witness has.* I do everything I can to muddy the water, to create a diversion so that the jury can't focus on the guilt of my client.
>
> I found that pretty profound. Because from my perspective as a prosecutor, *if I don't have the facts on my side, if I don't have the law on my side, or if I don't have either on my side, I don't have a case.* I don't have the option of muddying the water. . . .
>
> . . . I submit to you that this trial has some of that flavor.

3 RP at 424-25 (emphasis added). The prosecutor also stated,

> [Powell] had that same opportunity on cross-examination. Why did he not ask them? Did you hear him ask the two girls or Officer Donaldson: So, at first you told one version of the story, and then you told another version of the story, what changed? Did you hear him ask that? No. He had absolutely every right to ask that question. He didn't ask that.
>
> Why? Because the change was so insignificant there was no point in asking that question. Because their stories were consistent. So his use of the word change to make a mountain out of a little mole hill is just complete disingenuous.

3 RP at 429. The prosecutor responded to the defense counsel's accusations about the surveillance video by telling the jury that

> [t]he Defense made insinuation that the State was hiding some video surveillance from J.C. Penney. You think if we had any video surveillance, any additional video surveillance, we would not show it to you, that we wouldn't by law have an obligation to provide to the Defense? Well, that's all we had folks. Okay.
>
> All the evidence we had we presented to you. There's nothing else to hide. We have a moral and ethical obligation to turn everything that we have in terms of evidence over to the Defense. We cannot hold anything back. So, for the Defense

> to make that insinuation is just plain wrong. That's just not right.

3 RP at 428. The prosecutor ended the State's argument by stating,

> Bottom line, folks, this one thing I agreed with the Defense on, the three critical witnesses in this case were Daniel Mackey, Michelle Powell and Angela Carey. . . . So their testimony is the basis pretty much for this case.

3 RP at 431. The jury found Powell guilty as charged and the trial court sentenced him within the standard range. Powell timely appeals.

DISCUSSION

Prosecutorial Misconduct[6]

Powell assigns error to five alleged incidents of prosecutorial misconduct. First, Powell alleges that the State committed misconduct by disparaging the defense attorney in his rebuttal argument. Second, Powell alleges that the State elicited testimony from witnesses that their testimony was consistent with their unadmitted out-of-court statements and then improperly used this testimony to imply that the witnesses were credible because Powell failed to impeach them. Third, Powell argues that the State improperly commented on Powell's decision to exercise his right to trial. Fourth, Powell alleges that the State personally vouched for the quality of the police investigation during its closing argument. Fifth, Powell argues that the State's rebuttal remarks about the State's obligation to provide evidence to the defense was improper. The State argues that its comments were appropriate responses to the arguments made by the defense counsel. We hold that both the defense counsel's and the prosecutor's comments were improper and that the effect of this misconduct deprived Powell of a fair trial. Accordingly, we reverse and remand for

[6] In his SAG, Powell alleges two additional instances of prosecutorial misconduct. These allegations are addressed below with the rest of Powell's SAG claims.

a new trial.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudice is established only where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)). Absent a proper objection and a request for curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *Dhaliwal*, 150 Wn.2d at 578; *Brown*, 132 Wn.2d at 561. And we presume a jury follows the trial court's instruction. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Anderson*, 153 Wn. App. 417, 428-29, 432, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Even if improper, a prosecuting attorney's remarks do not require reversal if "they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be

ineffective." *See State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). But when the prosecutor's remarks directly address the sole defense theory and the State has not presented overwhelming evidence of the defendant's guilt, the improper remarks are reversible error. *Reed*, 102 Wn.2d at 147. Although sometimes a prosecutor's improper remark is not reversible error when made in response to a defense argument, the prosecutor's comments in this case created an incurable prejudice. *See Gentry*, 125 Wn.2d at 643-44. The cumulative error doctrine applies when several errors occurred at the trial court that would not merit reversal standing alone, but in aggregate effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004).

