IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29383-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
KORY NATHENIEL WARD,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Korsmo, J.—Korey Ward challenges his convictions on six counts of second degree arson, raising several trial and post-trial issues. We affirm the convictions and remand for corrections to the judgment and sentence.

FACTS

Mr. Ward was charged with one count of first degree arson and six counts of second degree arson following a string of fires in Yakima. Mr. Ward was a member of the "Mayday Mob," a group of skateboarders linked to the fires. The initial trial resulted in a hung jury, leading to retrial.

Following the first trial, defense counsel filed a motion for an order of production,

asking the State to produce several police investigation reports, including Yakima Police Department (YPD) report number 07-15085. Defense counsel stated this report was part of the criminal history information for State's witness, Nicholas Heilman. Counsel stated that he wanted to know if there was a connection between one of the victims, who was a juvenile probation officer, and the individuals charged with the arson.

The trial court conducted an in camera review of the requested documents in order to determine whether the reports contained relevant information. Following review, the trial court released all of the requested police reports to defense counsel, except for YPD report number 07-15085 and three related interview transcripts. In its letter ruling, the trial court stated it believed these nondisclosed documents were irrelevant and ordered the documents filed under seal. Defense counsel subsequently filed a motion to unseal these documents, arguing that the report necessarily related to count IV.

Nonetheless, at a subsequent pretrial hearing, defense counsel reported to the court that he had seen the sought-after report and related transcripts. The record is unclear as to whether the trial court actually ruled upon the motion to unseal; no further mention of the report is made.

At the second jury trial, the State's primary evidence was the testimony of Eric Protsman and Nicholas Heilman, both members of the Mayday Mob. They testified that Mr. Ward was present and involved in locating fire sites and transporting the group to

those locations. Both witnesses had entered into plea agreements in which they agreed to testify against Mr. Ward regarding the charged fires.

Mr. Ward testified in his own behalf, and denied ever being present at, or having any knowledge of the fires. The State called Scott Lagerquist as a rebuttal witness. One of the first questions asked of Mr. Lagerquist was, "What was the first fire you were aware of involving [Mr. Ward] and [Mr. Heilman] and some of the rest of you?" Report of Proceedings (RP) at 3178. When Mr. Lagerquist began to answer about a fire other than the ones charged, defense counsel objected, arguing that the answer was "beyond the scope of the charges filed here and not relevant." RP at 3179. The objection was overruled.

In closing, the State argued that Mr. Ward had been the leader of the Mayday Mob, and that he had been instrumental in selecting sites and setting fire to them. Defense counsel argued that Mr. Ward was not present at the time the fires were committed, and that the testimony of Mr. Heilman and Mr. Protsman was necessarily biased and should be weighed accordingly.

As part of its closing rebuttal, the State argued:

> We had the defense expert, the investigator . . . . Well, the fire investigator said that he had spent over 1,000 hours on this case. His private investigator said she has spent over 1,000 hours. Have you heard one bit of evidence saying that [Mr. Ward] was anywhere else? One alibi witness saying he was somewhere here, he was out of town, he was doing this, he was doing that, he was home?

RP at 3300. Mr. Ward objected to this, arguing that he had no burden of proof to produce an alibi. The trial court overruled the objection, and instructed the jury to disregard any argument not supported by the evidence. RP at 3301.

The jury found Mr. Ward guilty of all six counts of second degree arson, and acquitted him of first degree arson. The judgment and sentence stated that Mr. Ward was to serve community custody pursuant to RCW 9.94A.701. As a condition related thereto, the trial court ordered him to "[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer [CCO]." Clerk's Papers at 598.

Mr. Ward timely appealed to this court.

ANALYSIS

Mr. Ward's appeal presents challenges to the sufficiency of the evidence supporting the convictions, the trial court's rulings concerning discovery of the noted YPD report and the two trial objections, and two aspects of the judgment and sentence. The claims will be addressed in the order in which they arose below.[1]

[1] In his statement of additional grounds, Mr. Ward complains about discovery that was allegedly not provided until after the first trial, but provides no details and does not suggest that the second trial was adversely effected by the late discovery. Under the circumstances, the argument presents at most a moot question and will not further be discussed.

