IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHAN RAY WINDFIELD, Appellant.	No. 38700-0-II UNPUBLISHED OPINION

Penoyar, J. — Nathan Windfield appeals his convictions of unlawful possession of a controlled substance with intent to deliver—cocaine, unlawful possession of a controlled substance—less than 40 grams of marijuana, resisting arrest, and first degree unlawful possession of a firearm. He argues that the State failed to present sufficient evidence that he possessed a firearm, possessed cocaine with the intent to deliver, possessed marijuana, or resisted arrest. Additionally, he asserts that the trial court erred when it refused to give an unwitting possession instruction. Finally, Windfield contends that the prosecutor committed misconduct during her closing and rebuttal arguments. We affirm.

FACTS

On February 7, 2008, police officers responded to an altercation in a Tacoma parking lot. Witnesses testified that an African American man, wearing a black puffy jacket and a blue New York baseball cap, pulled a gun out from underneath his jacket during an argument with another man. The gun appeared to be a small, semiautomatic Glock. Witnesses testified that the suspect drove away in a silver Chrysler Sebring. Nicholas Nagel testified that the suspect left the scene with no passengers in the vehicle.[1]

An officer transmitted a description of the suspect and the vehicle, including the license plate information, over the radio. Approximately eight minutes after receiving the license plate information, Officer Henry William Betts and his partner observed a silver Chrysler Sebring driving in the opposite direction. Betts verified that the license plate and description of the Chrysler matched the reports and followed the Chrysler to a Shell gas station. Betts parked his unmarked car across the street and observed the Chrysler with binoculars. He observed the driver, later identified as Windfield, exit the car, enter the gas station, come back to the car, and then pump gas.

Betts noticed two black men in the Chrysler, one in the passenger seat and one in the back seat. One passenger wore a button-up white and beige shirt, black jacket, and blue jeans, while the other passenger wore a red jacket. Betts testified that he did not remember the passenger's black jacket as being puffy. Windfield wore a heavy black jacket and a blue baseball cap.

As the patrol cars entered the parking lot, Windfield tried to hide behind the gas pumps. The two passengers got out of the car and began walking away. The officers activated their car lights and gave verbal commands to Windfield and the other two men. Windfield ran in an eastbound direction and the other two men complied with the commands.

Several officers chased after Windfield. Betts drove his car into the Shell parking lot in an attempt to stop Windfield, but Windfield ran around the front of the police car. Betts and his partner then exited their car and chased Windfield on foot. Officers Jared Williams and Lopez

[1] At trial, Officer Samuel Lopez testified that he received information over the radio that the suspect had forced a female into the vehicle. Officer Henry William Betts testified that, according to reports, there was more than one person in the Chrysler; however, none of the witnesses to the altercation, who testified at trial, attested to this information. Scott Blessum and Nagel both testified that they saw just one person enter the car.

followed Windfield in their car. When they arrived at a dead end, they exited their vehicle and pursued Windfield on foot. Williams and Lopez testified that they never lost sight of Windfield during the chase.

Windfield ran through the parking lot of an apartment complex, up a small hill, and into the yard of a residence where he fell to the ground. Numerous officers tried to detain him. Windfield resisted. Lopez applied an electronic control tool to Windfield three times. Lopez subsequently searched Windfield and found a shoulder harness with an empty pistol holster on one side and a loaded Glock 21 magazine on the other side.

Lopez testified that Windfield was wearing a dark-colored, puffy jacket at the time he was apprehended. Windfield did not have a hat when he was taken into custody. However, Williams recovered a baseball cap nearby that looked similar to the one he saw on Windfield at the gas station.

Betts returned to the Shell gas station and searched the car. He found three grams of marijuana in the center console cup holders and a purple cloth bag inside the center console. The cloth bag held a plastic sandwich baggy with a second baggy inside of it; the second baggy contained several two gram bindles of cocaine. Betts also found a digital scale, with white residue on its face, and a black box with a Glock label on it, containing paperwork for a tactical light, in the console. Betts also located a loaded Glock 21 with an attached tactical light under the passenger seat floor mat. He testified that it would be a "[l]ong reach" to get the gun while seated in the driver's seat. Report of Proceedings (RP) (Nov. 17, 2008) at 440. The Chrysler was registered to a rental car company. There were no documents in the vehicle that tied any individual to the car.

The State charged Windfield with unlawful possession of a controlled substance, cocaine, with intent to deliver; unlawful possession of a controlled substance, forty grams or less of marijuana; resisting arrest; and first degree unlawful possession of a firearm. The State later amended the charges to add one count of bail jumping.[2]

At trial, the State called Tacoma Police Narcotics Detective Terry Krause as an expert witness. Krause testified that the cocaine had the "same color, consistency, shape, [and] packaging as typical crack cocaine." RP (Nov. 17, 2008) at 512. He stated that the packaging, the quantity, and the lack of any device to ingest the crack cocaine all indicated the drugs were for delivery to other people. Tacoma Police Department Detective Brian Vold testified that the firearm located in the Chrysler would not fit into Windfield's holster with the tactical light attachment, but it would fit without the attachment. Vold also demonstrated how to remove the attachment. Vold tested the firearm prior to trial and determined that the magazine found on Windfield fit into the weapon.

Windfield testified that he was never in the Chrysler. He testified that he was smoking marijuana in a secluded area when he saw a police car pull into the Shell gas station and a black male standing by a gas pump. According to Windfield, the man ran toward him when the police officer got out of his car. Windfield further testified that he ran, because "I was smoking marijuana in the open kind of, you know, outside. I had warrants. I had a couple warrants. I didn't want to get in trouble." RP (Nov. 18, 2008) at 634. Windfield admitted to wearing a holster but explained that he was wearing it because "[w]ell, I know a holster is for a gun. Okay. I can't buy a gun. For some reason, I thought I wanted a gun." RP (Nov. 18, 2008) at 632. He

[2] Windfield does not appeal his bail jumping conviction.

testified that he never obtained a gun. He also denied that the holster contained a magazine.

At trial, the defense proposed an unwitting possession instruction because the "drugs were concealed" in the car. RP (Nov. 18, 2008) at 659. The trial court asked the defense if it was proper to give such an instruction because "[y]our client is not saying he was in unwitting possession. He is saying I wasn't even in the car." RP (Nov. 18, 2008) at 659. The trial court stated, "You are saying if the jury finds he was in the car, even though you say he wasn't, then you are saying that his possession would be constructive, but it would be unwitting." RP (Nov. 18, 2008) at 659. The trial court told the defense that "I will keep an open mind until you submit [the instructions] and read them." RP (Nov. 18, 2008) at 660. Ultimately, the trial court refused to submit the instruction to the jury. The defense objected:

> The defendant is entitled -- the instruction says the defendant is entitled to the benefit of all of the evidence that comes in, whether or not he presents it, regardless of who puts the evidence on. In this case, the argument from the State is that he's the driver. If he's the driver of the car, the jury agrees with that, then the jury could find, based on that fact that he was, in fact, in the car, and that he had no knowledge that that was there, no way he could have known, he's entitled to the benefit of that evidence. That's my reasoning. On the one hand, it is like the State gets it both ways here. They can say, well, he doesn't get the benefit of an unwitting possession because he wasn't in the car, but they want to say that he was in the car and therefore he has dominion and control over what is in there. They are getting the benefit of it both ways.

RP (Nov. 18, 2008) at 664-65. The defense also stated, "The defendant said that he was not in the car. The State says he was in the car . . . . If the jury agrees and puts him in the car, then they could also find that he had no knowledge and unwitting constructive possession." RP (Nov. 18, 2008) at 665.

During her closing argument, the prosecutor said, "Mr. Blessum testified that he saw the defendant reach under his jacket." RP (Nov. 18, 2008) at 676. The defense objected on the

grounds that Blessum "[d]id not identify the defendant. Identified a person at the scene." RP (Nov. 18, 2008) at 676. The court overruled the objection, stating that "the jury has both the facts and the law." RP (Nov. 18, 2008) at 676. The prosecutor continued her argument, stating that "Mr. Blessum testified that the person he saw in the parking lot reached under his jacket in a manner, and he demonstrated like this (indicating)." RP (Nov. 18, 2008) at 676.

The prosecutor also argued the following in her rebuttal: "In addition, I believe [Betts] testified as to the clothes that [the two passengers in the Chrysler] were wearing. Neither of them was wearing a black jacket or a New York Yankee's baseball hat. The young gentleman was wearing either white or tan." RP (Nov. 18, 2008) at 729. The defense objected on the grounds that the prosecutor was arguing facts not in evidence. The court overruled the objection. The prosecutor also stated, "We have people in the original scene, Mr. Blessum and Mr. Nagel, both who said I saw him pull a gun, I saw that person pull a gun out from underneath and wave it around." RP (Nov. 18, 2008) at 733. Defense counsel did not object.

