

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

STATE OF WASHINGTON,)	No. 65938-3-I
)	
Respondent,)	
)	
v.)	
)	
NINA ROSE SCOTT,)	UNPUBLISHED OPINION
)	
)	FILED: April 23, 2012
Appellant.)	
)	

Ellington, J. — Nina Scott appeals her conviction for forgery citing prosecutorial misconduct and ineffective assistance of counsel. We affirm.

BACKGROUND

In May 2009, Scott went to Bank of America in Renton to cash a \$3,284 check. She handed the check to a teller. Suspecting the check was forged, the teller gave it to the branch manager, Jason Shen, to inspect. The check contained at least three different types of handwriting, two different types of ink, and Scott's name written in the payee blank, which had previously been either covered in liquid paper or erased and rubbed so much that it was completely white.

While Scott waited in a bank cubicle, Shen compared the check to others that had been written on the account and concluded the handwriting didn't match. He then called one of the account holders, who confirmed the check was fraudulent. Shen

called the police.

Officer Thaddeus Kerkoff of the responded and arrested Scott. After she was read her rights, Scott indicated that somebody named Rob gave her the check as a school loan, although she was not in school. She did not know Rob's last name, address, or phone number, but said he was waiting for her in the bank parking lot. Scott didn't know the names of the checking account holders.

When Detective Onishi interviewed Scott the following day, she told him that somebody named Matt gave her the check.

The State charged Scott with forgery.

At trial, Scott testified that she didn't look at the check before walking into the bank and didn't know the amount on it, suggesting only that she gave it "a little bit of [a] glance."¹

During closing argument, the prosecutor said:

The defendant is an educated adult with the financial know how to pay her bills, live on her own. So look at that check. *I know it's a bad check.* Is it reasonable that the defendant never really looked at the check or that the defendant thought this was a good check?^[2]

Defense counsel did not object to this statement. Scott was convicted as charged.

DISCUSSION

Prosecutorial Misconduct

Scott contends the State committed prosecutorial misconduct by expressing a personal opinion about Scott's guilt during closing argument.

¹ Report of Proceedings (RP) (Aug. 12, 2010) at 23.

² Id. at 156-57 (emphasis added).

To establish prosecutorial misconduct, the defendant must show the prosecutor's comments were improper and prejudicial.³ Comments are prejudicial only if there is "a substantial likelihood the misconduct affected the jury's verdict."⁴ Prejudicial error occurs when it is "clear and unmistakable" that the prosecutor improperly expressed personal belief, rather than argued an inference from the evidence.⁵ Failing to object to misconduct at trial and to request a curative instruction constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not be neutralized by a curative instruction.⁶

The prejudicial effect of a prosecutor's improper comment is determined by considering the comment in the context of the entire argument, the issues in the case, the evidence addressed in closing, and the jury instructions.⁷ Juries are presumed to follow the trial court's instructions.⁸

Here, Scott contends the prosecutor's statement, "So look at that check. I know it's a bad check," equates with a personal opinion about Scott's guilt.⁹ But the comment

³ State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).

⁴ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

⁵ State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006). The State has wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A prosecutor commits misconduct by expressing a personal opinion about either a witness's credibility or a defendant's guilt or innocence. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar and said defense witnesses were not credible because they drove fancy cars and lived out of town).

⁶ State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

⁷ Brown, 132 Wn.2d at 561.

⁸ State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

⁹ Appellant's Br. at 10.

concerned an issue that was undisputed: the check had been altered. Further, immediately after this comment, the prosecutor asked, “Is it reasonable that the defendant never really looked at the check or that the defendant thought this was a good check?”¹⁰ This conformed to the defense’s theory of the case that, although the check was clearly altered, Scott didn’t know that when she attempted to cash it, and therefore could not have had intent to defraud.¹¹ In both opening statement and closing argument, defense counsel conceded the check was “obviously” altered, and argued the critical question for the jury was whether Scott looked at the check long enough to know it was altered.

Given the context and the prosecutor’s closing argument as a whole, it is not “clear and unmistakable” that the prosecutor was expressing a personal belief that Scott was guilty of forgery. And Scott fails to show the prosecutor’s comment was so “flagrant and ill-intentioned” that it could not have been neutralized by a curative instruction.

Ineffective Assistance of Counsel

Scott next contends that she received ineffective assistance of counsel because her lawyer failed to object to the prosecutor’s “opinion” statement at closing.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) her attorney’s conduct fell below an objective standard of reasonableness and (2) this deficiency resulted in prejudice.¹² Prejudice exists where “there is a reasonable

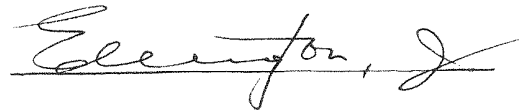
¹⁰ RP (Aug. 12, 2010) at 157.

¹¹ The jury was instructed that to convict the defendant of forgery, it must find, among other elements, that Scott knew the check was altered, and that she acted with the intent to defraud.

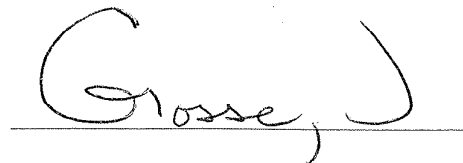
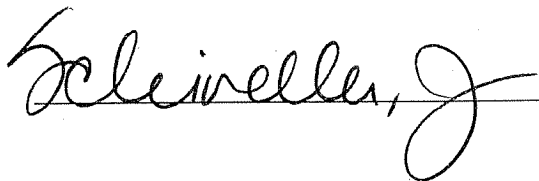
probability that, but for counsel's errors, the result of the trial would have been different."¹³ There is a strong presumption that counsel provided effective representation.¹⁴ On review, the relevant inquiry is whether counsel's assistance was reasonable considering all the circumstances.

As noted above, the fact that the check was obviously altered was not contested at trial, and the prosecutor's comment, which first pointed out the obviousness of the forgery and then posed the question of whether it was reasonable to believe Scott had not noticed this, comported with the defense's theory of the case. It was reasonable for defense counsel not to object to the prosecutor's challenged statement. Scott did not receive ineffective assistance of counsel.

Affirmed.



WE CONCUR:



¹² Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

¹³ State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

¹⁴ Strickland, 466 U.S. at 689.