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

STATE OF WASHINGTON, Respondent, v. SARA ALPHA DREBEN, Appellant.	)	No. 74855-6-I UNPUBLISHED OPINION FILED: April 24, 2017

VERELLEN, C.J. — Sarah Dreben appeals her convictions for three counts of second degree burglary and one count of residential burglary, claiming she was denied a fair trial because of prosecutorial misconduct. But Dreben failed to object at trial and fails to show here that the prosecutor's conduct was so flagrant and ill-intentioned that an instruction would not have remedied any prejudice. Dreben also argues that the jury instruction provided at her trial unconstitutionally defined "reasonable doubt," but our Supreme Court recently reaffirmed the constitutionality of the challenged instruction. Therefore, we affirm.

FACTS

On December 18, 2015, the State charged Sarah Dreben by amended information with one count of first degree burglary while armed with a firearm, count I, three counts of second degree burglary, counts II through IV, and one count of residential burglary, count V. The State alleged Dreben and her boyfriend Joseph

Nasby burglarized three buildings and a residence in Snohomish County, stealing power tools and other personal belongings.

Count I involved a burglary of Roger Ditto's garage in Snohomish. On the morning of August 19, 2014, Ditto discovered someone had broken into his garage and stolen power tools and personal items. The burglar also stole a rifle, shotgun, and three pistols from Ditto's safe inside the garage.

Count II involved a burglary of David Schwendtke's barn in Granite Falls. On November 29, 2014, Schwendtke noticed someone had removed the door to his barn and stolen a power saw and weed whacker. Schwendtke had experienced another break-in about a month earlier.

Count III involved the burglary of Branden Carnell's garage in Lake Stevens. Between December 28 and 31, 2014, Carnell discovered someone had kicked in a door to his garage and stolen multiple tools, including two chainsaws, a weed eater, a concrete saw, and a beam saw.

Count IV involved the burglary of James Miller's tree service business, a one-acre fenced property located in Snohomish. Miller stored his work equipment inside the property. Between December 30, 2014 and January 5, 2015, Miller took time off for the holidays. When he and his workers returned on January 7, 2015, they noticed someone had stolen 12 power tools. No one was authorized to enter the property over that time, including employees.

Count V involved the burglary of Brian Taylor's attached garage in Marysville. On the morning of January 1, 2015, Taylor discovered someone had entered his garage

and stolen power tools, collectible cigarette lighters, and jewelry.

On January 3, 2015, Snohomish County Sheriff's Office Deputy Ryan Phillips contacted Dreben and Nasby, who were driving together in a Mustang. Dreben provided her license and Nasby provided his name. While Deputy Phillips was running their names, Nasby fled. Deputy Phillips observed heroin paraphernalia inside the car and impounded it to apply for a search warrant. When Deputy Phillips searched the car, he discovered a notebook and a handwritten note from Dreben to Nasby. The notebook contained notes about several burglaries.

When Dreben picked up her car from impound a few days later, she agreed to a videotaped interview with Deputy Phillips. In the interview, Dreben explained that Nasby was a talented burglar who routinely broke into garages, sheds, barns, and businesses to steal tools. During the day, Dreben would drive Nasby around to find locations to burglarize. Nasby typically chose structures with open or unlocked doors or woodpiles outside that indicated the presence of power tools. Then, that evening, Dreben would drop Nasby off at or near the locations, leave, and return to pick him up when he called.

Dreben explained that when she picked Nasby up, he sometimes had stolen power tools and stolen property with him. Other times, since she had a small car, he would hide large items so they could retrieve them later. Dreben stated either she alone or she and Nasby would sell the stolen power tools to a "saw guy" in Marysville. She believed Nasby was not being fair in his allocation of the stolen goods and kept the more expensive saws for himself. Dreben also stated she knew that if you drove someone to a location to commit a crime you could be charged with the crime. Dreben was concerned she would be arrested that day.

After the interview, Deputy Phillips forwarded the case to property crimes detectives who contacted Dreben to discuss the burglaries. Dreben admitted to detectives that she had stolen property in her garage and agreed to a search of her house that day. In her garage, detectives found many stolen items, including the jewelry taken from the Taylor residence. Detectives also recovered duffel bags, binoculars, and flashlights, which Dreben said belonged to Nasby. One of the bags contained Nasby's wallet, identification, and pawn slips in his name.

After the search, Dreben agreed to drive around with detectives to show them the locations of the burglaries. She provided details about the burglaries and what had been stolen from each location. Dreben used her journal to jog her memory about the burglaries.

