

conducted such a search of Fuller's cell. Officers found a homemade pipe, fashioned from toilet paper hardened with soap and toothpaste. They found pieces of pencil lead that had been stripped of all surrounding wood. An officer testified that inmates are able to use stripped pencil lead as a lighter by inserting it into an electrical socket to create a spark that can ignite material such as tobacco or marijuana. Next to the pipe and pencil lead, officers found a leafy substance wrapped in plastic. A test of that substance revealed that it was marijuana. In addition to the marijuana, there was a small plastic container left over from a food item that Fuller had purchased from the jail commissary that contained tobacco. Fuller denied any knowledge of the tobacco and marijuana and testified that someone put those items in his cell.

The State charged Fuller with unlawful possession of a controlled substance by a prisoner. The jury delivered a guilty verdict, and the court sentenced Fuller to eight months in custody. Fuller timely appeals.

ANALYSIS

Fuller argues that the prosecutor's statements during closing argument improperly prejudiced his right to a fair trial in two ways. First, he argues that the prosecutor improperly shifted the burden of proof from the state and onto him. Second, he argues that the prosecutor improperly commented on his decision to exercise his right to a trial, suggesting to the jury that he was guilty based on that decision.

I. Standard of Review

Prosecutorial misconduct is grounds for reversal if the prosecuting

attorney's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. (citing State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Id. (citing State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). But a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. Id.

Without a timely objection, reversal is not required unless the conduct 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. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008), cert. denied Warren v. Washington, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Failure to object to a prosecutor's improper remark thus constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Fuller contends that the applicable standard of review here should be the much stricter constitutional harmless error standard. Under that standard, we

will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. Monday, 171 Wn.2d at 680. Fuller relies on State v. Moreno, 132 Wn. App. 663, 132 P.3d 1137 (2006), to support his assertion. In Moreno, this court stated, “When a [prosecutor’s] comment refers to a *separate* constitutional right, it is subject to constitutional harmless error.” Id. at 671-72 (emphasis added). The prosecutor’s comments at closing invited the jury to draw a negative inference based on Moreno’s decision to exercise his constitutional right to represent himself. Id. at 672 (The prosecutor stated, “The defendant is a picture perfect example of a domestic violence abuser. He has got to be in control. He is still trying to call the shots. So much so that he *has exercised his constitutional rights to defend himself, because power is that important to him.*”). Because those comments impacted Moreno’s separate constitutional right to represent himself, distinct from his right to a fair trial, the court applied the constitutional harmless error standard.

Similarly, in Monday, our Supreme Court applied this stricter standard of review, based on the prosecutor injecting improper racial biases into the trial. Monday, 171 Wn.2d at 680. The Supreme Court concluded that this stricter standard was appropriate in light of the prosecutor’s flagrant or apparently intentional appeal to racial bias. Id. But, here, the alleged prosecutorial misconduct did not inject any such racial bias, nor did it impact any separate constitutional right. The higher standard in Monday and Moreno is not applicable here. Fuller must demonstrate that the misconduct was so flagrant and ill-intentioned that an instruction could not have cured any prejudice.

Belgarde, 110 Wn.2d at 507.

II. The Burden of Proof

The State bears the burden of proving every element of a crime beyond a reasonable doubt. State v. Hager, 171 Wn.2d 151, 159 n.8, 248 P.3d 512 (2011). The State may not make remarks that conflict with the defendant's presumption of innocence, nor may it make arguments that shift the burden of proof onto the defendant. See State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010). Fuller argues the State shifted this burden of proof onto him, pointing specifically to several comments made by the prosecutor during closing:

The question for you now when you go back into that jury room is to decide whether the defendant's testimony created a reasonable doubt in your mind. Is there a reasonable doubt based on what he told you that that wasn't his marijuana? It's not enough for him to simply tell you it's not his marijuana. It's not enough for you to go back and say, well, that's plausible, therefore I must have a reasonable doubt.

....

The test for you all is to decide do you believe him, do you think there's a real possibility of what he's telling you? So when you look at the defendant's testimony ask yourself: Is there a real possibility that he's telling you the truth? If there is then you have a reasonable doubt.

....

. . . You have to look at his testimony and ask: Do you believe him?

....

. . . [W]hat the defense can't explain to you is why all the implements for a lighter were sitting on his desk. Simply can't explain it.

Fuller contends that these comments improperly suggested he was guilty *unless* he was able to prove his innocence, and that they instructed the jurors that they could only entertain a reasonable doubt as to Fuller's guilt if they believed his testimony. Fuller presents these comments severed from their context. But, we do not consider the prosecutor's comments in isolation; rather, we weigh them in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Monday, 171 Wn.2d at 675.