A. Disparaging the Defense Attorney

Powell argues that the prosecutor's rebuttal closing argument constituted prosecutorial misconduct because it improperly disparaged the defense attorney. The State argues that the comments were an appropriate response to defense counsel's closing argument remarks. Because Powell did not object to the prosecutor's comments paraphrasing the criminal defense attorney's "tell-all book" during closing argument, we review the comments only if they are so flagrant and ill intentioned as to cause an enduring and resulting prejudice that no jury instruction could have cured. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *Russell*, 125 Wn.2d at 86. In analyzing prejudice, we look at the comments in the context of the total argument, the issues, the evidence, and the instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). When the prosecution argues in a manner that disparages defense counsel, it is misconduct because it affects the defendant's constitutional rights to trial by an impartial jury. *Reed*, 102 Wn.2d at 145-46; *State v. Neslund*,

50 Wn. App. 531, 561-62, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). Moreover, the prosecutor may not disparage defense counsel's performance of his legitimate function. *Reed*, 102 Wn.2d at 145-46; *State v. Gonzales*, 111 Wn. App. 276, 282-84, 45 P.3d 205 (2002), *review denied*, 148 Wn.2d 1012 (2003); *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956).

The State argues that the defense attorney's comments calling its evidence "dubious, contradictory, [and] self-serving" were improper. 3 RP at 413. We agree. But the State did not object to these comments; instead, the prosecutor responded with an equally improper argument by paraphrasing a passage from the "memoirs" of an experienced defense attorney.[7] "The prosecutor's proper response was an appropriate objection, not similarly improper argument." *State v. Ramirez*, 49 Wn. App. 332, 339, 742 P.2d 726 (1987) (holding that even though defense counsel extensively commented on the possible reasons her client chose not to testify, the State's rebuttal argument that another reason the defendant would not have testified is that he was guilty was improper and significantly prejudicial so as to require reversal).

The State admits its case relied on the testimony of Michelle, Carey, and Mackey and its improper comments went directly to this evidence. The State sought to bolster the credibility of the witnesses by suggesting that criminal defense attorneys only challenge witnesses or highlight minor inconsistencies in witnesses' testimony when their clients are guilty. The prosecutor went even further to imply that if the State did not have the law or facts on its side, it would not have gone to trial. Because there is a substantial likelihood that the prosecutor's improper remarks influenced the jury's verdict, the remarks were prejudicial. *Stenson*, 132 Wn.2d at 719.

[7] There is nothing in the record that discloses who this defense attorney was or what memoir the State was referring to.

Accordingly, we hold that although in response to the defense attorney's improper personal attack, the prosecutor's rebuttal argument was prosecutorial misconduct, and reverse and remand for a new trial.

Powell further argues that the State compounded the error by arguing its "ethical and moral obligation to provide discovery to defense counsel." Br. of Appellant at 16. The State responds by arguing that it was forced to disclose its obligation to provide discovery to the defense because the defense counsel specifically accused it of hiding additional surveillance video evidence. As discussed above, the State's duty was to object to defense counsel's improper allegation, not to make equally improper comments. *Gentry*, 125 Wn.2d at 643-44. The prosecutor's comments, especially considered together with defense counsel's equally improper comments, resulted in cumulative error and irreparable prejudice. *See Hodges*, 118 Wn. App. at 673-74. Accordingly, we hold that, in the context of the closing argument, both the defense counsel's and the prosecutor's arguments regarding the surveillance video were improper.

B. Consistency of Witnesses' Testimony

Powell alleges that the prosecutor improperly alluded to evidence not admitted at trial and argues, without citation to authority, that it was improper for the prosecutor to ask the witnesses if their trial testimony was consistent with their prior statements to the police.[8] We will not generally address arguments raised in passing or unsupported by authority. RAP 10.3(a)(4), (6); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Although Powell did not properly

[8] Powell did not object to the question in Michelle's testimony. Powell objected to the question during Carey's testimony and then stated, "Well, there's been [no] analysis of what she actually told the police, but if the [c]ourt wants to accept it, that's fine. I'll move on." 1 RP at 120. During Mackey's redirect examination, Powell objected, arguing that the question was outside the scope of cross-examination and self-serving. The trial court overruled both objections.

brief the admission of these statements, this issue may arise at Powell's retrial so we take this opportunity to note that it is likely that the witnesses' prior consistent statements are admissible under ER 801(d)(1)(ii). Prior consistent statements may be admitted by either party to rebut the express or implied accusation of recent fabrication. ER 801(d)(1)(ii). Here, one of Powell's main arguments was that Michelle, Carey, and Mackey fabricated their testimony after they had been caught. Accordingly, it is likely that Michelle, Carey, and Mackey's prior consistent statements could have been properly admitted under ER 801(d)(1)(ii).

