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

STATE OF WASHINGTON, Respondent, v. JOEY WAYLAND, Appellant.	)	No. 64081-0-I UNPUBLISHED OPINION FILED: September 27, 2010

Schindler, J. — A jury convicted Joey Wayland of two counts of theft in the third degree in violation of RCW 9A.56.050. On appeal, Wayland contends insufficient evidence supports his conviction as to one of the two counts. Wayland also contends prosecutorial misconduct deprived him of a fair trial, requiring reversal. Because a rational trier of fact could have found Wayland guilty of theft in the third degree and Wayland cannot establish either prejudice or that a curative instruction could not neutralize any misconduct, we affirm.

FACTS

At 12:30 a.m. on September 21, 2008, Joey Wayland entered the Capitol Hill Quality Food Center (QFC) in Seattle. Privately contracted loss-prevention agents Matthew Evans and Colin Gierzak were working at the QFC that evening.

Evans watched Wayland enter the store, place his open backpack into a cart, and go to the beer aisle. After Wayland placed a six-pack of beer into his open backpack, Evans called Gierzak on his cell phone. Wayland placed a second six-pack of beer in his backpack. Then Evans followed Wayland as he left the beer aisle and walked up a different aisle, toward the front of the store.

Gierzak was at the front of the store and watched Wayland pass through the checkout stand. Wayland did not stop at the checkout stand or make any attempt to pay for the beer. Wayland left the store wearing his backpack.

Evans and Gierzak followed Wayland out of the store, identified themselves as store security, and asked Wayland to come back inside the store. Wayland resisted and engaged in a struggle with Evans and Gierzak. Evans and Gierzak wrestled Wayland to the ground at least three different times. During the struggle, Wayland took off his sweatshirt and his shirt in an attempt to escape from Evans and Gierzak, punched Evans in the head, and bit Gierzak on the arm. Several people gathered to watch the fight. A bystander called 911. The police arrived several minutes later. When the police took Wayland into custody, he was shirtless and the backpack was missing.[1]

Around 10:00 a.m. on October 9, 2008, Wayland returned to the same QFC.

[1] The backpack was never recovered.

Loss prevention officer Trevor Lucas watched as Wayland put a number of items into his backpack and left the store without paying for them. When Lucas attempted to bring Wayland back into the QFC, Wayland resisted, and fought with Lucas. The police arrested Wayland.

The State charged Wayland with two counts of robbery in the second degree in violation of RCW 9A.56.210. A number of witnesses testified at trial on behalf of the State as to the alleged robbery on September 21, including Gierzak, Evans, and several police officers. Wayland testified that he was too intoxicated to remember what happened that night.

The court instructed the jury on robbery in the second degree and the lesser included offense of theft in the third degree. The jury convicted Wayland of the lesser included crime of theft in the third degree. The court imposed a standard range sentence.[2] Wayland only appeals his conviction as to count I, the incident on September 21, 2008.[3]

ANALYSIS

Sufficiency of the Evidence

Wayland asserts insufficient evidence supports his conviction for theft in the third degree. Wayland claims the State did not present sufficient evidence to prove beyond a reasonable doubt that he intentionally took property from the QFC on September 21 with intent to deprive the QFC of the property.

In reviewing a challenge to the sufficiency of the evidence, all evidence

[2] Wayland was sentenced to two consecutive 12 month sentences, one for each conviction. The second sentence included one month of work crew, with the remaining 11 months suspended.

[3] Wayland does not appeal his conviction for count II, the incident on October 9, 2008.

presented by the State is presumed true, and all reasonable inferences are drawn from the evidence in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime can be shown by circumstantial evidence as well as direct evidence. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Witness credibility is determined by the trier of fact, and cannot be considered on appeal. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). Evidence is sufficient when any rational trier of fact could have found each essential element of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

To convict Wayland of theft in the third degree, the State had to prove beyond a reasonable doubt that, with intent to deprive the QFC of property, he committed theft of property which did not exceed two hundred fifty dollars in value. RCW 9A.56.050. "Theft" is defined in RCW 9A.56.020(1)(a) as follows:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

Under RCW 9A.56.010(19)(a), to wrongfully obtain or exert unauthorized control means, "[t]o take the property or services of another."

Wayland contends the evidence was insufficient to prove theft because neither the backpack nor the beer were recovered, and there "was no other evidence establishing the theft inside or outside the store." We disagree.

Even though the beer and the backpack were not recovered, viewing the evidence in the light most favorable to the State, a rational trier of fact could have

found the essential elements of the crime of theft in the third degree beyond a reasonable doubt. The entire time Wayland was in the QFC, either Evans or Gierzak were able to observe him. Evans' and Gierzak's testimony establishes that Wayland entered the QFC with a backpack, placed two different six-packs of beer into the backpack, put on the backpack, passed the checkout stands without paying for the beer, and left the QFC wearing the backpack. When Evans and Gierzak tried to stop Wayland, he fought with them and took off his sweatshirt and t-shirt. Even though Wayland was not wearing the backpack when police arrested him, the evidence shows he had the backpack on with beer in it when he left the QFC and supports the inference that he took the backpack off at some point during the struggle. Sufficient evidence supports Wayland's conviction of theft in the third degree.