On November 19, 2008, the jury convicted Windfield on all counts. By special verdict, the jury found that Windfield was armed with a firearm while he possessed the cocaine with intent to deliver it. The jury also found that he possessed the cocaine, with the intent to deliver, within 1,000 feet of a school district designated school bus route stop. The trial court sentenced Windfield to 120 months of confinement. He now appeals.

ANALYSIS

I. Sufficiency of the Evidence

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence is not to be considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A. First Degree Unlawful Possession of a Firearm

Windfield argues that the State failed to prove the element of possession on the unlawful possession of a firearm charge. We disagree.

A person commits the crime of first degree unlawful possession of a firearm by having in his possession or his control any firearm after having previously been convicted of any serious offense. RCW 9.41.040(1)(a). Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the item is in the actual, physical custody of the person charged with possession. *Callahan*, 77 Wn.2d at 29. Constructive possession occurs when the person charged with possession exercised dominion and control over the item or the premises where the item was found. *See State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). We consider an automobile to be a premises. *Mathews*, 4 Wn. App. at 656. Mere proximity to the item is not sufficient to prove possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Windfield's reliance on *Callahan*, 77 Wn.2d 27, and *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997), is misplaced. In *Callahan*, our Supreme Court held that the

defendant did not have constructive possession of drugs when drugs were found near the defendant, and the defendant was a guest, but not a tenant, of the premises. 77 Wn.2d at 31. In *Echeverria*, the court held that evidence did not support the conclusion that the defendant, a juvenile, constructively possessed a throwing star found beneath the driver's seat of the car he drove, because the throwing star was not visible and close proximity alone was not enough to show constructive possession. 85 Wn. App. at 784. Notably, the court also concluded that there was no evidence that possession of a throwing star was a prohibited act. *Echeverria*, 85 Wn. App. at 780, 784.

In this case, the State presented evidence that Windfield matched the description of the man who drove away from a parking lot fight in a Chrysler with no passengers.[3] The State also presented evidence that approximately 20 minutes after leaving the scene of the altercation, police officers saw Windfield driving the Chrysler and then fueling the car at a gas station. Windfield's actions demonstrate that he had dominion and control over the premises where the firearm was discovered. The State also presented evidence that the gun in the Chrysler matched the description of the gun that witnesses saw at the scene of the altercation. At the time of his arrest, Windfield was wearing a holster containing a magazine for a Glock 21, the gun found in the Chrysler. In addition, Windfield ran from the police, giving rise to an inference of consciousness of guilt. *See State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). When viewed in the light most favorable to the State, this evidence supports the jury's finding that Windfield had

[3] While eyewitnesses testified at trial that just one person entered the car, Lopez testified that the suspect had forced a female into the vehicle and Betts testified that, according to reports, there was more than one person in the Chrysler. Regardless, this still leaves Windfield, the driver of the Chrysler, in constructive possession of the car.

dominion and control over the firearm.

B. Unlawful Possession of a Controlled Substance with Intent to Deliver

Windfield argues that the State failed to prove the elements of possession and intent to deliver with regards to his unlawful possession of cocaine with intent to deliver conviction. *See* RCW 69.50.401. Again, we disagree.

As discussed, the State presented evidence that Windfield drove the Chrysler, giving him constructive possession of the premises where the cocaine was found. The center console contained cocaine, a scale, and a box for the tactical light attachment, indicating that Windfield knowingly used the center console to store items. In addition, the presence of a scale, the packaging of the cocaine, and the absence of paraphernalia to use the cocaine support the conclusion that Windfield possessed the cocaine with the intent to deliver. Windfield also ran from the police, giving rise to an inference of consciousness of guilt. *See Bruton*, 66 Wn.2d at 112-13. When viewed in the light most favorable to the State, these facts support Windfield's unlawful possession of cocaine with intent to deliver conviction.

C. Unlawful Possession of Forty Grams or Less of Marijuana

Windfield argues that the State failed to prove the element of possession in the unlawful possession of less than 40 grams of marijuana conviction. *See* RCW 69.50.4014.

At trial, the State presented evidence that, as the Chrysler's driver, Windfield had dominion and control over the marijuana in the center console cup holders, an area readily accessible to the driver. When viewed in the light most favorable to the State, these facts support Windfield's conviction.

D. Resisting Arrest

Assignments of error must be accompanied by argument with supporting legal authority

and references to the record. *See State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(6). Windfield argues that there was insufficient evidence that Mr. Windfield resisted arrest in the assignments of error section of his brief. However, he fails to include argument in his brief that supports this assertion. We therefore do not address this issue.

We have found sufficient evidence to support each of the charges against Windfield and the trial court properly denied these motions.

II. Unwitting Possession Jury Instruction

A. Issue Preserved for Appeal

Windfield argues that the trial court erred when it refused to give an unwitting possession instruction for the unlawful possession of a firearm charge, the unlawful possession of cocaine with intent to deliver charge, the lesser included offense of possession of cocaine, and the unlawful possession of 40 grams or less of marijuana charge. We hold that the trial court did not err by refusing to give an unwitting possession instruction.

First, the State, citing CrR 6.15, argues that Windfield did not properly preserve this issue for appeal. We agree, but only as to the firearm charge. Our Supreme Court has held that an exception is sufficient when "an exception is taken in such a fashion that the purpose of the rule requiring specificity is satisfied, *i.e.*, so that the trial court is informed of the alleged error, thereby affording it the opportunity to rectify any possible mistakes without the necessity and expense of appeal." *State v. Gosby*, 85 Wn.2d 758, 763, 539 P.2d 680 (1975).

The record does not show that the defense specified the number, paragraph, and particular part of the instruction to be refused. However, defense counsel did raise an objection to the trial court's refusal to give an unwitting possession defense, giving the trial court an opportunity to

correct any error. Accordingly, we find that Windfield properly preserved this issue for appeal. However, there is no record that the defense proposed an unwitting possession instruction for the unlawful possession of a firearm charge. When the defense proposed an unwitting possession instruction to the trial court, he argued that "these drugs were concealed. They were not in plain sight." RP (Nov. 18, 2008) at 659. Defense counsel did not argue the applicability of the unwitting possession defense to the unlawful possession of a firearm charge during his objection. This issue was not preserved for appeal.

B. The Unwitting Possession Instruction and the Unlawful Possession of Cocaine with Intent to Deliver Charge

Unwitting possession is not a defense to a possession with intent to deliver charge; it is a denial of the intent element. An unwitting possession instruction does not apply to possession with intent to deliver, because "one must know it is a controlled substance in order to intend to deliver it." *State v. Sanders*, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). A requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions. *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). The instructions given allowed defense counsel to fully argue that the State failed to prove the requisite intent.

Furthermore, any error was harmless. Failure to give a jury instruction may be harmless error "if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." *See State v. Hansen*, 46 Wn. App. 292, 297-98, 730 P.2d 706, 737 P.2d 670 (1986) (holding that it was harmless error to fail to instruct on a lesser included offense of unlawful imprisonment when jury rejected the intermediate offense of second degree kidnapping and convicted defendant of first degree kidnapping). Here, the jury

found "(1) [t]hat on or about the 7th day of February, 2008, the defendant possessed a controlled substance; (2) [t]hat the defendant possessed the substance with the intent to deliver a controlled substance; and (3) [t]hat the acts occurred in the State of Washington." Clerk's Papers (CP) at 41. Thus, the jury found that the elements of an unwitting possession defense were disproven beyond a reasonable doubt.

C. The Unwitting Possession Instruction and the Lesser Included Offense

The State acknowledges that an unwitting possession instruction would have been relevant to the lesser included offense of unlawful possession of cocaine, but argues that such an omission was harmless error. We agree that the error was harmless. A trial court's refusal to give an instruction is not grounds for reversal unless it was prejudicial. *State v. Thomas*, 110 Wn.2d 859, 862, 757 P.2d 512 (1988). "It is not prejudicial 'unless, within reasonable probabilities, had the error not occurred, the outcome . . . would have been materially affected.'" *Thomas*, 110 Wn.2d at 862 (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). As discussed, the jury found beyond a reasonable doubt that Windfield knowingly possessed the cocaine. The lesser included offense instruction allowed defense counsel to appeal to any jurors inclined to convict, but who were also open to convict for a lesser offense. An unwitting possession instruction would have undercut this argument. Had Windfield been convicted of mere possession, prejudice would have been apparent, as jurors willing to agree to a lesser offense conviction might also have been open to an acquittal based on unwitting possession. However, here, none of the jurors were persuaded to convict Windfield of only the lesser offense; thus, there was no prejudice.

