IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65239-7-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
WENDY DAWN MOSLEY,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 21, 2011
_____	)	

Leach, A.C.J. — In this prosecution arising from a check kiting scheme, Wendy Mosley contends her convictions for theft and unlawful issuance of checks are not supported by sufficient evidence, the trial court admitted photographs without proper authentication, and the prosecutor committed reversible misconduct in closing argument. We disagree and affirm.

FACTS

Based on allegations that Wendy Mosley knowingly wrote bad checks on her bank account as part of a check kiting scheme,[1] the State charged her with one count of unlawful issuance of bank checks and one count of second degree theft.

At trial, the State's evidence established that on March 26, 2009, a person

[1] Bellingham Police Detective Tim Ferguson testified that in a check kiting scheme, person A writes checks to person B who then deposits the checks knowing there is not enough money in A's account to cover them. B then writes multiple checks to persons C, D, and possibly E for amounts that will likely avoid detection by the banks.

named Wendy Mosley opened a bank account with Industrial Credit Union (ICU) in Bellingham. Mosley presented photo identification in the form of a driver's license, a social security card, and a copy of a municipal court letter verifying her current address. Mosley's signature card listed her son Marcus Mosley as the person her account would be payable to in the event of her death.

On March 27, 2009, Mosley endorsed and deposited two checks for $250 written on Kelsey Bartell's bank account with Bank of America. Later that day, Mosley went to another ICU branch, withdrew $500 and wrote multiple checks, including checks to her son Marcus Mosley and Samanda Dillard. Detective Ferguson testified that Kelsey Bartell was Marcus Mosley's girl friend and the mother of his child.

On March 28, 2009, Mosley deposited three more checks from Bartell, again for $250 each. These checks were deposited at different ICU branches. All five checks from Bartell were written on an account with insufficient funds.

On April 10, 2009, ICU closed Mosley's bank account due to insufficient funds. That same day, Samanda Dillard deposited several checks from Wendy Mosley into her bank account at Whatcom Educational Credit Union (WECU). She then went to other WECU branches and withdrew varying amounts of cash. All the checks she deposited were returned and marked “account closed.”

On April 16, 2009, Marcus Mosley opened an account with WECU. He

proceeded to deposit checks from Wendy Mosley at several WECU branches and made withdrawals of equal amounts from other branches. Video surveillance at one branch confirmed it was Marcus Mosley who withdrew $200 from that branch.

Samantha Henthorn, an accounts control specialist with WECU, testified that she discovered a MySpace page for a Wendy Mosley of Bellingham on the Internet. Henthorn downloaded two photos from the page: one of Mosley and one of Mosley with Samanda Dillard. Detective Ferguson testified that, based on his past contacts with Mosley and Dillard, he recognized the persons depicted in the photographs as Mosley and Dillard. The court admitted the photographs over a defense objection that they were not properly authenticated.

ICU lost approximately $537 on Mosley's account, and, in all, Mosley wrote approximately $4,400 worth of bad checks on her account. In closing, defense counsel conceded that the State proved that someone used Mosley's account for a check kiting scheme but argued that the State had failed to prove that Mosley was that person. He noted there was no eyewitness testimony or photograph identifying Mosley as the person who made the deposits and withdrawals. He reminded the jury that Mosley did not have to testify and that her silence could not be used to infer guilt.

In rebuttal, the prosecutor began by pointing out what defense counsel

did not argue:

> [Defense counsel] didn't tell you what the defense was. He didn't say that it wasn't her. I was listening pretty closely. I didn't hear that he said I didn't prove that. Maybe it could have been somebody else, may have been, it could have been, even had been her son, Marcus Mosley.

He then reviewed all the circumstantial evidence pointing to Mosley, including the striking similarity in her signatures. Out of the jury's presence, defense counsel moved for a mistrial, arguing that the prosecutor had shifted the burden of proof. The court denied the motion.

The jury found Mosley guilty as charged. Mosley appeals.

DECISION

Mosley first contends the evidence was insufficient to prove that she was the person who opened the account or conducted the transactions underlying the charges in this case. Evidence is sufficient if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.[2] A claim of insufficiency admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence.[3] Circumstantial evidence and direct evidence are equally reliable,[4] and we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.[5] Applying

[2] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[3] Salinas, 119 Wn.2d at 201.
[4] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

these principles here, we conclude the evidence was sufficient to prove Mosley's guilt beyond a reasonable doubt.

The evidence established that Mosley's account was opened by a person using her driver's license for photo identification, her social security number, and a letter from municipal court providing verification of her address. The jury could compare the bank's copy of the license photo, which was admitted at trial, with the defendant. The evidence also established that the person who withdrew $500 from Mosley's account on March 27 either presented photo identification or correctly answered questions about the details of the account.

Exhibits admitted at trial also allowed the jury to compare the signature Mosley provided when she opened her account with the signatures on the checks and withdrawal slip.[6] The prosecutor emphasized the striking similarities between these signatures. In particular, he noted that "in all of these signatures each and every one of them Mosley is a two-part word, meaning that she writes Mosley M-o-s and then there's a break and then l-e-y. Mos and ley. That's consistent through the whole thing." He asserted there was "no reason to doubt the same person signed all of those documents."