Powell relies heavily on this court's decision in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005), to argue that it was improper for the State to argue the witnesses' statements were consistent because it was referring to facts not in evidence. Powell's reliance is misplaced. In *Boehning*, the prosecutor repeatedly referred to a victim's prior statements regarding her sexual assault. 127 Wn. App. at 517-18. The State implied to the jury that the victim's prior statements contained *more* information than the victim's trial testimony. *Boehning*, 127 Wn. App. at 517-18. In addition, the State referred to additional rape charges that the State had filed but dismissed after the State rested its case. *Boehning*, 127 Wn. App. at 517. This court held that "[t]his repeated attempt to bolster H.R.'s trial testimony and credibility by instilling inadmissible evidence in the juror's minds was so flagrant as to constitute misconduct." *Boehning*, 127 Wn. App. at 523.

Here, unlike in *Boehning*, because the previous statements, or at least the fact that the statements were consistent, were admitted through the witnesses' trial testimony, the prosecutor's remarks concerning this consistency did not improperly refer to evidence outside the record to bolster the witnesses' credibility. Unlike in *Boehning*, here the prosecutor did not imply that the

witnesses withheld information at trial or that their previous statements supported more serious or unfiled charges. Therefore, the State did not rely on facts not in evidence to artificially bolster the credibility of its witnesses and we hold that the prosecutor's comments were not of the type this court held to be flagrant misconduct in *Boehning.*

Even though the prosecutor's prior statement was not improper under *Boehning*, its comments were improper to the extent that they implied the defendant had the burden of presenting evidence. *Contra State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991); *see State v. Cleveland*, 58 Wn. App. 634, 647-49, 794 P.2d 546 (the record may show that a prosecutor's closing argument implying that a defendant with "a good defense attorney" has a duty to present existing favorable evidence is harmless error beyond a reasonable doubt), *review denied*, 115 Wn.2d 1029 (1990), *cert. denied*, 499 U.S. 948 (1991). Because the State's case relied heavily on the testimony of Michelle, Carey, and Mackey, the prosecutor's closing argument implying that Powell had a duty to disprove their testimony was designed to influence the jury's verdict by shifting the burden of proof to the defense. Accordingly, we hold that the prosecutor's comments were flagrant, ill intentioned, and prejudicial. *Russell*, 125 Wn.2d at 86.

C. Right to a Jury Trial

Powell alleges that the prosecutor's remarks regarding Mackey's choices were improper. Specifically, Powell argues that the remarks improperly commented on Powell's right to a jury trial by implying that Mackey did the "right thing" and Powell was wasting everyone's time and money by exercising his right to a jury trial. We cannot agree with Powell's characterization of

these statements.

Powell did not object to these statements at trial. Thus, in order to require a new trial, the prosecutor must have improperly commented on Powell's decision to exercise his constitutional rights, and the comment must "naturally and necessarily" cause the jury to focus on the defendant's exercise of a constitutional right. *Ramirez*, 49 Wn. App. at 336. Comments "naturally and necessarily" focus on the defendant's exercise of a constitutional right when they either explicitly or implicitly direct the jury's attention to the *defendant's* acts which are the result of the defendant's exercise of a constitutional right. *Ramirez*, 49 Wn. App. at 336-37 (State's argument that one reason a defendant would not testify is because the defendant is guilty naturally and necessarily focuses the jury's attention on the defendant's constitutional right to remain silent); *State v. Sargent*, 40 Wn. App. 340, 346-47, 698 P.2d 598 (1985) (State's argument that, if the defendant had known of other possible suspects, the jury would have heard of them directly drew attention to the defendant's failure to testify).

Here, the prosecutor's remarks were not a commentary on Powell's decision to exercise his right to trial. The prosecutor did not compare Mackey's decision to plead guilty with Powell's decision to exercise his right to a jury trial. Rather, the prosecutor reminded the jury that Mackey made the decision to cooperate and testify at trial. Accordingly, because Mackey's independent decisions do not relate to Powell's decision to exercise his right to a jury trial, we hold that these comments were not improper; our review of the record shows that the comments were not flagrant and ill intentioned and do not amount to prosecutorial misconduct.

D. Personally Vouching for the Police Investigation

Powell argues that it was improper for the prosecutor to express a personal opinion about

the quality of the police investigation. Specifically, Powell alleges that the prosecutor vouched for the quality of the police investigation and gave it his "seal of approval." Br. of Appellant at 19. The State responds that it made an appropriate argument in the context of the case. We hold that although the comment was an improper expression of the prosecutor's personal opinion, it is not reversible error.

A prosecutor arguing credibility commits misconduct if it is "clear and unmistakable" that he is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *Sargent*, 40 Wn. App. at 344), *cert. denied*, 516 U.S. 1121 (1996). In closing argument, he stated, "But there wasn't a whole lot that I can see that was wrong with the investigation in this case, other than there was some minor discrepancies. But that's—it's no biggie. It's not a critical thing." 3 RP at 393. Powell did not object. Because the prosecutor not only told the jury he did not think anything was wrong with the investigation but that a few inconstancies were "no biggie," the prosecutor was expressing an improper personal opinion. 3 RP at 393. The State's sole comment on the police investigation did not establish prejudice that Powell could not have cured by a timely objection. In light of the entire case, which was based primarily on the credibility of the witnesses in the car, the police investigation had little to do with proving Powell's guilt. Accordingly, we hold that there is not a substantial likelihood that the prosecutor's comment affected the jury.

Ineffective Assistance of Counsel

Powell argues that because his defense counsel failed to object to the various alleged instances of prosecutorial misconduct, he was denied his Sixth Amendment right to effective assistance of counsel. We agree.

To establish ineffective assistance of counsel, Powell must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Here, defense counsel failed to object to the State's misconduct during closing argument, thus compounding the prejudice against Powell. Because of the substantial likelihood that the prosecutor's improper comments during rebuttal argument affected the jury's verdict, defense counsel's failure to object to these comments prejudiced Powell. Moreover, it was defense counsel's own improper arguments which invited and facilitated the improper arguments from the prosecutor. *See Gentry*, 125 Wn.2d at 643-44. Accordingly, we hold that Powell received ineffective assistance of counsel and reverse.

Appearance of Fairness Doctrine[9]

Powell argues that the trial court violated the appearance of fairness doctrine by showing bias in favor of the police officers in the case. After the jury had been excused for the afternoon break, the following colloquy took place:

> [STATE]: Your Honor, how late are we going today because I—
> THE COURT: That was one of the questions I wanted to ask you. . . .
> [STATE]: I have a couple witnesses that I need to get on—
> THE COURT: Okay. We—
> [STATE]: —from J.C. Penney.
> THE COURT: Okay. Let's get them on and off.

[9] In his SAG, Powell alleges an additional comment demonstrates that the trial court violated the appearance of fairness doctrine. This additional comment is addressed below with the rest of Powell's SAG claims.

> [STATE]: Okay. And then—
> THE COURT: Do you want to send the police officers back to the streets where they can do some good?
> [STATE]: I might—I might need just to do—to get one officer on, just depends.
> THE COURT: Okay. Why don't we do this? Why don't we take a break, let's go figure these things out and we'll reconvene.

1 RP at 142. Powell contends that the trial court's comment about the police officers demonstrates an improper bias in favor of the police officers. We disagree. It is unlikely that the trial court was expressing any type of preference or bias in favor of the police. Instead, the trial court was likely expressing frustration with the State's inability to manage witnesses efficiently, which resulted in four police officers being subpoenaed for the entire day without testifying.