D. The Unwitting Possession Instruction and the Unlawful Possession of Less

than 40 Grams of Marijuana Charge

Next, the State argues that the unwitting possession instruction is not applicable to the unlawful possession of less than 40 grams of marijuana charge because no evidence was presented at trial to support such an instruction. In general, a trial court must give an instruction on a party's case theory if the law and the evidence support the instruction. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). The court's failure to give such an instruction constitutes reversible error. *Otis*, 151 Wn. App. at 578.

Once the State establishes prima facie evidence of possession, the defendant may assert that he had unwitting possession of the drug. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). A criminal defendant is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. *State v. Buford*, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). A trial court must consider all of the evidence that is presented at trial, without regard to which party presented it, when it is deciding whether or not an instruction should be given. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005). In determining whether the evidence is sufficient to support such an instruction, the trial court interprets the evidence most strongly in the defendant's favor. *Otis*, 151 Wn. App. at 578.

In this case, Windfield testified that he was never in the Chrysler. The State presented evidence that Windfield drove the car and that the center console cup holders contained marijuana. Furthermore, Windfield testified at trial that he had smoked marijuana, indicating he would recognize the substance if he saw it. There was no evidence presented at trial to permit a reasonable juror to find that Windfield unwittingly possessed the marijuana. We conclude that the trial court did not abuse its discretion by refusing to give an unwitting possession instruction.

III. Prosecutorial Misconduct

Finally, Windfield argues that the prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct during her closing and rebuttal arguments. We disagree.

We review a trial court's rulings based on allegations of prosecutorial misconduct for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To show misconduct, the defendant must show that the prosecutor did not act in good faith and that the prosecutor's conduct was both improper and prejudicial. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985). A prosecuting attorney's allegedly improper remarks should be reviewed in 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. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor may not refer to evidence not presented at trial; however, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008). Prejudice occurs if there is a substantial likelihood that the 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)).

Absent a proper objection and a request for a curative instruction, the error is waived unless the conduct was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction. *State v. Charlton,* 90 Wn.2d 657, 661, 585 P.2d 142 (1978). Courts presume jurors follow instructions to disregard improper evidence. *Russell*, 125 Wn.2d at 84.

First, Windfield argues that the prosecutor engaged in prejudicial misconduct when she stated that "Mr. Blessum testified that he saw the defendant reach under his jacket." RP (Nov. 18, 2008) at 676. The State asserts that the prosecutor did not act in bad faith, because she corrected herself after the defense raised an objection to her statement. We agree with the State. Upon resuming her closing argument, the prosecutor stated, "Mr. Blessum testified that *the person* he saw in the parking lot reached under his jacket." RP (Nov. 18, 2008) at 676 (emphasis added). The prosecutor's correction of her earlier statement in front of the jury demonstrates that she acted in good faith and that no prejudice could have resulted from her remark.

Windfield also argues that the following statement, made during the prosecutor's rebuttal argument, constituted misconduct: "In addition, I believe [Betts] testified as to the clothes that [the two passengers of the Chrysler] were wearing. Neither of them was wearing a black jacket or a New York Yankee's baseball hat. The young gentleman was wearing either white or tan." RP (Nov. 18, 2008) at 729. Actually, Betts testified at trial that one passenger wore a non-puffy black jacket and a white and beige button-up shirt, while the other passenger wore a red jacket. The court instructed the jury that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP at 36. It is presumed that jurors follow the court's instructions; the prosecutor's statement was not prejudicial.

Finally, Windfield argues that the prosecutor committed prejudicial misconduct when she stated, "We have people in the original scene, Mr. Blessum and Mr. Nagel [witnesses to the parking lot fight], both who said I saw him pull a gun, I saw that person pull a gun out from underneath and wave it around." RP (Nov. 18, 2008) at 733. There is no record that the defense objected to this statement. This comment was not so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction; therefore, the error is waived.

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.

Penoyar, J.

We concur:

Van Deren, C.J.

Houghton, J.