Here, the State presented undisputed evidence that marijuana and tobacco were found in his cell; that there was a homemade pipe; that there was a device to create a flame; and that Fuller regularly smoked marijuana outside of jail. In closing argument, the State reviewed these facts and the evidence it had presented and argued that they collectively and conclusively establish Fuller's guilt. Fuller did not contest any of this evidence. Instead, he asserted his theory of the case, that the contraband was planted there by another inmate. The only evidence to support Fuller's theory was his own testimony and his own credibility. The prosecutor's comments in closing accordingly addressed Fuller's testimony and focused on whether the jury found it to be credible. Indeed, his credibility was a central issue for the jury and the prosecutor's comments during closing were directed at challenging that credibility. If the jury did not believe Fuller was credible and did not believe his assertion that the contraband belonged to some other inmate, there was no alternative explanation for how the marijuana and tobacco ended up in his cell.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Boehning, 127 Wn. App. at 519. Taken in their broader context, the prosecutor's comments did not improperly shift the burden of proof but were consistent with the evidence at trial, consistent with the State's broader argument and theory of the case, and responsive to Fuller's counter-theory. We hold that the comments were not flagrant or ill-intentioned, and Fuller's claim of prosecutorial misconduct was thus waived by his failure to object at trial.

III. Comment on Exercise of Right to Trial

Fuller argues that the prosecutor's closing remarks also asked the jury to draw a negative inference about his decision to go to trial. It is improper for a prosecutor to ask the jury to draw a negative inference from the defendant's exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). Fuller points to two comments by the prosecutor during closing:

As long as there are people who don't want to accept responsibility for their actions they will demand their trials and put together a story that they hope you will sign off on.

. . . .

. . . [A]nd don't allow a defendant who simply doesn't want to accept responsibility to create a reasonable doubt in your mind.

Fuller contends that these statements encouraged the jury to draw a negative inference about his decision to go to trial and suggested that his decision to do so was indicative of his guilt and his unwillingness to accept responsibility for his

actions. But, as in his argument above, these statements were a part of the prosecutor's broader argument, that Fuller's testimony was not credible. The comments Fuller point to must be weighed in the proper context of the arguments presented by both sides. In addition to the comments quoted by Fuller on appeal, the prosecutor also stated:

As long as there are people who don't want to accept responsibility for their actions they will demand their trials and put together a story that they hope you will sign off on. You have to look at his testimony and ask: Do you believe him? If you look at his testimony and say there's something there that doesn't pass the straight face test, something there that just doesn't sound right, I think he's lying to me about this or that, then the story doesn't present a real possibility that he was framed.

. . . .

. . . [W]hen you look at this case what you see is someone who got caught and someone who now wants to deflect responsibility. Look carefully at his attempt to deflect responsibility and ask yourself: Are there just too many coincidences, too many coincidences between the food container and the items found on his table and the fact that he was an avid marijuana smoker, and the chance, the very rare chance that anyone would actually attempt to plant the evidence in his room? And the conclusion you come to is that he is guilty and that's what your common sense tells you, *and don't allow a defendant who simply doesn't want to accept responsibility to create a reasonable doubt in your mind.*

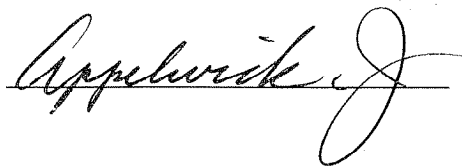
(Emphasis added to the portion cited by Fuller.) With the surrounding language of the prosecutor's closing argument, it is apparent that these comments were not a suggestion that the jury should hold Fuller's decision to go to trial against him. Rather, they were a part of the State's argument that Fuller's testimony and theory of the case was without merit or credibility. The State was entitled to address Fuller's credibility, once he took the stand and presented his defense

that the contraband was placed in his cell by someone else. We hold that these comments were neither flagrant nor ill-intentioned, such that an instruction could not have cured any potential impact. Moreover, Fuller's argument fails to satisfy the prejudice prong of prosecutorial misconduct. He fails to argue that these comments actually induced the jury to hold his decision to go to trial against him. There is not a substantial likelihood that these comments affected the jury's verdict.

IV. Statement of Additional Grounds

Fuller raises several issues in his statement of additional grounds. He asserts that his attorney breached attorney-client privilege by passing confidential information to the prosecutor; that an officer with knowledge of the incident should have been called to testify, but was not; and that the prosecutor erred in describing the process of using a make-shift lighter, by stating that he lowered the metal onto the outlet, when in fact the only outlet in his cell was on the ceiling. These grounds are not supported by the record or by substantive argument. We hold that they are without merit.

We affirm.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

Spencer, J.

Spencer, J.