Discovery of YPD Report. Mr. Ward complains at some length that the trial court erred in sealing the reports and not disclosing them, insisting that they were relevant. Even if he is correct, he has not established that any harm resulted from the trial court's ruling. Defense counsel admittedly had access to the documents before trial.

Under these circumstances, the issue is moot. "Where, as here, we can no longer provide appellants effective relief, the cases are moot." *In re Det. of LaBelle*, 107 Wn.2d 196, 200, 728 P.2d 138 (1986); *accord In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983). This case is in the same circumstance. Defense counsel had access to the reports. This court could afford no relief, nor does it appear that any relief would be necessary.

The claim is moot.

Rebuttal Testimony. Mr. Ward also challenges the rebuttal testimony of skateboarder, Scott Lagerquist, claiming that it was irrelevant and improper other-bad-acts testimony. The trial court did not abuse its discretion in permitting the testimony.

Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The purpose of ER 404(b) is to prohibit the admission of evidence that suggests

that the defendant is a "criminal type" and thus likely guilty of committing the crime with which he is charged. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). When ER 404(b) evidence is admitted, the trial court is required to state its reasoning on the record. *State v. Jackson*, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). As an evidentiary matter, ER 404(b) does not implicate constitutional concerns. *Id*. at 695.

Mr. Ward testified at trial that he had not been present at or otherwise involved with any of the fires. In rebuttal, the State called Mr. Lagerquist, a witness who had not been used in the case-in-chief. The essence of his testimony was that he had been with Mr. Ward and the Mayday Mob on several occasions when Mr. Ward was active in setting fires. The first occasion he discussed was not one of the charged crimes. Defense counsel promptly objected that the testimony was "outside the scope of the charges" and therefore not relevant. Notably, counsel did not argue that the testimony presented ER 404(b) concerns. That is the initial problem with Mr. Ward's argument on appeal. It is well established that a party cannot object on one ground at trial and argue a different theory on appeal. *State v. Mak*, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986). This is a specific application of RAP 2.5(a), which recognizes that appellate courts normally will not address issues that were not presented to the trial court. Having not raised ER 404(b) in the trial court, Mr. Ward cannot now raise that argument here.

The argument counsel did present was one of relevance, ER 401. The trial court

correctly overruled the objection on that basis. Evidence of Mr. Ward's involvement in fire-setting with other members of the Mayday Mob was directly relevant to the charged counts and supported the testimony of the State's other witnesses. Evidence of Mr. Ward's involvement in other uncharged fires was less relevant, but it did serve both to establish Mr. Lagerquist's basis of knowledge and to impeach Mr. Ward's broad denial of non-involvement in fire-starting or any fire-related activities of the Mayday Mob. RP at 3151-52. On these bases, we cannot say that the trial court abused its discretion.

The testimony was relevant. The trial court did not err in overruling the objection.

Prosecutor's Closing Argument. Mr. Ward also argues that the prosecutor erred in closing argument when he stated that despite over 1,000 hours of defense expert investigation of the crimes, there was no evidence that Mr. Ward had an alibi or was in some other location when the fires were started. We conclude this was a proper argument under the evidence presented.

A prosecutor has "wide latitude" in arguing inferences from the evidence presented. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Nonetheless, it is inappropriate for a prosecutor to suggest that the defendant bears any burden of proof. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995). However, once a defendant presents evidence, a prosecutor can fairly comment on what was not produced. *State v. Barrow*, 60 Wn. App. 869, 871-73, 809 P.2d 209 (1991); *State v. Contreras*, 57

Wn. App. 471, 476, 788 P.2d 1114 (1990).

The parties understandably take different views of the prosecutor's remarks, with Mr. Ward contending that the prosecutor imposed a burden on him while the prosecutor believes that the defense case was fair game for argument. We agree with the latter view.

A reviewing court considers challenged arguments in context. *State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). In the totality of this section of the prosecutor's closing argument, it is quite clear that he was talking about the strength of the State's case and that despite exhaustive defense work-up, there was no evidence to challenge the State's view. Far from telling the jury that the defendant had the burden to prove anything, this argument simply called the jury's attention to what aspects of the State's case the defense had challenged and what it did not. Since the defense had presented evidence, it was fair to comment on what the defense evidence did not address. *Barrow*, 60 Wn. App. 869; *Contreras*, 57 Wn. App. 471.

There was no error.[2]

Sufficiency of the Evidence. Mr. Ward challenges the sufficiency of the evidence to convict him on four of the arson counts (III, IV, V, VII). The evidence permitted the jury to reach the verdicts that it did.

[2] We thus do not address the alternative argument that any error would have been harmless in light of the court's cautionary instruction to the jury.

Well-settled rules govern review of a challenge to the sufficiency of the evidence. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Mr. Ward was charged as either a principal or an accomplice to each of the second degree arson charges. A person is an accomplice of another person in the commission of a crime if:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a)(i)-(ii).

Second degree arson is committed when a person "knowingly and maliciously

causes a fire or explosion which damages a building" or any structure or field. RCW 9A.48.030(1).

Mr. Ward challenges four of his convictions that involved fires admittedly started by either Eric Protsman or Nicholas Heilman. He argues that the evidence does nothing more than show his presence at the arson scenes and fails to show that he was a participant in the crimes. More than mere presence is required to establish accomplice liability. *State v. Landon*, 69 Wn. App. 83, 91, 848 P.2d 724 (1993). The evidence, however, showed more than mere presence. It permitted the jury to conclude that Mr. Ward was aiding the others in starting the fires.

Counts III, IV, and V all involved fires set August 26, 2007, the same day as Count VI, a conviction that Mr. Ward does not challenge. There was testimony that he started the fire charged in count VI. Mr. Heilman testified that Mr. Ward drove the car on each occasion and knew what was going on; in fact, Mr. Ward selected some of the sites where the others set fires.

The jury was free to conclude from this testimony that Mr. Ward, who drove the others to each fire scene, knew exactly what was going on and was an active participant in each of the offenses. Besides setting the one fire, he helped select some of the other locations. From this, the jury was free to believe that he was assisting in each of the other August 26 fires.

For similar reasons, the evidence was sufficient to support the jury's verdict on Count VII. As with the other counts, Mr. Ward was the driver and stopped the car to allow another occupant to start a fire. In light of his assistance to the earlier fires in August, the jury understandably believed Mr. Ward knew exactly what was going on and intended to assist in starting the fire that constituted count VII.

Mr. Ward was the leader of the Mayday Mob and drove the members to the various locations where they took turns starting fires. On the basis of this evidence, the jury could find that he was an accomplice by knowingly assisting in the arsons. The evidence supported the jury's verdicts on the challenged counts.

Sentencing Conditions. Mr. Ward also raises two objections to the judgment and sentence. The State concedes error and we agree with the concessions.

The first challenge is to the basis for ordering community custody. The judgment and sentence states that community custody is imposed pursuant to RCW 9.94A.701. As the parties correctly note, that statute was not enacted until 2008 and did not take effect until 2009. *See* Laws of 2008, ch. 231, § 7. Sentences are imposed in accordance with the law in effect at the time of the crime. RCW 9.94A.345. At the time of these offenses in 2007, community custody was governed by former RCW 9.94A.715 (2007). The judgment form erroneously lists the wrong statute as the basis for community custody.

The parties also correctly note that because of the references to the wrong statute,

the judgment and sentence form left the question of whether Mr. Ward would undergo any rehabilitative treatment to his CCO. However, that authority was not given to community corrections officers until the 2008 amendments. Instead, at the time of these offenses in 2007, only the trial court could impose rehabilitative conditions on an offender. *See* former RCW 9.94A.700(5)(c) (2007).

In light of these errors, we remand to the trial court to correct the statutory reference in the judgment and sentence and either impose rehabilitative conditions under its own authority or eliminate the requirement.

The convictions are affirmed. The case is remanded for correction of the judgment and sentence.

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

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Korsmo, J.

WE CONCUR:

_____ _____
Kulik, C.J. Siddoway, J.