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[5] 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.

[6] State v. Haislip, 77 Wn.2d 838, 841, 467 P.2d 284 (1970) (even though handwriting expert was unable to testify with any assurance, jury could still make its own comparison of signatures); State v. Davis, 5 Wn. App. 868, 869, 491 P.2d 676 (1971).

Finally, evidence that the checks were written to Wendy Mosley's friends and family provided additional circumstantial evidence that the suspect was in fact Wendy Mosley.

Viewed in a light most favorable to the State, this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Mosley committed the charged offenses.

Next, Mosley contends the court abused its discretion in admitting photographs downloaded from her MySpace page because the photographs were not authenticated.[7] She argues that photographs are not admissible absent "testimony from someone with personal knowledge of both the subject matter of the photograph and the circumstances under which it was created." Mosley misstates the law.

Under ER 901, evidence may be authenticated by testimony "that a matter is what it is claimed to be."[8] Thus, a photograph is sufficiently authenticated when a witness with knowledge of the thing or scene represented testifies that the photo is a true and correct representation of its subject.[9] Although some earlier cases suggested that testimony concerning the circumstances under

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[7] We review decisions regarding the authenticity of exhibits for abuse of discretion. State v. Williams, 136 Wn. App. 486, 499, 150 P.3d 111 (2007).

[8] ER 901(b)(1).

[9] 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 901.21, at 315-16 (5th ed. 2007); Toftoy v. Ocean Shores Props., Inc., 71 Wn.2d 833, 836, 431 P.2d 212 (1967).

which the photograph was taken is required, subsequent cases have not required this evidence.[10]

Here, Detective Ferguson testified that he recognized Mosley and Dillard in the photographs based on his prior contacts with them. Samantha Henthorn testified that she found the photographs on a MySpace page for a Wendy Mosley of Bellingham and that she recognized Dillard from a photograph on file with the credit union. Given this testimony, the trial court did not abuse its discretion in ruling that the photographs were properly authenticated.

Last, Mosley contends the prosecutor committed reversible misconduct when he argued in rebuttal that "[defense counsel] didn't tell you what the defense was. He didn't say that it wasn't her. I was listening pretty closely. I didn't hear that he said I didn't prove that." The trial court rejected Mosley's argument that these remarks shifted the burden of proof and required a mistrial. Mosley now contends the remarks not only shifted the burden of proof but also impermissibly commented on her right to remain silent and deprived her of "the full benefit of the reasonable doubt standard." We reject these contentions.

We review the trial court's ruling on Mosley's burden-shifting claim for abuse of discretion.[11] The challenged remarks focused on what defense counsel

[10] 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence ER 901 author's cmts. (15)(b), at 497 (2010-2011 ed.) ("Some earlier Washington cases seemed to require testimony about when, where, and under what circumstances the photograph was taken, but the requirement has been abandoned since the late 1960s.").

did or did not argue, not on what he did or did not prove. Generally speaking, it is not misconduct to comment on opposing counsel's arguments.[12] Given the nature of the remarks and the prosecutor's repeated reminders that the defense had no burden,[13] the trial court did not abuse its discretion in denying Mosley's motion for a mistrial.

Mosley's arguments that the prosecutor's remarks infringed her right to silence and diminished the reasonable doubt standard are raised for the first time on appeal. Review of these arguments is limited to determining whether the alleged misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated any prejudice it engendered.[14] Mosley contends the prosecutor's statement that her counsel "didn't say it wasn't her"

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[11] We review the trial court's denial of a motion for a mistrial for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

[12] State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (prosecutor may comment on the arguments of defense counsel and argue that the evidence does not support defense theory).

[13] In pertinent part, the prosecutor stated,

> I want you to hold me to my burden . . . . Now, because I do have the burden beyond a reasonable doubt, the defendant has no burden whatsoever. She doesn't have to produce anything. He can get up here and just argue that I haven't done my job, I haven't produced enough. Or he can present a defense and argue a defense. I don't know what he is going to do. I have the burden, he doesn't. She doesn't.

[14] When the defendant fails to object to a prosecutor's comments, including comments allegedly touching indirectly on a constitutional right, the alleged misconduct will not be reviewed unless the comments were so flagrant and ill-intentioned as to be incurable. See State v. French, 101 Wn. App. 380, 386-88, 4 P.3d 857 (2000); State v. Klok, 99 Wn. App. 81, 85-86, 992 P.2d 1039 (2000); State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001).

was "an indirect but obvious comment on Mosley's failure to testify" and "indicated to the jury its reasonable doubts were not enough to acquit without affirmative evidence of innocence." This is a distortion of the prosecutor's remarks.

As we previously noted, the prosecutor only commented on defense counsel's arguments; he did not mention Mosley's failure to testify or suggest that the defense failed to produce evidence. And even if the remarks could be interpreted as indirectly commenting on Mosley's silence or a lack of defense evidence, they were neither flagrant and ill-intentioned nor incurable.[15]

Affirmed.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Ann, J.

[15] We note that the right to remain silent is not infringed unless "the jury would 'naturally and necessarily accept [the challenged remark] as a comment on the defendant's failure to testify.'" State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)).