Dreben repeated to detectives many of the details she had described in her videotaped interview. She explained that she drove Nasby to locations he planned to burglarize. They targeted homes where the garages or sheds had been left open or unlocked because they were looking for power tools. When they found a target, they would leave but return at night when she would drop Nasby off. When Dreben returned to pick Nasby up, he would either have the stolen property with him or would have hidden it somewhere they could pick it up.

Dreben specifically remembered the locations but not the exact addresses of the Taylor, Carnell, Schwendtke, and Miller burglaries, which formed the bases for counts II-V. Dreben was able to describe some of the power tools and other items taken from each location. She remembered burglarizing the Schwendtke's barn twice. She also remembered waiting in the car while Nasby ran into the Taylor residence to steal

jewelry. Dreben did not specifically remember the Ditto home, count I, but remembered that Nasby had once taken a rifle and handguns from an open gun safe in a garage.

At trial, all five burglary victims testified, as did several police officers. Dreben also testified. Dreben testified she had not dropped Nasby off at any of the burglary locations and never picked him up from any of the burglary locations. She testified she never told the police she had done so and never showed them properties that had been burglarized. Dreben admitted she possessed stolen property but did not know Nasby had stolen it. She also admitted she dropped off stolen power tools to the "saw guy" at least 50 times. Dreben said she knew about Nasby's burglaries because he bragged to her about them.

Dreben testified she did not know the police were investigating her for burglaries when she spoke to them. She admitted the burglary notebook in her car was written in her handwriting and was hers and discussed how she and Nasby split up the value of the stolen property. However, she insisted she had never taken Nasby to a burglary or picked him up from one.

The jury acquitted Dreben of first degree burglary and the firearm enhancement, but convicted her of the remaining four counts. The court imposed a prison-based drug offender sentencing alternative sentence with 36.75 months confinement.

Dreben appeals.

ANALYSIS

CLOSING ARGUMENT

Dreben argues the prosecutor committed prejudicial misconduct by misstating the reasonable doubt standard in closing argument. We disagree.

A prosecutor who addresses the reasonable doubt standard in closing argument acts improperly by "'trivializ[ing] and ultimately fail[ing] to convey the gravity of the State's burden and the jury's role in assessing' the State's case against the defendant."[1] "In essence, the State acts improperly when it mischaracterizes the standard as requiring anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt."[2]

Dreben contends the prosecutor trivialized the State's burden of proof by characterizing reasonable doubt "as an entirely subjective standard."[3] The prosecutor told the jury, "I'm just here to tell you [the reasonable doubt standard is] not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt."[4]

While the prosecutor's statement taken in isolation leaves room for criticism, Dreben does not establish she is entitled to relief on appeal. First, Dreben did not object at trial. Therefore, she is deemed to have waived the error "unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice."[5] Under this heightened standard, Dreben must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of

---

[1] State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)).

[2] State v. Feely, 192 Wn. App. 751, 762, 368 P.3d 514, review denied, 185 Wn.2d 1042, 377 P.3d 762 (2016); accord State v. Osman, 192 Wn. App. 355, 368, 366 P.3d 956 (2016).

[3] Appellant's Br. at 15.

[4] Report of Proceedings (RP) (Jan. 27, 2016) at 333.

[5] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

affecting the jury's verdict.'"[6] "[R]emarks are not per se incurable simply because they touch upon a defendant's constitutional rights."[7] Dreben does not establish that any prejudice could not have been cured by a curative instruction.

Second, Dreben cannot show a substantial likelihood that the statement affected the jury's verdict. In analyzing the prejudicial effect of a prosecutor's statement, we do not look at the statement in isolation but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.[8]

Here, immediately preceding and immediately following the statement, the prosecutor accurately stated the reasonable doubt standard:

> [W]e spoke about reasonable doubt Monday. And I had these questions to some people about the difference between beyond a reasonable doubt and beyond a shadow of a doubt, or beyond all doubt whatever, beyond all possible doubt. They're often used interchangeably, until you come into this room.
>
> So much like the definition of "building," things are specific under the law. And the standard we apply is beyond a reasonable doubt, and that's not the same thing as beyond all possible doubt. I will be the first to concede *it is a high standard. I'm not here to tell you that it is not that difficult to meet or it's not that high.* I'm just here to tell you it's not any higher than you decide it is, and you get to decide what is beyond a reasonable doubt. *Nobody is going to give you specific percentages. It's a high burden,* but it's clearly met in this case. It's easily met in this case, given the defendant's statements.[9]

---

[6] Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

[7] Id. at 763; accord State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001) ("Some improper prosecutorial remarks can touch on a constitutional right but still be curable."); see also State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (prosecutor's flagrantly improper comments in closing argument undermining the presumption of innocence were cured by trial court giving a correct and thorough curative instruction on the reasonable doubt instruction).

