IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66907-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
ANTHONY LEROY PINES, JR.,	)	
	)	
Appellant.	)	FILED: November 5, 2012
	)	

Leach, C.J. — Anthony Pines Jr. appeals his convictions for first degree assault while armed with a firearm and first degree unlawful possession of a firearm. Pines challenges the trial court's failure to hold a hearing on whether a juror was inattentive during the proceedings and its inquiry into possible juror bias. He also alleges prosecutorial misconduct, violation of the confrontation clause, and ineffective assistance of counsel. Because Pines failed to preserve the first claim for appellate review and we find no merit in his other claims, we affirm.

FACTS

On September 9, 2010, the State charged Anthony Pines Jr. with four counts of first degree assault while armed with a firearm and one count of unlawful possession of a firearm in the first degree. The case proceeded to jury trial.

On the second day of trial, the judge received a note from his clerk after someone indicated to the clerk that a juror was having a difficult time staying awake. Although the judge did not personally observe the juror's alleged inattention, he suggested that the parties speak with others who might have done so. Following a recess and at the end of the day, counsel indicated that they had nothing further to add to the record.

When the State called its first witness, a different juror indicated that she knew the witness by sight. Outside the jury's presence, the prosecutor and Pines questioned the witness and the juror separately about whether they knew each other. Both stated that they recognized each other but maintained that they never had any in-depth conversations and never discussed the case. The juror believed she could "be fair knowing that [the witness] took the stand." The court, the State, Pines, and the juror agreed that the juror would not speak with the other jurors about the inquiry that just took place. All parties agreed that the juror would continue to serve.

During the State's closing argument, the prosecutor read aloud to the jury the court's instruction defining the "beyond a reasonable doubt" standard. She then "tr[ied] to give an everyday example of what a reasonable doubt is." In her example, she discussed a series of circumstances that could affect someone's ability to drive safely from home to the courthouse. Following those statements,

the prosecutor explained the evidence as it related to each of the elements of the assault charges. Pines did not object to the prosecutor's comments, nor did he request a curative instruction.

At the close of the State's case, Pines moved to dismiss counts as to two of the four accusers because they did not testify at trial. He argued that their absence violated his rights under the confrontation clause of the Sixth Amendment to the United States Constitution. Pines conceded that the State presented no testimonial hearsay from those individuals at trial. The court concluded that both individuals were unavailable and that their absence did not violate Pines's rights under the confrontation clause.

A jury convicted Pines as charged. Although no one specifically identified Pines, there was significant circumstantial evidence against him. The jury returned special verdicts finding that Pines was armed with a firearm during each assault. Pines appeals.

STANDARD OF REVIEW

We review for abuse of discretion a trial court's determination whether a juror was so inattentive as to prejudice the defendant.[1] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.[2]

[1] State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986).
[2] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

We review for abuse of discretion a trial court's decision whether to excuse a juror.[3] The trial court must determine whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially.[4] It has discretion to find facts before deciding to dismiss a juror as unfit under RCW 2.36.110.[5]

To succeed on a claim of prosecutorial misconduct made for the first time on appeal, the appellant must show that the prosecutor's behavior was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[6] To prove prosecutorial misconduct, an appellant must show both improper conduct and resulting prejudice.[7] Conduct is not flagrant and ill-intentioned where a curative instruction could have cured any error.[8] However, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect."[9] Prejudice exists where there is a substantial likelihood that the misconduct

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[3] State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009).

[4] Ottis v. Stevenson-Carson Sch. Dist. No. 303, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991).

[5] State v. Jorden, 103 Wn. App. 221, 229, 11 P.3d 866 (2000).

[6] State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

[7] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

[8] State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), petition for review filed, No. 86790-9 (Wash. Dec. 8, 2011).

[9] Walker, 164 Wn. App. at 737.

affected the verdict.[10] We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[11]

We review de novo alleged confrontation clause violations.[12] We apply a harmless error analysis.[13] The error is harmless if, considering the untainted evidence, we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.[14] We presume the error is prejudicial, and the State bears the burden of proving beyond a reasonable doubt that the error did not contribute to the jury's verdict.[15]

Claims of ineffective assistance of counsel are mixed questions of law and fact, which we review de novo.[16] To prevail, an appellant must show (1) that counsel's performance fell below an objective standard of reasonableness based on a consideration of all the circumstances and (2) that the deficient performance prejudiced the trial.[17] When an appellant raises an ineffective assistance of counsel claim on direct appeal, we do not consider matters outside

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[10] State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).
[11] State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).
[12] State v. O'Cain, 169 Wn. App. 228, 234 n.4, 279 P.3d 926 (2012).
[13] State v. Fraser, ___ Wn. App. ___, 282 P.3d 152, 158 (2012).
[14] Fraser, 282 P.3d at 158.
[15] Fraser, 282 P.3d at 158.
[16] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).
[17] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

the trial record.[18] The reasonableness inquiry presumes effective representation and requires the appellant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[19] To show prejudice, the appellant must prove that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[20]

ANALYSIS

During the second day of trial, outside the jury's presence, the judge informed the parties that he received a note from his law clerk "that someone apparently was indicating that Juror No. 4 was having some challenges staying awake or something along those lines." The judge stated that he did not personally observe the juror sleeping and he did not know whether anyone else had information about the juror. However, he continued, "[S]ometimes people do simply close their eyes. But, I guess, folks are alerted. Folks may want to keep an eye on him. If there's something further we need to do, we can talk about that." The judge suggested that the parties speak with custodial staff or others who might have observed the juror.

Pines claims that the court abused its discretion by "choosing to remain ignorant of whether the juror's sleeping or sleepiness undermined his ability to

[18] State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).
[19] McFarland, 127 Wn.2d at 336.
[20] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

participate in the case and deliberate upon the evidence." If Pines truly believed that the juror missed significant portions of the proceedings, he was responsible for asking the court to act upon the matter.[21] As the Ninth Circuit stated in United States v. Moore,

> "The only conclusion possible from this record is that defense counsel, fully aware of the existence of the problem that is now pressed upon us, deliberately chose to proceed with the original jury to create a no-lose situation: either a not guilty verdict would be returned or an arguably tainted guilty verdict would provide a basis for appeal. We strongly disapprove such a gamesmanship approach to criminal justice."[22]

The trial court gave the parties notice of the matter, as well as an opportunity to question those who might have observed the juror. The appellate record contains no evidence that either party investigated the matter. At trial, Pines did not claim that a juror was sleeping or otherwise inattentive. He also did not request a hearing on the matter or to excuse the juror. Because Pines did not object to a juror's alleged inattentiveness during trial, he failed to preserve this argument for appeal.[23]

Pines contends that he received ineffective assistance when counsel did not object to the court's failure to question the juror or request permission to question the juror. The record contains no evidence besides the clerk's note to

[21] United States v. Moore, 580 F.2d 360, 365 (9th Cir. 1978).

[22] 580 F.2d 360, 365 (9th Cir. 1978) (internal quotation marks omitted) (quoting United States v. Krohn, 560 F.2d 293, 297 (7th Cir. 1977)).

[23] Hughes, 106 Wn.2d at 204; see also RAP 2.5(a).

suggest that anyone observed the juror sleeping or otherwise inattentive. After the judge discussed the note, no one in the courtroom raised the issue or indicated that the juror continued to have any problem paying attention. There is insufficient evidence to conclude that the juror was inattentive and that Pines did not receive a fair trial. Pines does not demonstrate that an investigation would have revealed otherwise.

In addition to his inattentive juror claim, Pines alleges that he did not receive a fair trial because the trial court failed to investigate whether a juror and a witness "had any harmfull [sic] history that could have given me a [sic] unfair trial" after the juror informed the court that she knew the witness. He also asserts that the court abused its discretion because it did not investigate whether the juror or the witness correctly recalled the last time they saw each other. Under Washington law, the right to a jury trial includes the right to an unprejudiced and unbiased jury.[24] Although the juror did not believe that her prior interactions with the witness biased her views, Pines maintains that those beliefs were irrelevant. Finally, Pines claims that he received ineffective assistance because counsel failed to object to the court's alleged lack of investigation.

Outside the jury's presence, both the State and Pines questioned the juror

[24] State v. Jackson, 75 Wn. App 537, 543, 879 P.2d 307 (1994); see also U.S. Const. amend. VI, XIV; Wash. Const. art. I, § 3, § 22 (amend. 10).

and the witness, Jodi Nelson. Nelson stated that she knew the juror because Nelson was a customer at the grocery store where the juror worked and the juror was a customer at the department store where Nelson worked. They had never "done anything socially" or discussed the case with each other—"[c]asual hi, bye, that is about it." Nelson also said that she saw the juror about three times over the past five years. After the parties completed their questions, the court asked a number of follow-up questions. Nelson told the court that she last saw the juror about a year ago while working in a department store and about three years prior to that while the juror worked at the grocery store. Nelson and the juror never had any in-depth discussions. Finally, the court asked, "Any discussions where, effectively, you would be called upon to weigh her credibility or she would be called upon to weigh your credibility?" Nelson answered, "No."

The juror informed the trial judge that she did not even know the witness's name. She stated, "I recognize [Nelson] from passing in my job," that she never had any in-depth discussions or talked about the case with Nelson, she did not feel that she could not remain fair and impartial, and that the last time she saw Nelson was within the previous three months. The court and the parties agreed that the juror would continue to serve on the jury.

Both the juror and witness testified that they never held extensive conversations. They also did not interact with each other outside their casual

store clerk-customer context. The triviality of their interactions makes irrelevant whether they last saw each other one year or three months before the trial. Pines offers no persuasive reason for us to disregard the juror's belief that her brief interactions with the witness would not impact her judgment in the case. The court properly investigated their history by allowing both parties to question the witness and the juror and then following up with additional questions. The record includes no evidence that the juror's prior interactions with the witness impacted Pines's right to a fair jury trial. Therefore, the trial court did not abuse its discretion in retaining the juror. Because the court acted properly, we reject Pines's ineffective assistance of counsel claim.

Pines also alleges prosecutorial misconduct. During the State's closing argument, the prosecutor referred the jurors to jury instruction 2 that defined the beyond a reasonable doubt standard. She noted that the standard is "still a difficult term for people." She compared the term to "an everyday example" of driving a car from home to the courthouse:

> There's always a chance when you get in your car and get on the road and drive somewhere, say to the courthouse here, that you could get in a serious accident and be seriously injured or killed, that's the facts of life. That's a possibility. But we still every day get up, get in our cars, and go places. We come to the courthouse, we live our lives because although there's a possibility of that happening, there's not a reason to think that that would happen.
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> But let's say, you wake up in the morning and you looked out this morning and it had snowed a foot and all the roads were

> covered in sheer ice and you didn't have a four-wheel drive and you are not good at driving in the snow or ice. That is a reason to doubt that you will get to the courthouse.
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> Or, let's say, you get up and you turn on the news and you hear on the news that you have to drive on I-5 to get here and you hear on the news that the way you have to drive there's a sniper that is out on the road that's shooting people on I-5. That also could be a reason to doubt that you might get to the courthouse safely.
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> These are reasons to doubt that you will get to your destination safely, and that is an example of what a reasonable doubt is. It's a doubt for which there is a reason. There's always a possibility that something can happen, but do you have a reason to doubt?

On appeal, Pines claims that the prosecutor improperly diminished the beyond a reasonable doubt standard. He compares the remarks to those in State v. Anderson,[25] in which the prosecutor discussed the standard in the context of everyday decision making. In the State's closing argument, the prosecutor in Anderson compared being convinced beyond a reasonable doubt to choices such as whether to have elective dental surgery.[26] In such instances, he told the jury, "'If you go ahead and do it, you were convinced beyond a reasonable doubt'" that it was necessary.[27] The analogies indicated that the jury should convict Anderson unless there was a reason not to do so.[28] The court concluded that the comments were improper: "By comparing the certainty

[25] 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).
[26] Anderson, 153 Wn. App. at 425.
[27] Anderson, 153 Wn. App. at 425.
[28] Anderson, 153 Wn. App. at 432.

required to convict with the certainty people often require when they make everyday decisions—both important decisions and relatively minor ones—the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson."[29] Nonetheless, the court in Anderson held that the jury instructions on the presumption of innocence cured any prejudice.[30] Moreover, any error was harmless because of the strong evidence against Anderson.[31]

Pines also compares the prosecutor's language to that held improper in State v. Walker.[32] In Walker, the prosecutor made a number of improper statements, including some similar to those in Anderson. He stated that the standard "'is a common standard that you apply every day'" and compared it to having surgery or leaving children with a babysitter.[33] Unlike in Anderson, however, the court held that the comments were prejudicial because, when combined with the conflicting evidence, a jury instruction would not have cured their effect. The prosecutor "made the improper comments not just once or twice, but frequently. He used them to develop themes throughout closing argument. . . . These statements were only further emphasized by the

[29] Anderson, 153 Wn. App. at 431.
[30] Anderson, 153 Wn. App. at 432.
[31] Anderson, 153 Wn. App. at 432 n.8.
[32] 164 Wn. App. 724, 265 P.3d 191 (2011), petition for review filed, No. 86790-9 (Wash. Dec. 8, 2011).
[33] Walker, 164 Wn. App. at 732.

prosecutor's PowerPoint slides."[34]

The State argues that this case is similar to State v. Curtiss.[35] In Curtiss, the prosecutor, in closing, described the State's burden as follows: "'Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.'"[36] The court concluded that the remarks about identifying the puzzle with certainty before it is complete were not comparable to the statements in Anderson that involved "weighing of competing interests inherent in a choice that individuals make in their everyday lives."[37] As in Curtiss, the State claims, the prosecutor's comments "suggested a common sense illustration of how circumstantial evidence could affect one's decision in light of the reasonable doubt standard."

The issue in this case, on which the State presented considerable circumstantial evidence, was the shooter's identity. Here, the prosecutor discussed circumstantial evidence that could impact whether a reason exists to believe that a certain outcome will not occur. We distinguish this from evidence

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[34] Walker, 164 Wn. App. at 738-39.

[35] 161 Wn. App. 673, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011).

[36] 161 Wn. App. at 700.

[37] 161 Wn. App. at 701.

used to make a choice, as in Anderson, or evidence impacting an ability to make a proper identification, as in Curtiss. The prosecutor's analogy properly suggested that the jury consider the way that certain circumstantial evidence could cast doubt on a particular outcome. We hold that the State did not trivialize the reasonable doubt standard with its argument.

Because Pines does not show that the prosecutor's statements were improper, we need not reach whether they prejudiced the result. For this reason, counsel's failure to object to the comments was not unreasonable, so Pines's ineffective assistance of counsel claim also fails.

At the close of the State's case, Pines requested dismissal of two of the four counts against him. Two of Pines's accusers testified at trial. However, the other two, Alendra Fallon and Oscar Herrera Gonzales, did not testify. Relying upon the confrontation clause, Pines asked the court to dismiss the counts pertaining to them. He conceded that the State presented no testimonial statements from either Fallon or Herrera Gonzales. Nonetheless, he stated that he wanted to question them about their injuries and the events that took place.

The confrontation clause of the Sixth Amendment of the United States Constitution gives the accused in all criminal prosecutions the right to be confronted with the witnesses against him. It prohibits the court from admitting testimonial hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination.[38] The prosecution has

the burden to establish that statements are nontestimonial.[39]

Because the trial court did not admit any testimonial hearsay, the court did not violate Pines's confrontation rights. If Pines wanted to question Fallon or Herrera Gonzales, he could compel their testimony, using the process available under CR 45.

CONCLUSION

Because Pines did not challenge at trial the juror's alleged inattentiveness, we decline to address it for the first time on appeal. The trial court properly allowed another juror to continue, despite prior trivial interactions with a witness. Considering the context of the entire case, the prosecutor's statements during closing were not improper. There was no confrontation clause violation even

[38] Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[39] O'Cain, 169 Wn. App. at 235.

though two of Pines's accusers did not testify at trial. Finally, Pines fails to show that counsel's performance was deficient or prejudicial. We affirm.

Leach, C.J.

WE CONCUR:

Spearman, J.

Cox, J.