IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of washington, Respondent, v. ANTHONY BRIAN WALKER, Appellant.	)	No. 66756-4-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: September 17, 2012

Becker, J. — Anthony Walker appeals his conviction and sentence for felony harassment of a police officer. We reject his contention that the information and to-convict instruction omitted an essential element. We find no misconduct by the prosecutor in closing argument. The case is remanded for a sentencing hearing to address the comparability of out-of-state convictions.

FACTS

According to testimony presented at trial, Anthony Walker was the neighbor of Jason and Phui Cooper. Walker's girl friend had a Chihuahua that annoyed the Coopers by barking loudly at night. Jason Cooper complained to Walker several times. Eventually, on June 28, 2010, he filed a complaint with the city. In the early morning hours of July 4, 2010, Cooper awoke to hear

Walker banging on his door. For about five minutes, Walker stood outside yelling profanities, racial insults, and threats. The Coopers heard Walker yell, "You don't like my dog. . . . I'm going to kill you." They also heard Walker throw a rock at their door. Jason Cooper called 911.

When police arrived, Walker was back in his house and refused to emerge. He yelled insults at the officers through a second floor window. This behavior was documented by a video camera mounted on the dashboard of the police car. Walker later came out of his house, but he refused to cooperate with the police investigation and was placed under arrest. The officers put Walker into the back of Officer Robert Cambronero's marked patrol car for transport to a police station. Officer Jacob Leenstra followed in his patrol car.

At the police station, a police sergeant told Cambronero to take a still volatile Walker straight to King County jail. Leenstra was instructed to ride along in the passenger seat because Walker remained hostile. During the ride, Walker continued yelling profanities at the officers. He called Officer Leenstra a racist, used ethnic slurs, and repeatedly threatened to kill him. He said he had guns, and that after he was released from jail he would find out if Leenstra had family and he would hunt Leenstra down. Walker's threats to Officer Leenstra were captured on the video recording device located inside Officer Cambronero's patrol car.

The State charged Walker with two counts of felony harassment based on threats to kill Jason Cooper and Officer Leenstra. A jury trial lasting three days was held. The video recording of

Walker's statements to Officer Leenstra was played for the jury. Officer Leenstra testified that Walker's threats made him actually fearful for his own safety and that of his family. Unlike other threats he had received as a police officer,

> it seemed as though Mr. Walker actually had a plan. He essentially told me he was going to ambush me. I'm not going to see him when he comes. I'm not going to know what happened to me. He's going to ambush me. He's going to kill me in a manner that several law enforcement officers have been killed in recent years.

Walker also took the stand. He admitted calling Cooper bad names and threatening to knock him out but denied threatening to kill him. He claimed he was intoxicated at the time and did not remember what happened after the police came. "I never knew that I said any of those things until they showed me the videotape and it's embarrassing."

The jury acquitted Walker of the felony harassment charge based on threatening Cooper but convicted him of the felony harassment charge based on threatening Officer Leenstra. The court sentenced Walker at the top of the standard range to 29 months' confinement. He now appeals.

TRUE THREAT

All essential elements of a crime must be included in a charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Each element must also appear in the "to convict" instruction. State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). Walker contends he is entitled to have his conviction overturned because "true threat" is an essential element of felony harassment and it was not included either

in the information or in the to-convict instruction.

Washington's harassment statute provides, in relevant part:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> . . . .
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Former RCW 9A.46.020 (2003). Subsection (2)(b)(ii) of the statute makes harassment a class C felony if "the person harasses another person under subsection (1)(a)(i) of this section *by threatening to kill* the person threatened or any other person." RCW 9A.46.020(2)(b)(ii) (2003) (emphasis added). The threat-to-kill provision proscribes only "true threats," which occupy a category of speech unprotected by the First Amendment. State v. Schaler, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010).–

The true threat concept is not an essential element of the crime of felony harassment. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007). True threat is a "definitional concept" that "merely defines and limits the scope of the essential threat element." Tellez, 141 Wn. App. at 481, 484. The jury must be instructed that a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat. "The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole." Schaler, 169 Wn.2d at 283.

That requirement was met in this

case. The jury was given a pattern instruction, Washington Pattern Jury Instruction Criminal 2.24, that the Supreme Court has expressly approved as satisfying the requirement to instruct the jury as to "true threat." Schaler, 169 Wn.2d at 288 n.5. Accordingly, we find no error.

PROSECUTORIAL MISCONDUCT

Walker contends the prosecutor made improper and prejudicial comments during closing argument.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing both improper conduct and resulting prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Comments made by a prosecuting attorney during closing argument can constitute misconduct entitling a petitioner to a new trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). However, a prosecuting attorney has wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

Tailoring

Walker's first theory of misconduct is that the prosecutor alleged in oral argument that Walker "tailored" his testimony and thereby impugned Walker's exercise of his right to be present at trial and his right to testify and assist in his own defense.

Our Supreme Court has

determined that under Wash. Const. art. I, § 22, a prosecutor is not prohibited "from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial." State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011). In Martin, the court conducted an independent analysis of this issue under the state constitution and adopted the position expressed by Justice Ginsburg's dissent in Portuondo v. Agard, 529 U.S. 61, 78, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (Ginsburg, J., dissenting). Justice Ginsburg agreed with the majority in Portuondo that when a defendant takes the stand, the State may fairly use its cross-examination to make an accusation of tailoring because it is important to the truth-seeking function of a trial that the credibility of the defendant be tested in the same manner as any other witness. But Justice Ginsburg differed with the Portuondo majority in that she would forbid prosecutors from making a generic tailoring accusation in closing argument. A generic accusation in argument, as illustrated in Portuondo, is one that calls the jury's attention to the fact the defendant, unlike all other witnesses, "had the opportunity to hear all of the witnesses testify and tailor his testimony accordingly." Martin, 171 Wn.2d at 527, citing Portuondo, 529 U.S. at 63. Such an argument is tied only to the defendant's presence in the courtroom, not to his actual testimony. Martin, 171 Wn.2d at 535.

While Martin was concerned only with cross-examination, for purposes of this case we will assume that Justice Ginsburg's position on closing argument is the law in Washington under Martin. We

will further assume that even though Walker did not object at trial to the portions of argument he is now challenging on appeal, the issue is one he may raise belatedly under RAP 2.5(a) as a manifest error affecting a constitutional right. Cf. Martin, 171 Wn.2d at 527 n.1 ("The State has not argued that the defendant waived his right to raise the issue by failing to raise it at trial"); 171 Wn.2d at 541-42 (Stephens, J., concurring/dissenting) (discussing the issue as a constitutional error).

The prosecutor first used the word "tailor" at the end of her initial argument in the context of explaining that a defendant enjoys no presumption of credibility:

> So your credibility determination of the defendant is the same as any other credibility determination you make of any other witness. So Jason Cooper, Phui Cooper and the three officers and the defendant all start at the same baseline in your credibility determination.
>
> So you have to think about what is their memory? What is it affected by? Well, everyone there that night was sober except for one person: The defendant. Everyone there seems to have a pretty clear memory of what happened except the defendant. What bias or motive does any of the officers have? They don't have any. They don't know the defendant from Adam. The Coopers we talked about what motive do they have. *The only person with a motive to tailor their testimony is the defendant*.

(Emphasis added.)

This argument did not suggest that Walker had designed his testimony, or was in a position to design it, to be exculpatory while still remaining consistent with other evidence introduced at trial. It merely attacked his credibility based on the evidence. The use of the word "tailored" to describe a defendant's

testimony is not inherently improper.

The prosecutor's next use of the word occurred during rebuttal, while discussing some inconsistencies in Walker's testimony on direct examination about his usual work hours. The prosecutor argued that such minor inconsistencies demonstrated Walker's general lack of credibility in that he was figuring out how to tailor his testimony:

> The whole point of this, yes, minor inconsistencies that don't necessarily have to do with the underlying facts of this case is that, ladies and gentlemen, the facts show you that the defendant is a liar. What you heard out of his mouth on direct examination versus what I got out of him on cross-examination, yet changing his story *tailoring his testimony*.

(Emphasis added.)

Here again, the prosecutor did not accuse Walker of giving false testimony calculated to fit with other evidence presented at trial or with the prior testimony of other witnesses. The prosecutor merely pointed out how Walker had changed *his own story* between direct examination and cross-examination.

Earlier, during rebuttal, the prosecutor said Walker had a selective memory. "The defendant remembers everything he claims up until the point when the police came. Why is it selective? Because everything up until that point is not on video. Everything after that point is on video." At oral argument before this court, Walker referred to this remark as another instance where the prosecutor made an unconstitutional allegation of tailoring. The argument fails for two reasons. First, an issue not set forth in the briefs is not properly before the court and need not be considered.

State v. Johnson, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992). Second, even if considered, the accusation of selective memory was not generic. Because it was tied to Walker's actual testimony, it was not the type of comment disapproved of by Justice Ginsburg. See Portuondo, 529 U.S. at 79 (Ginsburg, J., dissenting), quoted in Martin, 171 Wn.2d at 535. In short, the challenged arguments did not draw an adverse inference from Walker's exercise of his constitutional rights and were not misconduct.

Focusing the Jury on Which Witnesses Were Lying

Walker also argues the prosecutor improperly focused the jury's attention on deciding which of the witnesses were lying.

Where, as here, the defense fails to object to a comment at trial, any error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. McKenzie, 157 Wn.2d at 52.

As noted above, the prosecutor said Walker was the "only witness that you heard from in this case that has any motivation to lie" and the "only person with a motive to tailor their testimony." The prosecutor also said that the inconsistencies in Walker's testimony showed he was "a liar."

It is misleading for a prosecutor to say that for jurors to believe a defendant or accept a defense theory, they must find that the State's witnesses are lying. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991).

The jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth before deciding whether the State has met its burden of proof. Wright, 76 Wn. App. at 825.

Here, the prosecutor did not set up a "false choice" of the kind decried in Wright and Barrow. Wright, 76 Wn. App. at 825. The prosecutor did not tell the jury they could acquit Walker only by concluding that the officers and the Coopers were lying. The challenged remarks simply asked the jury to consider that there was reason to doubt Walker's credibility, while less reason existed to doubt the credibility of the State's witnesses. Such comments are well within the prosecutor's wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995). And even if the remarks had been improper, any prejudice could have easily been neutralized by a curative instruction to the jury.

JUROR BIAS

In a statement of additional grounds for review under RAP 10.10, Walker alleges that one of his jurors was a Seattle police detective who worked alongside Officer Leenstra. He contends this juror should not have been admitted onto his jury and that his counsel was ineffective for failing to exercise a challenge, as Walker claims he requested.

Because the jury voir dire was not transcribed, the record is inadequate to

support review of this issue.

OFFENDER SCORE

Walker contends he is entitled to have his sentence vacated because the court did not require the State to prove the comparability of four out-of-state convictions before using those convictions to increase his offender score. We review de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007).

Out-of-state convictions must be classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3); State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). Classification based on comparability is a mandatory step in the sentencing process. State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). To classify an out-of-state conviction, the court must compare the elements of the foreign offense to the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479, citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements are identical, the foreign conviction counts toward the offender score as if it were the Washington offense. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the trial court may look to the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington statute. Ford, 137 Wn.2d at

479, citing Morley, 134 Wn.2d at 606.

Here, a statement of criminal history presented to the court showed that Walker had five prior King County convictions. He also had four out-of-state convictions before 1986. The record is silent as to the comparability of the four out-of-state convictions. At the sentencing hearing, the prosecutor asked for a sentence at the high end of the standard range, which she said was 22 to 29 months. She informed the court that she and the defense had agreed that the offender score was 6, but she did not comment as to whether they had discussed comparability. Defense counsel did not deny that the offender score was 6, but he likewise did not say anything about the comparability of the offenses. He asked the court to consider a drug offense sentencing alternative or else to impose a sentence at the "low end of the range, which should be 22 months."

A defendant is not deemed to have affirmatively acknowledged comparability based on his failure, at the sentencing hearing, to dispute the fact of the out-of-state conviction or the State's inclusion of it in his criminal history. State v. Jackson, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006); State v. Lucero, 168 Wn.2d 785, 788, 230 P.3d 165 (2010). Agreement with the ultimate sentencing recommendation is likewise not an affirmative acknowledgement. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). Following these authorities, we conclude Walker's implicit agreement to the offender score and standard range proposed by the prosecutor did not constitute an affirmative

acknowledgement of comparability.

This is an error that may be raised for the first time on appeal. Ford, 137 Wn.2d at 484-85. Without a comparability analysis, the out-of-state convictions may not be used to increase Walker's offender score.

Where, as here, there is no objection at sentencing and the State consequently has not had an opportunity to put on its evidence, it is appropriate to allow the State to present evidence on remand. Mendoza, 165 Wn.2d at 930.

We affirm the conviction and remand for resentencing.

Becker, J.

WE CONCUR:

Leach, C.J.

Appelwick, J.