

March 21, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW LYNN FERGUSON,

Appellant.

No. 48081-6-II

UNPUBLISHED OPINION

MAXA, A.C.J. – Matthew Ferguson appeals his convictions for two counts of vehicular assault arising from a head-on collision with an oncoming car. We hold that (1) the prosecutor did not commit misconduct during closing argument by referencing Ferguson’s own statements that were admitted into evidence, (2) defense counsel was not ineffective for failing to object to the prosecutor’s argument, and (3) we cannot consider Ferguson’s ineffective assistance claim based on defense counsel’s alleged failure to retain an expert because that claim depends on facts outside the record. Accordingly, we affirm Ferguson’s convictions.

**FACTS**

Shortly before 2:00 AM on February 8, 2015, Ferguson was driving a pickup truck northbound along a rural two-lane highway. He had consumed three or four alcoholic drinks earlier that evening, and his blood alcohol level later was measured at 0.12 grams per 100 milliliters.

A witness saw Ferguson's truck swerve several times over the road's double-yellow dividing line. The road curved to the right and the witness saw Ferguson drive into the southbound lane, towards an oncoming car. Ferguson and the car collided head-on.

A collision technical specialist with the Washington State Patrol investigated the collision. He concluded based on several pieces of physical evidence that Ferguson's truck had been in the oncoming lane of traffic when the vehicles collided.

The State charged Ferguson with two counts of vehicular assault, one count for each of the other car's occupants. In addition, the State filed two aggravating factors: demonstrating an egregious lack of remorse under RCW 9.94A.535(3)(q) and causing injuries that substantially exceeded the bodily harm needed to satisfy the underlying charge under RCW 9.94A.535(3)(y). The trial was bifurcated between a guilt phase and an aggravating factors phase.

During the first phase of the trial, the State presented evidence that after the collision, Ferguson was upset and screaming that the collision was the other driver's fault. An investigating officer testified that Ferguson was agitated and was yelling that the other driver and her passenger were "hood rats," that they were after his money because he was middle class, and that his family owned Ferguson Construction. Report of Proceedings (RP) (Aug. 18, 2015) at 83-84. Ferguson calmed down briefly while being treated for his injuries, but soon became agitated and again started yelling at the other car.

The witness testified that she never saw the oncoming car leave its lane of travel. Ferguson testified that the car had actually been traveling in his northbound lane immediately before the collision. He testified that, in an attempt to avoid the car, he first drove into the

southbound lane and, when the other car moved back into its own lane, he attempted to swerve to the right, back into his northbound lane.

As part of the State’s closing argument in the first phase of the trial, the prosecutor recounted Ferguson’s statements immediately after the collision. She stated that he was “concerned that these young women want his money. He calls them hood rats. He said that they were poor and they wanted his money because he’s a Ferguson and his dad owns Ferguson Construction.” RP (Aug. 20, 2015) at 111. She asked the jury whether these were things a sober person would say and whether someone in a state like that should be driving. Ferguson did not object to these statements.

After the close of the first phase, the jury returned a guilty verdict on both counts of vehicular assault. After the second phase, the jury found that neither aggravating factor applied.

Ferguson appeals his convictions.

## ANALYSIS

### A. PROSECUTORIAL MISCONDUCT

Ferguson argues that the prosecutor committed misconduct when she referred in closing argument to Ferguson’s statements that the persons in the other car were hood rats and were after his money. He claims that the prosecutor’s arguments appealed to the jury’s emotions. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must show that “in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). We review the prosecutor’s conduct and whether prejudice resulted “by examining

that conduct in the full trial context, including the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’ ” *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

It is improper for a prosecutor to appeal to the jury’s passion or prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). A prosecutor has a duty to ensure that a jury verdict is not tainted by prejudice and is based on reason. *Id.* at 553. The prosecutor therefore commits misconduct by appealing to the jury’s passion and prejudice. *See id.* at 554-56. But it is not improper for a prosecutor to make an argument that might evoke an emotional response if the argument is based on relevant evidence. *See State v. Brett*, 126 Wn.2d 136, 179-80, 892 P.2d 29 (1995). “ ‘A prosecutor is not muted because the acts committed arouse natural indignation.’ ” *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (quoting *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

Here, Ferguson’s statements that the people in the other car were hood rats and were after his money would tend to prejudice the jury against him. But the statements were directly relevant to whether Ferguson was intoxicated, which was at issue. The prosecutor expressly referenced Ferguson’s statement in the context of that issue, asking, “[A]re these things that someone sober is going to be saying?” RP (Aug. 20, 2015) at 111. Whether Ferguson would have made such statements had he been sober was within the wide latitude provided to the prosecutor to argue inferences from the evidence. *See State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

Further, the prosecutor did little more than restate Ferguson's statements, which were admitted into evidence without objection. The prosecutor's recitation of Ferguson's statements did not unfairly characterize or embellish anything in the record and did not introduce anything outside of the record.

We hold that the prosecutor did not commit misconduct by referring to Ferguson's post-collision statements.

**B. INEFFECTIVE ASSISTANCE OF COUNSEL**

Ferguson argues that he received ineffective assistance of counsel because his defense counsel failed to (1) object to the prosecutor's closing argument and request a curative instruction and (2) retain an expert to investigate the collision and present testimony on the issue. We disagree with the first argument and decline to decide the second.

**1. Legal Principles**

We review claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on an ineffective assistance claim, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 33. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the trial's result would have been different. *Id.* at 34.

**2. Objection to Prosecutor's Closing Argument**

Ferguson argues that he received ineffective assistance when his defense counsel failed to object to the prosecutor's closing argument. But as stated above, it was not improper for the

prosecutor to comment on Ferguson's statements. Therefore, Ferguson's defense counsel was not deficient by failing to object. We hold that Ferguson did not receive ineffective assistance of counsel when defense counsel did not object to the prosecutor's closing argument.

### 3. Investigation of the Collision

Ferguson argues that his defense counsel committed misconduct by not retaining an accident reconstruction expert to investigate his claim that the other driver caused the accident by driving in his lane.

Ferguson relies on *State v. Maurice*, where the court granted a personal restraint petition for ineffective assistance brought by a defendant convicted of vehicular homicide. 79 Wn. App. 544, 552, 903 P.2d 514 (1995). In that case, the defendant's truck veered into the path of an oncoming car. *Id.* at 546. Despite the defendant's repeated insistence that a mechanical malfunction had occurred, his defense counsel did not call an expert witness to testify about the vehicle's condition or otherwise pursue the issue. *Id.* at 547, 552. In support of his petition, the defendant submitted a declaration from an accident reconstruction expert stating that there was evidence of faulty repairs to the truck's steering components that, in the expert's opinion, caused the defendant to lose control. *Id.* at 551. In light of that declaration, the court held that the defense counsel's representation was deficient. *Id.* at 552.

By contrast, the record here is insufficient for this court to evaluate Ferguson's claim that defense counsel's representation was deficient. Nothing in the record shows whether defense counsel retained an accident reconstruction expert or, more importantly, what a reconstruction investigation would have revealed. Therefore, we cannot evaluate defense counsel's conduct or whether any deficient conduct caused prejudice.

On direct appeal, we cannot consider facts outside the record in addressing an ineffective assistance of counsel claim. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If a defendant needs to rely on facts outside the record, the appropriate means is to file a personal restraint petition. *Id.* Accordingly, we decline to consider Ferguson's ineffective assistance of counsel claim based on the failure to retain an expert.

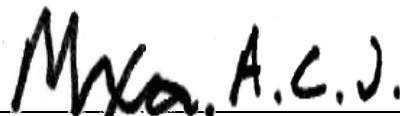
C. CUMULATIVE ERROR

Ferguson argues that, even if no single error warrants reversal, the combined effect of each alleged error denied him a fair trial. Because we find that there was no prosecutorial misconduct or ineffective assistance of counsel, we reject this argument.

CONCLUSION

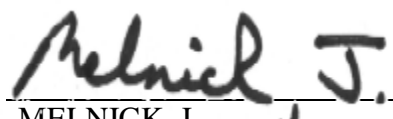
We affirm Ferguson's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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MAXA, A.C.J.

We concur:

  
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LEE, J.

  
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MELNICK, J.