IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICKY DEAN DAVIS, Appellant.	No. 39013-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Ricky Dean Davis guilty of one count of residential burglary and two counts of second degree theft. Davis appeals, arguing that the prosecutor committed misconduct during closing arguments by distorting the evidence such that he stated his personal beliefs about the credibility of a witness. In his statement of additional grounds for review (SAG),[1] Davis alleges a *Brady*[2] violation and that the prosecutor used leading questions to improperly provide unsworn testimony at trial. We hold that (1) the State did not make flagrant and ill-intentioned statements during closing arguments and that (2) Davis's alleged *Brady* violation refers to evidence and information outside the record, making it ineligible for review in a

[1] RAP 10.10(a).

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

direct appeal. Davis's other SAG issue was not properly preserved for our review and lacks merit. Accordingly, we affirm.

FACTS

On April 11, 2008, Angela Powell went next door to the apartment of Cynthia Stahl, her then hospitalized mother, to check on a cat. Powell entered the apartment through an open rear sliding-glass door and saw a woman whom she thought was her sister. Powell began calling out her sister's name but the woman did not respond. Then, Powell noticed a man standing near a front window that faced a street "staring out the window looking back and forth paranoid," "like a lookout," and that the woman was "digging through [her] mom's mail." 1 Report of Proceedings (RP) at 31, 33, 50. Realizing that the man and woman were intruders, Powell began yelling for the couple to get out of the house. A purse had been emptied on a couch, mail strewn around, and an upstairs bedroom closet was "messed up." 1 RP at 38. Stahl's jewelry box had been disturbed.[3] The couple fled, Powell immediately called the police, and the police apprehended the couple a few blocks away within minutes.

The police took Powell to a handcuffed man and woman, who were standing next to a patrol car. She positively identified them as the man and woman she had found in her mother's apartment. A frisk search incident to arrest of the woman, later identified as Davis's wife, Dawn Stephenson,[4] turned up (1) a Mervyns's store credit card in Stahl's name, (2) a Rainer Pacific Bank Visa debit card in Stahl's name, (3) a Moneytree Cash Solution card that had Stahl's

[3] There was conflicting evidence about whether Powell and the police saw a jewelry box upended in the closet or whether it was missing.

[4] Stephenson pleaded guilty to unidentified crimes for her role in this incident in a separate proceeding.

signature on it, (4) three other credit/debit/store bonus cards that contained no identifying information, (5) pieces of mail containing Stahl's medical and financial information, and (6) a set of stolen keys.[5] The police also seized five rings from Stephenson's hands that were later identified as some of Stahl's missing jewelry.[6]

Months later, when Stahl returned to her home, she reported that an entire box of personal documents, her passport, jewelry, a jewelry box, and credit cards were missing. At trial, Powell testified that a day or two prior to the April 11 burglary, she had found Stahl's back door wide open. She did not notice anything missing and locked the back door.

On April 14, the State charged Davis with one count of residential burglary and two counts of second degree theft. The theft charges were specific to the Visa debit card and Mervyns's credit card issued in Stahl's name.

At trial, Stephenson testified in her husband's (Davis's) defense. She testified that in the months preceding the burglary, she became indebted to a drug dealer, Curtis Kelly. After a meeting that Stephenson had arranged with another drug dealer, Dana Wolesley, went sour, Wolesley robbed Kelly at gunpoint. Kelly threatened to harm Stephenson if she did not pay him $5,000 to recoup his losses from the Wolesley robbery. Shortly thereafter, Wolesley offered to help Stephenson get money to pay back Kelly by arranging a meeting with Paul Knox.

Stephenson testified that on the day of the burglary, Knox visited her at a motel where she and Davis had been staying. Stephenson testified that Davis was not around. Stephenson smoked

[5] The record is unclear if the keys were Stahl's spare house keys, Powell's spare keys to her mother's place, or Powell's spare car keys.

[6] The record does not clearly identify whether the man, later identified as Davis, was searched incident to arrest.

a gram of methamphetamine with Knox and learned from him that the back door to Stahl's apartment would be open and she could steal some credit cards. When Davis returned to the motel room, he found Knox there, accused Stephenson of having an affair, and, after Davis and Knox argued, Knox left. Davis insisted on going with Stephenson when she claimed that she needed to go to a friend's house to pick some things up because he suspected that she was really going to meet up with Knox and continue having an affair. Stephenson testified that once the couple got to Stahl's house, she entered through the back door, which was open, and then let Davis in through the front door. Stephenson testified that she had only shuffled through papers in Stahl's front room before Powell caught them and that she had obtained Stahl's rings and an "activated card" from Wolesley and Knox in a drug deal prior to the burglary. 2 RP at 167.

During her trial testimony, Stephenson acknowledged her prior criminal history of multiple felony convictions for crimes involving dishonesty, including identity theft, forgery, first degree theft, and second degree theft. Stephenson admitted that she had previously fabricated identities online, established credit lines for these identities, and then sold the credit lines to others. Stephenson also admitted to being a drug addict for the last 30 years, since the age of 12, and to having a gambling addiction problem. Stephenson testified that at the time of her arrest, she gave false statements to the police because she was "trying to blame whoever [she] could" so that the police might let her go. 2 RP at 167. Stephenson testified that she "get[s] off on crime" but that all of her criminal convictions occurred prior to when she met and

married Davis and that Davis did not know all the specifics of her past criminal activity because she is a "very private person."[7] 2 RP at 160.

A jury found Davis guilty of all three counts as charged. Davis's offender score was 11 for the residential burglary and 8 for the second degree theft convictions. The trial court sentenced Davis to 63 months confinement on the residential burglary conviction and 22 months confinement on each of the theft convictions. These three sentences were concurrent to each other but consecutive to remaining time Davis had to serve on a prior drug offender sentencing alternative sentence. The trial court did not impose community custody. Davis appeals.

ANALYSIS

Prosecutorial Misconduct

Davis contends that the prosecutor committed misconduct during closing argument by asserting his personal beliefs about Stephenson's credibility. The State asserts that the prosecutor's arguments attacking Stephenson's credibility referred to specific evidence admitted at trial. The State also argues that Davis fails to show any prejudice because Stephenson's testimony disparaged her own credibility more than anything the prosecutor said during closing argument. We agree that specific evidence admitted at trial supported the prosecutor's closing argument.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudice is

[7] Stephenson testified that she and Davis shared their past criminal activities with each other "[t]o a point." 2 RP at 158.

established only where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)). Absent a proper objection and a request for a curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *Dhaliwal*, 150 Wn.2d at 578; *Brown*, 132 Wn.2d at 561. A prosecutor cannot state his or her personal belief as to the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). But a prosecutor has latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). "[P]rejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Davis challenges the following portions from the State's closing argument:

> Ladies and gentlemen, I am going to try and be brief with you here. You don't need me giving you a 30 or 45-minute exposition or lecture on why the defendant is guilty. That would be kind of an insult to your intelligence. Because when you look at the evidence, when you look at common sense, when you apply your own understanding and what you know happened there, the defendant is guilty.
>
> . . . [8]
>
> The only thing that points to anything other than the defendant's guilt is

[8] The prosecutor reviewed the accomplice liability jury instruction, reviewed the elements of burglary, and discussed the State's evidence.

> Dawn Stephenson. That's it. That's it. Everything else says the defendant's guilty. So again to Dawn Stephenson, the person. Is Dawn Stephenson someone you can rely on? Someone who, by her own admission, gets off on crimes; who is a dedicated -- by her own word, dedicated drug addict; someone who is a gambling addict; who admits she makes money by stealing people's identities; someone, by her own admission, since 2006 has been convicted of six crimes, all of which involve dishonest behavior: Thefts, forgeries, identity thefts. All of these things reflect on her character and who she is. This is an individual that commits dishonest crimes. It reflects on her character.
>
> She lies to the police. She lies to the police when she tells, according to her own words, that [Davis] hurts her and [Davis] makes her do things that she doesn't want to do. Then she comes on the witness stand and tells you that she was being honest with the police. But that's a lie.
>
> She lies to you because then she comes back around and says, "Oh, but I guess I was lying to them." So she lies to the police, according to her testimony on the stand, and then she lies to you when she says she's being honest to the police. She can't keep it straight. Is that someone that you want to believe? Is that someone that you want to rely on and not applying the presumption that the defendant intended to commit a crime?
>
> And I want to point one other thing out. The notion that Dawn Stephenson wouldn't get up here on the stand and lie for her husband? It's ludicrous. I don't need to tell you that. Remember her own testimony? "I get off on committing crimes." She gets off on committing crimes.
>
> Do you really think she would bat an eye to get up here on the stand and lie to you? Do you really think she would bat an eye to get up on the stand and perjure herself? By her own admission she would get off on it.
>
> So just remember her testimony. Remember that it's not worth a lick. If you believe anything that Dawn Stephenson says, by gosh, she will probably have some property to sell you in the desert. She will probably have some beach property to sell you out in the desert. Dawn Stephenson is not someone you can rely on, not someone that's credible. Don't rely on her testimony.
>
> Look at the evidence as a whole, and that evidence as a whole says that the defendant and his wife were in that property looking to steal, looking to find things that they could use to continue with Dawn Stephenson, [sic] admitted identity theft scam. That's the residential burglary count.

2 RP at 192, 199-201.

Davis did not object to these statements nor did he request a curative jury instruction so the flagrant or ill-intentioned standard applies. *Russell*, 125 Wn.2d at 86. Davis argues that the prosecutor distorted parts of Stephenson's trial testimony so that he could call her a liar. Davis

contends that because there is no evidentiary support for the prosecutor calling Stephenson a liar, the prosecutor's statements must be identified as his personal beliefs. We disagree.

Reviewing the prosecutor's arguments in context, Davis has failed to identify how any of the statements are improper expressions of personal opinion. The prosecutor posed questions to the jury about Stephenson's credibility, suggesting that based on admissions she made during her testimony, jurors should not find her a credible witness. Then he properly cited various portions of her testimony to support his argument that the jurors should not give Stephenson's testimony any credence. *See, e.g.*, *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971).

Moreover, Stephenson's testimony at trial belies Davis's argument that the trial evidence does not support the prosecutor's suggestion that Stephenson lied to the jury. On direct examination, she testified that, at the time of her arrest, she gave the police a statement and she "told them basically everything. I told them everything that was going on." 2 RP at 155. Stephenson did not detail her pretrial statement at trial. During Stephenson's cross-examination, the following occurred:

> [PROSECUTOR]: [A]t some point you are arrested, correct?
> [STEPHENSON]: Correct.
> [PROSECUTOR]: And then you give a handwritten statement; is that correct?
> [STEPHENSON]: Yes.
> [PROSECUTOR]: And I think in your words, according to what you testified to on direct, "I basically told them everything that was going on."
> [STEPHENSON]: Correct.
> [PROSECUTOR]: So you were trying to be truthful.
> [STEPHENSON]: Yeah.
> [PROSECUTOR]: You didn't want to lie to the officers.
> [STEPHENSON]: Correct.
> [PROSECUTOR]: Did you think you might get in more trouble if you began lying to the officers?
> [STEPHENSON]: I -- yeah, probably. I was doing -- yeah. I was pretty much

trying to blame whoever I could in that statement.

. . . .

[PROSECUTOR]: And so according to you, you lied to the police, correct?
[STEPHENSON]: Yes.
[PROSECUTOR]: You told them that this was all [Davis's] idea and you were just going along with it because he hurts you, correct?
[STEPHENSON]: I don't remember telling them it was [Davis's] idea.
[PROSECUTOR]: But you wrote that down that it was [Davis's] idea; you were going along because he makes you do acts you don't want to do?
[STEPHENSON]: I did not write down it was [Davis's] idea.
[DEFENSE]: No statement written --
[THE COURT]: Go ahead and ask your question.
[PROSECUTOR]: Ms. Stephenson, tell me and tell the jury what you meant when you say, "[Davis] hurts me and he makes me do acts I don't want to do?"
[STEPHENSON]: I was trying to get them to blame [Davis].
[PROSECUTOR]: Okay. So, but that wasn't the truth, correct?
[STEPHENSON]: Correct.
[PROSECUTOR]: According to your story, correct?
[STEPHENSON]: Correct.
[PROSECUTOR]: So you lied to the officers?
[STEPHENSON]: Yes, sir.
[PROSECUTOR]: You expected them to believe you, correct?
[STEPHENSON]: Uh huh.
[PROSECUTOR]: But you were lying.
[STEPHENSON]: Yes.
[PROSECUTOR]: And you expected them to believe you just like you expect the jury to believe you now, correct?
[STEPHENSON]: I do expect the jury to believe me now.

2 RP at 166-69. On redirect, Davis asked Stephenson about perjury:

[DEFENSE]: [Y]ou know the difference between right and wrong?
[STEPHENSON]: I do.
[DEFENSE]: And the truth and a lie?
[STEPHENSON]: I do.
[DEFENSE]: Okay. Would you ever lie or not tell the truth to -- in front of a jury and having sworn an oath --
[STEPHENSON]: No.
[DEFENSE]: -- just to save somebody that you care about?
[STEPHENSON]: No, I don't think so.
[DEFENSE]: Okay. Is that what you are doing now?
[STEPHENSON]: No.

2 RP at 172. It was reasonable for the State to question whether Stephenson was trying to mislead the jury insofar as Stephenson initially testified on direct examination that she "told [the police] everything that was going on." 2 RP at 166. In fact, as Stephenson's subsequent testimony reveals, she had omitted telling the jury that "the everything" that she told the police had been a lie. Stephenson only admitted that she had lied to the police during cross-examination. Even in light of Stephenson's subsequent redirect testimony that she had not intentionally perjured herself, the State was still free to present argument that Stephenson had lied to the jury based on her other misleading testimony.

Next, Davis argues that because Stephenson testified that she would not lie under oath, the State could not argue that she "admitted that she would 'get off' on committing perjury." Br. of Appellant at 11. The State is allowed to draw reasonable inferences from the evidence and to express such inferences to the jury. *Hoffman*, 116 Wn.2d at 94-95. Stephenson did testify that she "gets off" on crime, perjury is a crime, and it is up to the jury to determine whether Stephenson lied during her trial testimony. Particularly, in light of Stephenson's history of committing crimes involving dishonesty, the State's argument that Stephenson "gets off" by committing acts of deception, including perjury, is not unreasonable.

Accordingly, the prosecutor did not distort Stephenson's testimony. Instead he referenced evidence to support his arguments and then drew reasonable inferences from that evidence. Davis fails to show that the prosecutor committed misconduct during closing argument.

Moreover, the trial court properly instructed the jury that "[t]he lawyer's remarks, statements, and arguments are . . . not evidence" and that the jury must disregard any "remark, statement, or argument that is not supported by evidence or the law." Clerk's Papers at 25. We

presume a jury follows the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). On the record before us, Davis has failed to show that a further curative instruction would not have corrected any error. Davis's prosecutorial misconduct claim fails.

Exculpatory Evidence

In his SAG, Davis alleges that the prosecutor committed a *Brady* violation by witholding exculpatory evidence. Specifically, Davis claims that the State had an automated teller machine (ATM) photograph taken two days before the burglary that showed Stephenson using Stahl's stolen Visa debit card that formed the basis for one of his second degree theft convictions. Accordingly, Davis argues that this evidence proves that he could not have stolen Stahl's Visa debit card on the day of the burglary. The ATM photograph is not in the record on review and the record is not otherwise adequately developed for this court to address Davis's claim in his direct appeal.

To the extent Davis raises a *Brady* violation, he must prove three things: (1) the evidence at issue is favorable to him, either because it is exculpatory or impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) the suppressed evidence is material, meaning that the absence of the evidence prejudiced him. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). But a *Brady* violation does not exist if the defendant, using reasonable diligence, could have obtained the evidence at issue. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916, 952 P.2d 116 (1998).

To support his *Brady* violation argument, Davis cites to a brief statement in the record that he made at sentencing where he alleged that the State "knew ahead of time, Your Honor,

there was already bank activity on those cards, so we could not have went [sic] over there that day to steal those cards." 2 RP at 253. But this vague statement, which does not describe the alleged evidence that the State had and suppressed, is not adequate for this court to review Davis's claim. More importantly, the alleged exculpatory evidence of the ATM photograph is not included nor referenced in any way in the record on review. On direct appeal, we do not consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995). Moreover, we have no way to evaluate whether with due diligence Davis could have obtained a copy of the ATM photograph. Accordingly, based on the record before us, we cannot address Davis's exculpatory evidence challenge.

In an attempt to develop the record for our review of his *Brady* challenge, Davis attached to his SAG various letters between the prosecutor and the Washington State Bar Association regarding a disciplinary complaint that Davis filed related to this matter. We do not accept evidence into the record on appeal that was not before the trial court. RAP 9.11; *State v. Madsen*, 153 Wn. App. 471, 485, 228 P.3d 24 (2009), *review denied*, 168 Wn.2d 1034 (2010). Moreover, on direct appeal, we do not consider matters outside the record. *See McFarland*, 127 Wn.2d at 338 n.5. ("a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record").

Leading Questions

Last, Davis argues that the State asked leading questions "specific to elements of what constitutes [b]urglary" during its redirect examination of Powell such that the State became a witness and provided unsworn testimony. SAG at 5. At trial, Davis did not object to the State's alleged leading questions. Generally, an issue cannot be raised for the first time on appeal unless

it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Moreover, our review of Davis's cited portions of the record in his SAG reveal that the State asked Powell questions about the layout of her mother's house and the lock on the back door and not the subject matter that he alleges. We note that "the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review." RAP 10.10(c). Accordingly, even if this issue were properly preserved for our review, it is meritless.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.