IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67562-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ALLEN MICHAEL KNOLL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 28, 2013
	)	

Lau, J. — In this prosecution for theft of a purse containing a large amount of cash and a firearm, a jury convicted Allen Knoll of second degree theft and unlawful possession of a firearm. Knoll appeals, arguing that the trial court violated his constitutional rights when it answered a jury inquiry in his absence and that the prosecutor's closing arguments denied him a fair trial. Because any error in the court's handling of the jury inquiry was harmless, any misconduct in the prosecutor's remarks was curable, and Knoll's pro se arguments do not establish any basis for relief, we affirm.

FACTS

On March 1, 2011, Peggy Lee was loading groceries into her car when a car pulled up next to her grocery cart. A man in the front passenger seat of the car

reached out his window and grabbed Lee's purse from her cart. Lee testified that her purse contained roughly $1,500 in cash in a zippered pocket, "about $300" in a wallet, a credit card, and a handgun. Verbatim Report of Proceedings (VRP) (Mar. 17, 2011) at 20. She also testified that she has a concealed weapon permit.

As the car drove off, witnesses reported its description and license number to police. A short time later, police stopped the vehicle and found Knoll in the front passenger seat, Mark Gerrish in the driver seat, and Connor Alamillo in the back. Lee's wallet was on the front passenger floorboard. Her purse was on the floorboard behind the driver's seat. It contained approximately $1,500 in a zippered pocket and a hand gun. Knoll had $295 in folded bills in his pocket. Lee identified this money in court as the money she had in her wallet. The State charged Knoll with unlawful possession of a firearm, second degree theft, second degree identity theft, and theft of a firearm.

Prior to trial, Gerrish and Alamillo pleaded guilty and agreed to testify against Knoll in exchange for reduced charges. They testified that Knoll was the front seat passenger who took Lee's purse and that he threw it into the back of the car. As he did so, he announced that there was a gun in the purse.

The jury acquitted Knoll of identity theft and theft of a firearm but found him guilty of unlawful possession of a firearm and second degree theft. He appeals.

ANALYSIS

Knoll contends the trial court violated his rights under the federal and state

constitutions when it answered the jury inquiry in his absence. State v. Irby, 170 Wn.2d 874, 880-85, 246 P.3d 796 (2011) (addressing federal and state rights). This court, however, will not decide constitutional questions when it is unnecessary to do so. State v. Humphries, 170 Wn. App. 777, 285 P.3d 917 (2012); State v. Ng, 110 Wn.2d 32, 36, 750 P.2d 632 (1988). That is the case here.

When a court's answer to a jury question is negative in nature and conveys no affirmative information, a violation of the right to be present is harmless beyond a reasonable doubt. State v. Besabe, 166 Wn. App. 872, 882-83, 271 P.3d 387 (2012); State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988). It is undisputed that the court's answer to the jury inquiry in this case simply told the jury to refer to their instructions. Thus, even assuming constitutional error occurred,[1] any error was harmless beyond a reasonable doubt.[2] We therefore decline to reach Knoll's constitutional arguments.

Knoll next contends prosecutorial misconduct in closing argument denied him a fair trial. Absent an objection and request for a curative instruction, alleged misconduct

[1] In State v. Jasper, 158 Wn. App. 518, 539-40, 245 P.3d 228 (2010), aff'd, 174 Wn.2d 96, 271 P.3d 876 (2012), we held, "Because the jury's questions did not raise any issues involving disputed facts, the court's consideration of and response to the jury's inquiries did not constitute a critical stage of the proceedings. Therefore, Jasper's presence when the trial court resolved the jury's inquiries was not constitutionally required." In so holding, we noted that the State constitutional right to be present is no broader than its federal counterpart. Jasper, at 539 n.12. In Irby, however, the Supreme Court suggested the state constitutional right may in fact be broader. Irby, 170 Wn.2d at 885 n.6.

[2] Prejudice in this setting is not presumed, and reversal is not required if the error was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886.

is not reviewable unless it was so flagrant and ill intentioned that it could not have been cured. State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). To establish misconduct, a defendant must demonstrate both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Reversal is required only when there is a substantial likelihood the remarks affected the verdict. Brown, 132 Wn.2d at 561. We review a prosecutor's remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). Applying these principles here, we conclude any misconduct was curable and does not warrant relief.

Knoll contends the prosecutor committed misconduct by referring repeatedly to defense arguments as "red herrings." A prosecutor may comment disparagingly on a defense argument, Brown, 132 Wn.2d at 566, so long as the comment does not disparage counsel or impugn counsel's integrity.[3] State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

Here, most of the prosecutor's "red herring" references criticized counsel's

[3] State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (improper to urge jury not to be swayed by defendant's "city lawyers"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (improper to argue that all defense attorneys mischaracterize evidence and twist the facts); State v. Gonzales, 111 Wn. App. 276, 284, 45 P.3d 205 (2002) (improper to argue that, unlike defense lawyers, prosecutors take an oath "'to see that justice is served'"); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper to argue that defense counsel is being paid to twist the words of a witness).

arguments, not counsel, and were therefore proper. However, the prosecutor also remarked, "Now, counsel also talked about there was no investigation on fingerprints and DNA analysis. Having defended many cases before I became the Prosecutor, that's another red herring. We can dole those things out, and I can throw out 20 more that they could have done." VRP (July 20, 2011) at 149 (emphasis added). By telling the jury that she had been a defense attorney and essentially knew the tricks of their trade, the prosecutor denigrated defense counsel and invoked her own professional experience in doing so. These remarks were completely improper and we strongly disapprove of them. Nevertheless, Knoll did not object to the comments and we cannot say they were so flagrant and ill intentioned as to be incurable.[4]

Knoll also contends the prosecutor committed misconduct when she made the following remarks:

> But the real truth is there's three different versions with . . . a lot of the same facts, and in this case the important facts.
>
> They agree on a lot of things. They all agree to come to Mount Vernon and Burlington. . . . Again, it's consistent. Did the other two get out of longer terms in jail? Yeah, they did. But they came in here and told their version of events. Gerrish told you the same thing he told law enforcement on the day that he was arrested.

VRP (July 20, 2011) at 131. Knoll contends these remarks "improperly drew the jury's attention to the fact that Mr. Knoll had exercised his constitutional right to silence" and

[4] See Warren, 165 Wn.2d at 29-30 (remarks disparaging defense attorneys in general and calling defense argument a "'classic example of taking these facts and completely twisting them . . . and hoping that you are not smart enough to figure out what in fact they are doing'" were not so flagrant and ill intentioned as to be incurable); Negrete, 72 Wn. App. at 66 (remark that defense counsel "'is being paid to twist the words of the witnesses'" was curable) (italicization omitted).

suggested that he had a "burden to produce evidence, directly undermining the actual burden of proof and misstating the law." Appellant's Br. at 18-19.

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)). The remarks challenged here would not necessarily be understood as a comment on Knoll's failure to testify. Any reference to Knoll's failure to testify or to the burden of proof was, at most, oblique. And even assuming the remarks could be characterized as misconduct, they were neither flagrant nor ill intentioned and could easily have been cured.

Last, Knoll contends cumulative misconduct deprived him of a fair trial. We disagree. Whether viewed individually or cumulatively, the prosecutor's remarks in this case did not deprive Knoll of a fair trial. In addition to our observations above, we note that the court instructed the jury that the prosecution had the entire "burden of proving each element of each crime beyond a reasonable doubt" and that they must disregard any remark, statement, or argument that was not supported by the instructions or the evidence. We presume that juries follow the court's instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). In these circumstances, and in light of the jury's acquittal on two of the counts, any misconduct did not deprive Knoll of a fair trial.

Knoll raises several additional claims pro se in a statement of additional grounds for review. He contends his conviction for unlawful possession of a firearm is not

supported by sufficient evidence because there was no evidence that he possessed an operable firearm. Evidence is sufficient if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find each element proven beyond a reasonable doubt. State v. Montgomery, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). In challenging the sufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). For purposes of Knoll's offense, "firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(7), .040(1)(a); RCW 9A.56.310(5). A weapon satisfies this definition as long as it is a real gun; it need not be operable. State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998); State v. Raleigh, 157 Wn. App. 728, 734-35, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011); State v. Anderson, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), rev'd on other grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000).

Here, the gun was admitted as an exhibit and given to the jury for deliberations. The owner of the gun identified it and testified that she has a concealed weapon permit. Officer Tom Wenzel identified the gun as a .22 caliber Smith and Wesson revolver. He testified that the gun was loaded.[5] Viewed in a light most favorable to the State, this evidence was sufficient to support Knoll's conviction. Anderson, 94 Wn. App. at 162-63

[5] We note that even if a showing of operability were required, the fact that Lee's gun was loaded supports an inference that it was operable. Anderson, 94 Wn. App. at 163.

(trier of fact could find gun was a firearm where police officers testified the gun was loaded, appeared to be a real gun, the gun displayed a serial number, and gun was admitted as an exhibit at trial).

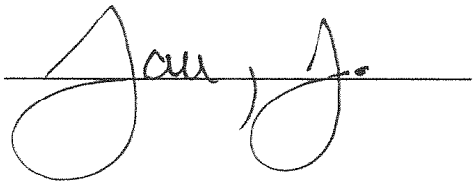
Knoll also contends his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed above and to the court's consideration of the jury inquiry in his absence. To establish ineffective assistance of counsel, Knoll must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). He must also establish the absence of any legitimate strategic basis for the challenged conduct and overcome a strong presumption that counsel was effective. McFarland, 127 Wn.2d at 335-36. Knoll has not carried his burden.

Whether to object during trial is a matter of strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). In this case, Knoll's trial counsel could have reasonably concluded that the prosecutor's closing arguments were not unduly prejudicial and/or that objecting would draw unnecessary attention to them and do more harm than good. Counsel could also have reasonably determined that Knoll's presence during the response to the jury inquiry was unnecessary and would not have assisted his defense. Knoll has not overcome the strong presumption of effective assistance of counsel.

Finally, Knoll contends the court erred in giving the jury an instruction on accomplice liability "when there was no evidence to even suggest Mr. Knoll was an

accomplice." Statement of Additional Grounds at 15. But as defense counsel conceded below, Gerrish told police three different versions of events, including one in which Alarmillo took the purse and then switched seats with Knoll. Given this evidence, the court did not err in giving an accomplice instruction.

Affirmed.



WE CONCUR: