IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY W. GEORGE JR., Appellant.	No. 40421-4-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Anthony W. George, Jr. guilty of second degree taking or riding in a motor vehicle without permission, under RCW 9A.56.075. On appeal, George challenges the court's authority to order a 10-year no-contact order as a condition of his sentence. In a statement of additional grounds (SAG),[1] George also challenges the sufficiency of the evidence supporting his conviction, contends that he received ineffective assistance of counsel, and alleges that the prosecutor engaged in misconduct during his closing argument. The State properly concedes error on the sentencing condition, and George's SAG claims challenging his conviction fail. Accordingly, we affirm his conviction and remand for correction of the term of the no-contact order in the judgment and sentence.

[1] RAP 10.10.

FACTS

On September 6, 2009, CTM Unlimited Auctions in Oakville, Washington, reported a 1989 white Jeep Cherokee stolen from its lot. On the night of September 10, while on patrol, Officer Warren Ayers of the Chehalis Tribal Police observed a white Jeep Cherokee travelling towards him from the opposite direction. No other cars or people were on the road at this time. Ayers ran a license plate check on the Jeep and learned that it had been reported stolen. Ayers turned his vehicle around and activated his emergency lights. He watched the Jeep turn into a residential driveway, so he pulled up and parked behind the car. He approached the car and checked to see if there was anyone inside of it. Ayers did not see anyone in the car or on the property around the car. A few moments later the homeowner came out of the house to speak with Ayers. Ayers learned that the Jeep did not belong to the homeowner and had no reason to be in parked in the driveway.

Officer Ayers walked back down the driveway and saw a man, later identified as George, walking across the road. Ayers handcuffed George and detained him in the back of his patrol car. Ayers took George's wallet in order to obtain identification and kept it until he turned it over to the arresting officer. Ayers noticed that there was dew covering the homeowner's lawn and that the bottoms of George's pants were wet.

Officer Matthew Bogart of the Chehalis Tribal Police arrived and helped Officer Ayers secure the scene. Bogart searched an area around a dumpster near the driveway and found a Crown Royal bag[2] containing a white towel, several glass pipes, and a bindle containing a white

[2] There is no testimony that the bag was either wet or dry.

powdery substance[3] on the ground just underneath the dumpster.

Shortly thereafter, Deputy Paul Fritts of the Grays Harbor County Sheriff's Department arrived at the scene. Fritts spoke with Officers Ayers and Bogart and then searched the Jeep. Two receipts with the name "Anthony George" were found in the vehicle's center console. Report of Proceedings (RP) at 54. Also, various hand tools, a weedeater, and gas cans were found in the vehicle.

After searching the vehicle, Deputy Fritts spoke with George, who was still in the back of Officer Ayers's patrol car. Fritts read George his *Miranda*[4] rights and George agreed to speak with him.[5] George told Fritts that he did not know anything about the Jeep and that he was walking to his sister's house. George stated that his friend had dropped him off on the road because his friend did not feel like driving any further. When Fritts asked George for information about his friend, George said that his friend's name was "Tom" but that he did not know his friend's last name, did not know his phone number, and did not know where his friend lived. RP at 59. Fritts asked George about the receipts found in the car and he replied that "they must have been planted." RP at 60.

On September 25, 2010, the State charged George with second degree taking or riding in a motor vehicle without permission. On January 25, 2010, the State filed an amended information charging George with second degree taking or riding in a motor vehicle without permission and

[3]The parties stipulated that the substance found on the glass pipes was methamphetamine.

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[5] The record does not indicate exactly when, if ever, any officer formally placed George under arrest or if a search incident to arrest of George's person occurred.

possession of methamphetamine. A one-day jury trial began on February 9, 2010. At trial, George testified that he had never been in the Jeep. He also explained that the receipts had been in his wallet up until the time Officer Ayers took his wallet in order to identify him. Ayers denied removing the receipts from George's wallet and placing them in the center console of the car. The jury entered a guilty verdict only for second degree taking or riding in a motor vehicle without permission. The trial court sentenced George to 30 days in jail and converted 23 days to community service. As a condition of his sentence, the trial court imposed a 10-year no-contact order prohibiting George from going on the premises of CTM. George appeals his conviction and the no-contact order.

ANALYSIS

Sentencing Condition

First, George argues that the court exceeded its authority when it imposed a 10-year no-contact order with CTM as a condition of the sentence. The State correctly concedes error.

A trial court's authority to impose conditions of a sentence is limited to the authority provided by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Thus, the term of a no-contact order cannot exceed the maximum term for the crime. *State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). George was convicted of second degree taking or riding in a motor vehicle without permission. This is a class C felony which carries a maximum penalty of five years. RCW 9A.20.021. Therefore, the trial court exceeded its authority when it imposed a 10- rather than 5-year no-contact order as a condition of George's sentence.

We accept the State's concession and remand to the trial court for correction of judgment

and sentence.

Sufficiency of Evidence

In his SAG, George challenges the sufficiency of the evidence supporting his conviction for second degree taking or riding in a motor vehicle without permission. Specifically, George argues that no witness at trial testified to ever seeing George in or driving the Jeep. We hold that sufficient evidence supports George's conviction.

Evidence is sufficient to support a conviction if, 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. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). We do not need to be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the jury's verdict. *State v. Jones*, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999).

A person is guilty of second degree taking or riding in a motor vehicle without permission if he rides in the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken. RCW 9A.56.075. George argues that unless someone saw him riding in the stolen car, the evidence is insufficient to prove the charge.

But eye witness testimony that George was in the car is not necessary. A reasonable jury could infer that George was riding in the stolen car based on the fact that the Jeep was the only vehicle Officer Ayers observed on the road, George was the only person found near the car, and George's receipts were found in the car. Moreover, based on George's wet pants and the dew on the ground, a reasonable jury could also infer that George had exited the Jeep and hid behind the dumpster in an attempt to escape because he knew the car had been stolen. To the extent George challenges that his statements to police and trial testimony explain his presence on the road, the jury decides issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Camarillo*, 115 Wn.2d at 71; *Walton*, 64 Wn. App. at 415-16. Accordingly, we hold that there was sufficient evidence to support the jury's verdict finding George guilty of second degree taking or riding in a motor vehicle without permission.

Ineffective Assistance of Counsel

Next, in his SAG, George contends that he received ineffective assistance of counsel because his defense counsel (1) made him look bad in front of the jury and (2) did not call his sister as a witness in his defense. We disagree.

To establish ineffective assistance of counsel, George 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).

First, George alleges that his defense counsel made him look bad to the jury during the

following line of questioning:

> [DEFENSE] Did you get an opportunity to observe the defendant—I know you said you didn't talk to him. Did you observe him at all that night?
> [OFFICER BOGART] Just in the back of the patrol car.
> [DEFENSE] How did he appear?
> [OFFICER BOGART] Nervous.

RP at 44.

George's allegation fails to satisfy either prong of the *Strickland* test. There is nothing in the challenged questions that demonstrates a deficiency that would overcome the presumption that an attorney is acting reasonably. *Pirtle*, 136 Wn.2d at 487. In addition, there is no indication that Officer Bogart's observation that George acted nervously while in the back of the patrol car was improper or changed the outcome of the trial. Therefore, George's allegation that he received ineffective assistance of counsel lacks merit.

George also alleges that his counsel was ineffective for failing to call his sister as a witness. Because this allegation refers to alleged evidence outside the record on review, we cannot address this allegation on direct appeal. *McFarland*, 127 Wn.2d at 335 (where ineffective assistance of counsel claim is brought on direct appeal, reviewing court will not consider matters outside the record; a personal restraint petition (PRP) is the appropriate means of having the reviewing court consider matters outside the record).[6]

Prosecutorial Misconduct

Finally, in his SAG, George alleges that the prosecutor engaged in misconduct by

[6] We note that George included the notation "(PRP)" in front of the allegation in his SAG regarding his defense counsel's failure to call his sister as a witness. SAG at 2. Assuming that George was attempting to file a PRP pursuant to RAP 16.3, noting an issue in a SAG is not the proper process for filing a PRP. RAP 16.7, 16.8. Accordingly, we address this allegation as a SAG argument and apply the standards used in direct appeals.

"manipulation of [the] jury" in his closing arguments and referring to evidence not presented at trial. SAG at 1.

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 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. We presume a jury follows the trial court's instruction. *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, 432, 220 P.3d 1273 (2009), *review denied*, No. 84234-5 (Wash. Nov. 2, 2010).

George did not object to the State's statements nor did he request a curative jury instruction, so we review the allegedly improper statements applying the flagrant or ill-intentioned standard. *Russell*, 125 Wn.2d at 86. George cites only generally to the State's closing argument and rebuttal. Based on our review of the record, the State's closing arguments refer specifically

to evidence that was presented at trial and reasonable inferences that could be drawn from this evidence. The State's arguments were neither improper nor flagrant or ill intentioned.

Furthermore, George alleges misconduct when the prosecutor stated,

> And there's a lot of other stuff that was in that car that got in that car in the four days after it was stolen and before Mr. George was found riding around in it.

RP at 97.

Specifically, George alleges that the prosecutor's comment that he "was found riding around in [the car]" was improper because there was no eye witness testimony that he was actually riding in the car, thus the prosecutor was referring to facts outside of the evidence. RP at 97.

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).

Here, the State argued a reasonable inference from the evidence presented in this case. Police found a Jeep that had been in motion and was parked and empty at a residential home where the homeowner denied ownership. Police found George walking nearby and explicitly noted a lack of cars or other people on the road in the area. Some of George's personal effects, specifically the receipts, were found in the Jeep. Accordingly, when the State argued that police found him "riding around" in the Jeep, it merely highlighted a reasonable inference that the jury could draw from the evidence. Moreover, the trial court instructed the jury that

> [t]he attorneys' remarks, statements and arguments are intended to help you

> understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

Clerk's Papers at 7. We presume a jury follows the court's instructions. *Swan*, 114 Wn.2d at 661-62; *Anderson*, 153 Wn. App. at 428, 432.

We affirm George's taking or riding in a motor vehicle without the owner's permission conviction, accept the State's concession of sentencing error on the duration of the no-contact order, and remand for correction of the judgment and sentence.

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.