Prosecutorial Misconduct

Wayland also contends the prosecutor committed misconduct during closing arguments by diluting the burden of proof and the presumption of innocence and improperly commenting on the credibility of the witnesses.

We review the allegedly improper comments in the context of the entire closing argument, the issues presented, the evidence addressed, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Wayland must show that the prosecutor's comments were improper as well as prejudicial. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments are prejudicial only if "there is a substantial likelihood the misconduct affected the jury's verdict." Brown, 132 Wn.2d at 561.

If the defense fails to object to any of the allegedly improper statements, the issue of prosecutorial misconduct is waived unless the comments were so flagrant or ill intentioned that the prejudice could not have been cured by an instruction from the court. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). The jury is presumed to have followed the court's instructions. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Here, the court used the standard Washington pattern jury instruction, 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008) to instruct the jury as to the burden of proof and the presumption of innocence:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> 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.

In State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), our Supreme Court approved using WPIC 4.01 and warned against altering the definition of reasonable doubt: "[t]he presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be so illusive or too difficult to achieve." Bennett, 161 Wn.2d at 316.

During closing argument, the prosecutor described reasonable doubt as follows:

> Now, the State has a high burden, beyond a reasonable doubt . . .
> It is not beyond any doubt. It is not beyond all doubt. It is beyond a reasonable doubt. And what that means is that you must have a reason, a reason to doubt Mr. Wayland's guilt.
> It is a high burden, but it is not an impossible one. And I am going to talk to you now about how and why the State has met that burden.

Wayland contends that, as in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), the prosecutor's argument that the jury must have a reason to doubt diluted the State's burden of proof and the presumption of the defendant's innocence.

In Anderson, the prosecutor argued that, "in order to find the defendant not guilty, you have to say 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." Anderson, 153 Wn. App. at 424. Defense counsel did not object to the comment. The court concluded the statement was improper because it suggested a presumption of conviction which could only be overcome if the jury found a specific reason not to convict, and therefore diluted the presumption of innocence and the burden of proof. Anderson, 153 Wn. App. at 431. But because the prosecutor's argument was not so flagrant or ill intentioned as to create an incurable prejudice, and the instructions to the jury minimized confusion about the relevant presumptions and burdens, the court held reversal was not warranted. Anderson, 153 Wn. App. at 432.

Here, as in Anderson, Wayland did not object, and the court correctly instructed the jury on the burden of proof. Because the prosecutor's argument was

not so flagrant or ill intentioned that a curative instruction could not have neutralized the remarks, we conclude Wayland has not established prosecutorial misconduct that warrants reversal.

Wayland also argues that in rebuttal, the prosecutor diluted the burden of proof by telling the jury that a lack of certain evidence was not a reason to doubt. In rebuttal closing, the prosecutor responded to defense counsel's argument that the backpack was not presented as evidence:

> We don't have the backpack. It was not there. The police did not recover it. The loss prevention officers did not recover it. There is no way we could have brought it before you.
>
> Similarly with the beer . . . .
>
> Those are not reasons to doubt, those are just comments on counsel's performance in trial or other things of that nature of whether or not this case was presented in a way that the jury can actually see the evidence.

Even improper prosecutorial comments are not grounds for reversal when "they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective." State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The prosecutor's argument about the lack of evidence was a pertinent response to defense counsel's attack on the State's lack of physical evidence, and was not prejudicial.

In addition, Wayland contends the prosecutor made an improper argument about the witnesses' credibility by implying that the jury needed a specific reason to disbelieve Evans' and Gierzak's testimony:

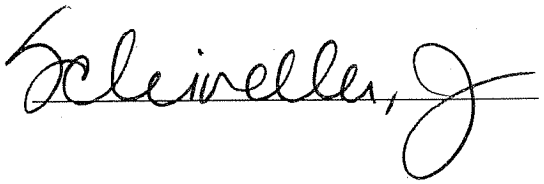
> One or the other of them had constant surveillance over Mr. Wayland the entire time.
>
> There is no reasonable explanation for why Mr. Gierzak and Mr. Evans would be dishonest about this particular fact of Mr. Wayland

stealing.

Similarly, in Anderson, the prosecutor argued "that the State's witnesses were 'just telling the truth.'" Anderson, 153 Wn. App. at 430. The court concluded that these comments were not improper, and were merely intended to argue inferences from the evidence. Anderson, 153 Wn. App. at 431. Here, defense did not object, and the prosecutor was arguing inferences from the evidence. Moreover, the argument was

not so flagrant or ill intentioned that a curative instruction would not have neutralized any misconduct.

We affirm.



WE CONCUR: