

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DEONTE JAMAR THOMPSON,

Appellant.

No. 40082-1-II

UNPUBLISHED OPINION

Johanson, J. — A jury found Deonte Jamar Thompson guilty of three counts of first degree assault with firearm enhancements, one count of first degree unlawful possession of a firearm, and one count of unlawful possession of cocaine with a firearm enhancement. He appeals, arguing that the prosecutor committed numerous instances of misconduct during closing argument, and that these errors cumulatively denied him a fair trial. Thompson also argues that insufficient evidence supports that he was armed with a firearm while he possessed cocaine. We affirm Thompson's convictions.

FACTS

Marquita Jackson held a birthday celebration at her Tacoma, Washington home. Just before 1:30 am on July 19, 2008, Marquita and several other guests were on the front porch and saw a sport utility vehicle (SUV) drive by several times. After the SUV drove by a third time, it

disappeared around a street corner. Marquita, Michael Jackson, and three other guests saw Thompson approach Marquita's house with a gun in his hand. At trial, all five witnesses identified Thompson as the man holding the gun.

Thompson opened fire on the group as he walked toward the house. One bullet grazed Marquita's leg and another bullet struck Michael's arm. Immediately after realizing that Michael had been shot, Marquita called 911, identified "Deonte" as the shooter, and provided a description of Thompson and the SUV. 3 Verbatim Report of Proceedings (VRP) at 276. As Thompson headed back to the SUV, he turned around and returned to retrieve a magazine clip that he had dropped.

Tacoma police officers were dispatched to the shooting location, responded within "seconds," and spotted the SUV around the corner from Marquita's house. 4 VRP at 390. As officers pulled behind the SUV they saw someone entering it and activated their emergency lights, but the vehicle drove away. The SUV eventually stopped and arrested Thompson, the vehicle's driver, and a passenger from the back seat.

While performing a search incident to arrest, officers discovered crack cocaine in Thompson's front pants pocket. While at the scene, one of the officers also noticed a handgun resting on the rear passenger floorboard of the SUV. Forensic tests later determined that the bullet casings found at the shooting matched the handgun.

At trial, witnesses testified to the above facts. In addition, Thompson testified that he, a cousin, and an acquaintance had been near Marquita's house, expecting to get into a fight with someone connected to Michael, when he heard gunshots and returned to the SUV. Thompson

admitted that officers found crack cocaine on his person, but denied knowing about any gun or who fired the gun. But Thompson testified that at one point he returned to get “the clip *I* dropped.” 7 VRP at 850 (emphasis added).

During closing and rebuttal arguments, the prosecutor made several statements challenged on appeal. First, the prosecutor argued that Thompson “failed to accomplish his premeditated act” to kill and was “not charged with attempted murder . . . the crime he actually committed.” 7 VRP at 938. The prosecutor also said that the State could have brought more than three assault charges, one for each person on the front porch during the shooting. Next, the prosecutor stated Thompson’s guilt or responsibility for the charged offenses at least 7 times. Then, the prosecutor responded to defense arguments attacking Marquita’s credibility by saying Marquita “believes [her testimony] because it’s the truth.” 8 VRP at 1000. Last, when responding to Thompson’s defense that he was not the shooter and, in the alternative, that he acted recklessly rather than intentionally the prosecutor said, “You [can’t] have it both ways. [Thompson] wasn’t the shooter, but if you believe [he] was, [he] didn’t really intend to hurt anyone.” 8 VRP at 993. Thompson objected at trial only to the prosecutor’s reference of uncharged crimes, as being based on facts not in evidence, and the perception of incompatible defenses, as a misstatement of law shifting the burden of proof. 8VRP 993, 997.

The jury found Thompson guilty as charged: three counts of first degree assault, RCW 9A.36.011(1)(a), one count of first degree unlawful possession of a firearm, RCW

¹ We note a scrivener’s error on Thompson’s judgment and sentence, which lists the relevant statutory provision for first degree unlawful possession of a firearm incorrectly as RCW “9.94.040(1)(a).” CP at 211. The State cited the correct statute in the charging information.

9.41.040(1)(a),¹ and one count of unlawful possession of a controlled substance (cocaine), RCW 69.50.4013(1).² The jury also found by special verdict that Thompson was armed with a firearm while committing the three assaults and while possessing cocaine. Thompson appeals.

ANALYSIS

I. Prosecutorial Misconduct

Thompson argues that the prosecutor committed several instances of misconduct during closing argument. He asserts that the prosecutor improperly (1) appealed to the jury's passions and prejudices by accusing him of being guilty of uncharged crimes, (2) expressed a personal opinion that Thompson was guilty, (3) vouched for a witness's credibility, and (4) misstated the law. He also contends that the cumulative effect of this misconduct denied him a fair trial. The State argues that none of the prosecutor's statements constitute misconduct, but even if they did Thompson cannot show prejudice because of overwhelming evidence of his guilt. We agree with the State that Thompson cannot show prejudice even if we assume the prosecutor's statements were misconduct.

An appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

¹ We note a scrivener's error on Thompson's judgment and sentence, which lists the relevant statutory provision for first degree unlawful possession of a firearm incorrectly as RCW "9.94.040(1)(a)." CP at 211. The State cited the correct statute in the charging information.

² The State also charged Thompson with one count of drive-by shooting, RCW 9A.36.045(1), but the trial court dismissed this charge at the close of the State's case.

Assuming without deciding that the prosecutor's challenged statements constitute misconduct, Thompson cannot show any resulting prejudice. Five eyewitnesses identified Thompson as the shooter. Officers responded to the scene within seconds of the shooting and arrested Thompson after a short car chase. Officers found the gun used in the shooting in the same car as Thompson. Thompson testified at trial that he went to retrieve the magazine "clip *I* dropped." 7 VRP at 850 (emphasis added). Finally, Thompson admitted on the stand that officers found cocaine on his person. Accordingly, overwhelming evidence supports the jury's verdicts and we are convinced that there is not a substantial likelihood that any misconduct by the prosecutor impacted the jury's verdict. Thompson cannot possibly show prejudice and his claim of prosecutorial misconduct must fail.

Thompson also argues that cumulative effect of the prosecutor's misconduct denied him a fair trial. Multiple incidents of a prosecutor's improper conduct that, when combined, materially affect the verdict violate a defendant's right to fair trial and require a new trial. *State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wn. App. 794, 805, 998 P.2d 907 (2000). Here, even if Thompson's allegations of misconduct are correct they cannot possibly combine to *materially affect* the jury's verdicts based on the overwhelming evidence that we have already outlined.

II. Sufficiency of the Evidence

Thompson argues that insufficient evidence supports the jury's verdict that he possessed a firearm while he possessed cocaine. He argues that the State failed to show a nexus between the firearm, which was found in the rear passenger floorboard of the SUV, and his cocaine possession

because the firearm was not easily accessible and readily available for his use when officers found the cocaine. The State responds that, taking the evidence in the light most favorable to the State, the jury could reasonably believe that Thompson possessed the firearm and the cocaine at the same time when he was shooting at the victims. We affirm Thompson's conviction.

Sufficient evidence supports the jury's verdict if the jury has a factual basis for finding each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We view both circumstantial and direct evidence as equally reliable, and defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Mere proximity or mere constructive possession is insufficient to establish that a defendant was armed at the time he possessed a controlled substance. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). A person is armed with a deadly weapon if it is easily accessible and readily available for use for either offensive or defensive purposes, whether to facilitate the crime's commission; escape the crime scene; protect contraband; or to prevent investigation, discovery, or apprehension by the police. *Gurske*, 155 Wn.2d at 137, 139. And there must be a nexus between the defendant, the crime, and the weapon. *Gurske*, 155 Wn.2d at 140-41. When reviewing the nexus requirement, we examine "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *Gurske*, 155 Wn.2d at 142 (quoting *State v.*

Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002) (plurality)). Where the State can prove actual, rather than constructive, possession of a weapon, the State will rarely have to do more than establish the requisite connection. *See State v. Brown*, 162 Wn.2d 422, 432, 173 P.3d 245 (2007) (rejecting argument that actual possession of a deadly weapon during an ongoing crime necessarily shows a nexus between the weapon and the crime); *State v. Easterlin*, 159 Wn.2d 203, 209, 149 P.3d 366 (2006) (giving examples when a defendant's possession of a weapon during a crime's commission may be coincidental and unconnected to the crime, such as having a kitchen knife in a picnic basket).³

Here, sufficient evidence supports Thompson's actual possession of the firearm while in possession of the cocaine. Eyewitnesses identified Thompson as the shooter, who returned to the SUV after the shooting. Within seconds of the shooting, police arrived at the scene and pulled behind the SUV while a passenger door was still open. Police engaged in a short vehicle pursuit before the vehicle stopped and police arrested the occupants. Police found the cocaine on Thompson's person after they pulled him from the vehicle. Given the short period of time that passed between the shooting, Thompson's arrest, and the discovery of the cocaine, a reasonable juror could believe that Thompson had the cocaine in his pocket when he fired at the victims.

Contrary to Thompson's argument, the State did not have to prove that he had the gun in order to protect the cocaine. A nexus exists between a weapon and the crime of unlawful possession of a controlled substance when the defendant is near a firearm and *could* have used it to protect the controlled substance. *Schelin*, 147 Wn.2d at 574-75.

³ Thus, the State is incorrect when it asserts that the nexus requirement applies only when the State relies on constructive possession.

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Sufficient evidence supports the jury's verdict and any possible misconduct by the prosecutor during closing argument could not have prejudiced the jury in light of the overwhelming evidence presented.

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We affirm Thompson's convictions.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Penoyar, C.J.

Armstrong, J.