[8] State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

[9] RP (Jan. 27, 2016) at 333-34 (emphasis added).

Further, in rebuttal, the prosecutor again addressed reasonable doubt: "You get to decide whether those things have been proved beyond a reasonable doubt by the evidence that the State introduced."[10] The prosecutor reiterated that the law was not subject to interpretation and that the jury should remain "true to the oath that you've taken" and "true to the law as instructed" by the trial judge.[11]

Taken in context of the prosecutor's total closing argument, the prosecutor clearly reiterated and emphasized the State's burden of proof. These statements corresponded with the trial court's reasonable doubt instruction. Juries are presumed to follow the court's instructions.[12]

Moreover, Dreben admitted in her videotaped interview that she drove Nasby around during the day to find locations to burglarize, and that in the evening, she would drop Nasby off at the locations, leave, and return to pick him up when he called. The videotaped interview was entered into evidence and played for the jury. Further, Dreben drove around with detectives to show them the locations of the burglaries. She remembered the locations of the burglaries and what had been stolen from each location, using her journal to jog her memory. Dreben repeated to detectives many of the details she had described in her videotaped interview and the detectives testified at trial. Dreben also testified at trial and admitted the burglary notebook in her car was hers, and discussed how she and Nasby split up the value of the stolen property. Therefore, compelling evidence supports her convictions.

---

[10] Id. at 351.

[11] Id.

[12] State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Dreben relies on State v. Johnson, where, even absent an objection, the court concluded the prosecutor's misstatements were flagrant and ill intentioned and required reversal.[13] But in Johnson, the prosecutor used a puzzle analogy to explain the abiding belief requirement of the reasonable doubt standard.[14] The prosecutor further stated that to "be able to find reason to doubt, *you have to fill in the blank*, that's your job."[15] The Johnson court held the prosecutor's statements improperly "trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so."[16]

Dreben argues the prosecutor's minimization of the State's burden of proof here "is analogous" to the prosecutor's improper statements in Johnson.[17] But the prosecutor here never implied the jury had a duty to convict without a reason to do so or ever suggested that the burden of proof shifted to Dreben. In context of the total closing argument, we conclude the prosecutor did not trivialize the State's burden.

Because Dreben did not object at trial and fails to establish any resulting prejudice, her claim fails.

WPIC 4.01

Next, Dreben challenges the trial court's reasonable doubt instruction.

The trial court instructed the jury using the Washington pattern jury instruction on reasonable doubt, WPIC 4.01, stating in part,

---

[13] 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

[14] Id. at 682.

[15] Id. (emphasis added).

[16] Id. at 685.

[17] Appellant's Br. at 17.

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.[18]

Dreben claims that defining a reasonable doubt as "one for which a reason exists" erroneously tells jurors that they must be able to articulate a reason for any doubt. She thus argues WPIC 4.01 unconstitutionally undermines the presumption of innocence and shifts the burden of proof to the defendant.

Our Supreme Court has mandated that an instruction in the words of WPIC 4.01 be given in all cases[19] and recently reaffirmed the constitutionality of the challenged instruction.[20] We have recognized this controlling authority.[21] The trial court did not err by doing the same.

In any event, WPIC 4.01 does not require jurors to articulate a reason. "[A] doubt for which a reason *exists*" is not the same as "a doubt for which a reason *can be given*."[22] Dreben's argument is meritless.

APPELLATE COSTS

Dreben asks the court to deny the State appellate costs. Newly amended RAP 14.2 requires us to follow a trial court finding of indigency unless the State provides sufficient new evidence to overcome that finding:

---

[18] Clerk's Papers at 69.

[19] State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

[20] State v. Kalebaugh, 183 Wn.2d 578, 586-87, 355 P.3d 253 (2015).

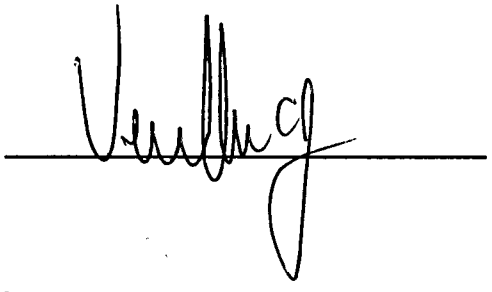
[21] State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016).

[22] Kalebaugh, 183 Wn.2d at 584.

> When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

Here, after the trial court entered the judgment and sentence, the trial court executed an order authorizing Dreben to seek appellate review at public expense and appointment of an attorney. RAP 14.2 places the burden on the State to show Dreben's position has changed. The State has not done so. If the State has evidence indicating that Dreben's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.



WE CONCUR: