IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFERY M.R. LARISON, Appellant.	No. 40022-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jeffery Larison guilty of second degree robbery. On appeal, Larison argues that evidence is insufficient to prove that he used force to obtain or retain property belonging to the victim. In a statement of additional grounds for review (SAG),[1] Larison argues that the prosecutor committed misconduct during closing argument by misquoting Larison's testimony and that his counsel was ineffective for failing to object to this misstatement. We hold that (1) sufficient evidence supports the jury's finding that Larison used force to obtain the victim's property, (2) the prosecutor's misquoting of Larison's testimony did not prejudice his right to a fair trial, and (3) defense counsel was not ineffective for failing to object to the prosecutor's misstatement of the defendant's testimony. We affirm.

[1] RAP 10.10(a).

FACTS

On August 27, 2009, Kyle Randall was waiting for a bus in Shelton, Washington, when Larison approached him and challenged him to a fight. Randall declined to fight, and Larison punched him. Larison then took Randall's skateboard and carried it across the street. When Randall followed to retrieve his skateboard, Larison punched him once more. As Randall tried to walk away with his skateboard and call the police, Larison punched him yet again and then walked away without the skateboard.

Sergeant Les Watson of the Shelton Police Department responded to Randall's emergency call. When Watson arrived on the scene, a witness pointed out Larison as the assailant. Watson then approached and detained Larison.

Officer Warren Ohlson of the Shelton Police Department also responded to Randall's call. Ohlson picked Randall up in his patrol car and drove to where Sergeant Watson had detained Larison. While seated in the patrol car about 30 yards from Larison, Randall identified Larison as his assailant.

On September 1, 2009, the State charged Larison with one count of second degree robbery. A jury trial occurred on October 28 through 29, 2009.

At trial, the prosecutor cross-examined Larison:

Q. Do you know who [Randall] is?
A. *Other than seeing him on the stand*, no, I don't.

Report of Proceedings (RP) at 113 (emphasis added).

But during closing remarks, the prosecutor misquoted Larison's response:

> [W]hat I want you to focus on is something that Mr. Larison said in his testimony when I asked him, you didn't know Mr. Randall, did you? You've never seen him before? And he says, *other than that day?* No, I'd never seen him before.

RP at 140 (emphasis added). The prosecutor then drew conclusions from this misrepresentation of Larison's response:

> Well, when did [Larison] see [Randall] on that day if [Larison] didn't go over to the area of that bus stop as he told you? When did [Larison] see [Randall] on that day?
>
> The only other time they would have ever been close enough for [Larison] to have seen [Randall] was when Officer Ohlson drove Kyle Randall in his patrol car—and they stayed in the patrol car—at a distance of about thirty yards from where Jeffery Larison was detained by Sergeant Watson.

RP at 140.[2]

Ultimately, the jury found Larison guilty of second degree robbery. The trial court sentenced Larison to 14 months of confinement. Larison timely appeals.

ANALYSIS

Sufficiency of the Evidence

Larison contends that insufficient evidence supports the jury's verdict because the evidence did not prove that he used force to take or retain the skateboard and because Randall ignored Larison's punches. We disagree and affirm the conviction.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Credibility determinations are for

[2] In his SAG, Larison claims that he requested his counsel to object to the misstatement but was told to be quiet. 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). Larison's instructions to his counsel are not in the record.

the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Camarillo*, 115 Wn.2d at 71; *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To prove that Larison committed second degree robbery, the State must produce evidence showing (1) an unlawful taking (2) of personal property (3) from the person of another or in his presence (4) against his will (5) by the use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. RCW 9A.56.190, .210. In addition, in order to convict Larison of second degree robbery in Washington, the State must prove the nonstatutory element of a specific intent to steal. *See In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005) ("'our settled case law is clear that "intent to steal" *is* an essential element of the crime of robbery'" (quoting *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984))). Criminal intent may be inferred from conduct where plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the court properly instructed the jury that to find Larison guilty of second degree robbery, it had to find that Larison specifically intended to steal Randall's property using force. And, at trial, Randall and two eyewitnesses testified that Larison punched the victim before taking the skateboard. A jury could reasonably infer that Larison's punching of Randall was connected to his intent to take control of the skateboard and commit the theft of the skateboard. Thus, any rational jury could conclude that Larison committed second degree robbery and substantial evidence supports the jury's verdict.

Prosecutorial Misconduct

Larison next argues that the prosecutor committed misconduct during closing argument by misquoting his testimony, and, as a result, he did not receive a fair trial. Although we agree that the prosecutor's statements were inaccurate, his statements did not prejudice Larison. Accordingly, Larison's prosecutorial misconduct claim fails.

Prosecutorial misconduct that affects the overall fairness of a trial warrants reversal when there is a substantial likelihood that the comments affected the verdict. *State v. Traweek*, 43 Wn. App. 99, 107-08, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986). 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 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).

This court views 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. 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); *State v. Anderson*, 153 Wn. App. 417, 428-29, 432, 220 P.3d 1273 (2009).

A prosecutor may not argue facts not in the record or call the jury's attention to matters that the jury has no right to consider. *See State v. Warren*, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). But a prosecutor has latitude in closing arguments 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).

Larison did not object to the prosecutor's statements nor did he request a curative jury instruction, so we review the allegedly improper statements for whether they were flagrant or ill intentioned. *Russell*, 125 Wn.2d at 86. Here, the prosecutor's closing remarks incorrectly recounting Larison's testimony were manifestly erroneous, and the inferences drawn from the misquoted testimony were not reasonable and could have misled the jury. The prosecutor stated that Larison testified that he had never seen Randall "other than that day [of the crime]." RP at 140. But Larison never made such a statement during his testimony. Instead, Larison testified that he did not know Randall "[o]ther than seeing him *on the stand*." RP at 113 (emphasis added). The prosecutor compounded this error by then arguing that Larison could have only seen Randall "on that day" (i.e., the day of the robbery) if he had robbed Randall. RP at 140. Accordingly, the prosecutor's closing argument statements were erroneous.

In order to prevail on his prosecutorial misconduct claim, Larison must also show that this error prejudiced him. *Brown*, 132 Wn.2d at 561. Here, the trial court properly instructed the jury that "[t]he lawyers' remarks, statements and arguments are . . . not evidence" and that the jury must disregard any "remark, statement or argument that is not supported by the evidence or the law." RP at 126. We presume a jury follows the court's instructions. *Swan*, 114 Wn.2d at 661-62; *Anderson*, 153 Wn. App. at 428, 432. Therefore, we presume that the jury properly

disregarded the prosecutor's erroneous remarks because they were not evidence and were not supported by evidence.

Moreover, because Larison failed to object to these statements at trial, he must show that no curative instructive would have cured this error. *Russell*, 125 Wn.2d at 86. In this case, an objection and instruction would have easily corrected and cured any prejudice from the prosecutor's remarks.

On the record before us, Larison has shown that the prosecutor's closing remarks were erroneous. But he has failed to show prejudice to his right to a fair trial or that further curative instructions would not have cured this error. Therefore, we hold that Larison's prosecutorial misconduct claim fails.

Ineffective Assistance of Counsel

Finally, Larison argues that he received ineffective assistance of counsel because his counsel failed to object to the prosecutor's improper remarks. But we have reviewed Larison's prosecutorial misconduct claim despite the lack of objection.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782, *review denied*, 155 Wn.2d 1005 (2005). To establish ineffective assistance of counsel, Larison must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Here, Larison has not shown any prejudice resulting from the prosecutor's misstatement of his testimony and, in light of the victim's testimony, eyewitnesses' testimony, and the jury instructions, we see none. Because both *Strickland* requirements must be met to be successful in a claim of ineffective assistance of counsel, the failure to show resulting prejudice defeats Larison's claim. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

We affirm.

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:

BRIDGEWATER, P.J.

ARMSTRONG, J.