Moreover, challenges to the trial court's appearance of fairness are waived if not objected to below. *State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008), *review denied*, 166 Wn.2d 1007 (2009). Here, Powell had the opportunity to object to the trial court's partiality and request that the judge recuse himself when he made the comment. Powell did not object to the trial court's comment and no appearance of unfairness or bias appears from the record.

Sixth Amendment Right to Confrontation/Hearsay

Last, Powell assigns error to the trial judge's decision to admit Officer Anderson's statement "[t]hat everybody in the car, or at least multiple people in the car, had a plan to steal clothes from J.C. Penney's." 2 RP at 257. Specifically, Powell argues that his Sixth Amendment right to confrontation was violated because "[a]lthough the court assumed [Anderson] got that information from another officer, Anderson never stated who told him this." Br. of Appellant at 22.

As an initial matter, the trial court incorrectly relied on the "fellow officer" rule. The

"fellow officer" rule allows an arresting officer to rely on what other officers or police agencies know in order to determine whether there is probable cause to arrest a defendant; it is not an exception to hearsay. ER 803, 804; *State v. Nall*, 117 Wn. App. 647, 650, 72 P.3d 200 (2003). Because Powell objected to Anderson's testimony as inadmissible hearsay, the trial court erred when it applied the fellow officer rule. Thus, the trial court erred when it overruled Powell's objection based on its erroneous view of the "fellow officer" rule.

We review alleged violations of the confrontation clause de novo. *State v. Kirkpatrick,* 160 Wn.2d 873, 881, 161 P.3d 990 (2007). The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Here, the record clearly shows that Officer Anderson received the information from Vancouver Police Officer Brent Donaldson. Donaldson testified at trial and was subject to cross-examination. And although Donaldson testified before Anderson at trial, nothing in the record suggests Donaldson would have been unavailable for additional cross-examination and Powell's confrontation clause argument fails.[10]

Here, Powell objected to Officer Anderson's comment as hearsay rather than as a violation of the confrontation clause and the trial court erroneously admitted the statement under the "fellow officer" rule. Because this issue is likely to arise during Powell's retrial, we take this opportunity to note that the trial court erred in admitting Anderson's testimony. The State argues

[10] Officer Anderson's testimony was actually double hearsay because Anderson testified to statements that Officer Donaldson made to him about statements made by unidentified passengers in the car. But Powell did not make the double hearsay objection at trial and the record does not reveal who made the statements to Donaldson. If it was Powell, the statements could have been admissions under ER 803.

that Anderson's testimony was not hearsay because it was being offered under the "fellow officer" rule to "explain the steps that officers took in furthering their investigation." Br. of Resp't at 13. But our review of the record does not support the State's argument. As set out above, the "fellow officer" rule does not apply and Anderson's testimony was inadmissible hearsay.

We review a trial court's evidentiary rulings for an abuse of discretion. *Brown*, 132 Wn.2d at 571-72. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts or takes a view that no reasonable person would take; the standard is also violated when the trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); *see Brown*, 132 Wn.2d at 572. Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). Testimony that would otherwise be hearsay is admissible when offered for the limited, nonhearsay purpose of providing background or context to a police investigation because the testimony is not offered to prove the truth of the matter asserted. *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d 1006 (2006).

Although a narrow exception to the hearsay rule allows officers to explain the basis for some actions, the record belies the State's assertion that Anderson's testimony was offered under that exception here. The prosecutor specifically asked Officer Anderson what information he received regarding what Powell might have done with Mackey, not what Anderson did and why. Moreover, the prosecutor responded to Powell's hearsay objection by stating that it was asking Anderson for the information to refute the defense's strategy to show Powell was an innocent actor in the theft. Whether Powell collaborated with Mackey was the ultimate issue the State

needed to prove in order to establish second degree organized retail theft.[11] The record supports a finding that the State used Anderson's testimony to prove the collaboration, thus Anderson's testimony was being offered as substantive evidence for the truth of the matter asserted in the statement and is clearly inadmissible double hearsay. Accordingly, the trial court erred when it overruled Powell's hearsay objection at trial and admitted Anderson's improper testimony.

Statement of Additional Grounds (SAG)

In his SAG, Powell argues five additional grounds for reversal: two additional allegations of prosecutorial misconduct, an additional allegation that the judge violated the appearance of fairness doctrine, an allegation that he did not receive a fair and unbiased jury, and that there was insufficient evidence to support the jury's verdict.[12]

First, Powell alleges that the prosecutor engaged in misconduct by using the term "culprits" during his direct examination of Barr. The trial court sustained a defense to the use of the term objection and the State withdrew its question. We assume that the jury follows the court's instructions and adheres to the court's evidentiary rulings. *Russell*, 125 Wn.2d at 84. And the trial court instructed the jury to "disregard any evidence that either was not admitted [into evidence] or that was stricken by the court." Clerk's Papers (CP) at 4. Powell cannot assert that he suffered harm from the use of the term "culprits" and no remedy is needed.

Second, Powell argues that the State misstated the law of accomplice liability and

[11] In order to convict Powell of second degree organized retail theft, the State needed to prove beyond a reasonable doubt that Powell (1) committed theft (2) of property (3) with a value of or greater than $250 (4) from a mercantile establishment (5) with an accomplice. Former RCW 9A.56.350(1)(a), (3).

[12] Because we hold that the conduct of both the defense counsel and the prosecutor require reversal and remand for a new trial, we do not reach Powell's claim that he was denied a fair and unbiased jury.

misdirected the jury when it illustrated the concept of accomplice liability by using an analogy to a robbery. Powell objected to the State's analogy and the trial court overruled the objection. We review a trial court's ruling based on allegations of prosecutorial misconduct for abuse of discretion. *Stenson*, 132 Wn.2d at 718 (citing *Brett*, 126 Wn.2d at 174).

Before presenting the allegedly improper robbery analogy to the jury, the State quoted directly from the jury instruction defining accomplice liability. The accomplice liability jury instruction read was a correct statement of the law. *See* RCW 9A.08.020. Moreover, we assume that the jury obeyed its instruction to "[d]isregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court" and the jury instructions cured any possible prejudice created by the State's comments. CP at 5. Accordingly, we hold that the State correctly presented the law of accomplice liability and did not mislead the jury.

Third, Powell alleges that the trial court inappropriately sided with the prosecutor when it stated, "We probably shouldn't characterize it that way," during Barr's direct examination. 1 RP at 166. Specifically, Powell argues that the trial court's use of the word "we" when addressing the prosecutor is evidence of an improper relationship between the judge and the prosecutor and demonstrates actual trial court bias. We disagree, but, as discussed above, Powell waived this challenge because he did not object during trial. *Morgensen*, 148 Wn. App. at 90-91.

Fourth, Powell alleges that there was insufficient evidence to support the jury's verdict. Specifically, Powell argues that the evidence was insufficient because the State's case rested solely on the "un-corroborated, impeached testimony of an alleged accomplice." SAG at 5.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond

a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

In order to convict Powell of second degree organized retail theft, the State needed to prove beyond a reasonable doubt that Powell (1) committed theft (2) of property (3) with a value of or greater than $250.00 (4) from a mercantile establishment (5) with an accomplice. Former RCW 9A.56.350(1)(a), (3). To convict Powell of possession of a controlled substance, the State needed to prove beyond a reasonable doubt that Powell actually or constructively possessed methamphetamine. RCW 69.50.4013, .206(d)(2). Here, Mackey's testimony is sufficient to convict Powell of both charges. Mackey testified that (1) he and Powell planned to steal the clothes in order to exchange them for drugs, (2) Powell went into the store with him in order to pick out which clothes to steal, (3) Powell told him to run out the side door where the car would be waiting, and (4) Powell admitted the methamphetamine was his. Assuming, as we must, that the jury accepted Mackey's testimony as credible, we hold there is sufficient evidence to support the jury's guilty verdict and that former jeopardy protections do not bar retrial.

Accordingly, we hold that both the prosecutor and defense counsel made improper arguments during closing argument and that Powell received ineffective assistance from his

counsel. As a result, Powell was denied his right to a fair trial. Further, we hold that on this record, the trial court erred in admitting Officer Anderson's testimony. Accordingly, we reverse and remand for a new trial consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

JOHANSON, J.