

NO. 71218-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PEDRO MENDOZA-ESCATEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In order to prove second degree assault by strangulation, the State must prove beyond a reasonable doubt an actual obstruction of the person's blood flow or ability to breathe, or an intent to so obstruct. In the present case, unrebutted testimony established that the victim could not breathe when being repeatedly choked by Pedro Mendoza-Escatel. Is there sufficient evidence to support his conviction?

2. A prosecutor's statements in closing argument may require a new trial if the statements were error, and if the error had a substantial likelihood of affecting the verdict. Here, the prosecutor argued that, although there were conflicts between the testimony of two state witnesses, the witnesses agreed that the defendant choked the victim, and no evidence contradicted that testimony. The trial court specifically instructed the jury that the State had the burden of proof and the defendant had no burden. Has Mendoza-Escatel failed to establish reversible error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Pedro Mendoza-Escatel was charged with assault in the second degree by strangulation. CP 1. The State alleged that during a period of time intervening between May 6, 2013, and May 7, 2013, Mendoza-Escatel assaulted his live-in girlfriend, Katie McAlpin, by strangling her three times – each time restricting her ability to breathe. CP 1, 3. The State amended the information adding the lesser-included crime of assault in the fourth degree. CP 24. The jury convicted Mendoza-Escatel of one count of assault in the second degree by strangulation. CP 6. Mendoza-Escatel was sentenced on November 1, 2013. CP 67. The court imposed a standard range sentence of six months of confinement. CP 67. Mendoza-Escatel appealed. CP 62.

2. SUBSTANTIVE FACTS

a. Facts Of The Assault

Pedro Mendoza-Escatel and Katie McAlpin were involved in a romantic relationship. On the night of May 6, 2013, they met Katie's sister, Molly McAlpin, at the Little Water Cantina for food

and drinks. 2RP 146.¹ Mendoza-Escatel became drunk, angry, and loud toward Katie and Molly, so they left the restaurant without him. 2RP 146-48. Katie and Molly differed as to the precise events between leaving the restaurant and encountering Mendoza-Escatel.

According to Molly, the two sisters left the Cantina and went straight to Katie's apartment² on Minor Avenue East in Seattle. 2RP 76; CP 3. The two were at the apartment for approximately thirty minutes when Mendoza-Escatel arrived at the door with his pants undone and genitals exposed. 2RP 76-77. The initial argument between Katie and Mendoza-Escatel occurred in the hallway of the apartment. 2RP 78-79.³

According to Katie, after the two left the Cantina, they walked to Pazzo's, a pizzeria, where they had additional drinks. 2RP 148. After approximately an hour, Katie and Molly walked from Pazzo's to Katie's apartment. 2RP 149. As Katie and Molly approached the apartment, Mendoza-Escatel was coming from the

¹ Two reports of proceedings were filed for October 7, 2013. The longer one (133 pages) includes all the content of the shorter one. The State will cite to the longer report as 1RP.

² Mendoza-Escatel moved into Katie's apartment one week prior to May 6th and had not yet unpacked his boxed property, his name was not on the lease, and he did not contribute toward rent or utilities. 2RP 153-54.

³ The prosecutor discounted Molly's memory as "sketchy," but emphasized that her testimony was consistent with Katy's as to the assault. 3RP 70 71.

opposite direction with his pants undone. 2RP 150. The initial argument between Katie and Mendoza-Escatel began outside. 2RP 150-51.

When asked why his pants were undone, Mendoza-Escatel said he had just received oral sex. 2RP 80, 150. Katie was angry and told Mendoza-Escatel that he was not welcome at the apartment; however, Mendoza-Escatel entered the apartment and sat on the couch. 2RP 151. Both Molly and Katie attempted to make Mendoza-Escatel leave. 2RP 107, 152. Molly went inside the bathroom to call a friend for help in getting Mendoza-Escatel to leave. 2RP 81.

While Molly was in the bathroom on the phone, Katie grabbed Mendoza-Escatel's arm and attempted to pull him off the couch. 2RP 153. Mendoza-Escatel responded by reaching up to Katie's throat and squeezing her windpipe with enough force to prevent breathing. 2RP 153, 155. Mendoza-Escatel retained his grip on Katie even as she moved from standing over him, to sitting on the couch next to him, to being held down by the throat with Mendoza-Escatel on top of her. 2RP 154-55. Katie kicked Mendoza-Escatel, causing him to momentarily release his grip on her throat, and she called out to her sister in the bathroom.

2RP 155-56; 3RP 39. Mendoza-Escatel then again grabbed Katie's throat and squeezed in the same manner as before, preventing her from breathing. 2RP 156. Molly entered the room to see Mendoza-Escatel releasing his grip on Katie's neck. 2RP 116. Katie's face was red and her eyes were "popping out." 2RP 90. As Mendoza-Escatel's hands came off Katie's throat, she gasped for air and cried. 2RP 82. Molly left the room to call 911, at which point Mendoza-Escatel again grabbed Katie's neck and squeezed. 2RP 157; 3RP 39.

Molly reentered the room while on the phone with 911 and confronted Mendoza-Escatel. 2RP 85; Ex. 18 Track 1 at 1:12. Katie can be over-heard on the 911 recording complaining that Mendoza-Escatel had rammed his fist into her mouth. 2RP 158; Ex. 18 Track 2 at 0:01. At some point, Mendoza-Escatel had also called 911 to report being abused. 2RP 160; Ex. 7 at 1.⁴ Katie grabbed Mendoza-Escatel's phone and continued the 911 call already started. 2RP 161; Ex. 18 Track 2 at 1:43. On both calls the sisters can be heard saying that Mendoza-Escatel was banging his arms and head against the wall in an attempt to self-inflict injury. Ex. 18 Track 1 at 2:05-3:12; Ex. 18 Track 2 at 0:52-1:55. Officers

⁴ Exhibit 18 (Track 2) was Mendoza-Escatel's 911 call. The recording was redacted to exclude the first twenty-nine seconds of audio. 2RP 61-64.

Michaud, Blackburn, and Blase responded to the 911 calls and arrested Mendoza-Escatel, who was noticeably drunk. 2RP 21-22, 47-48, 56.

b. Prosecutor's Statements

During the State's closing argument, the prosecutor acknowledged inconsistencies in the testimony of Molly and Katie McAlpin but emphasized that their testimony was consistent and credible as to the elements of the charge. 3RP 55-73. Defense counsel argued that the inconsistencies in the sisters' testimony were material and counsel questioned the credibility of the witnesses. 3RP 74-86. During rebuttal, the prosecutor stated, "There has been no evidence in this case whatsoever to disprove that he strangled her." 3RP 90. Defense counsel objected on the grounds the prosecutor's argument insinuated a burden on the defendant. 3RP 90. The Court sustained the objection. 3RP 90.

The prosecutor continued:

Okay. There has been - - you have heard no evidence in this case that strangulation did not occur, and there has been numerous cross-examination of these witnesses. They all said the same thing: that he choked her or that Ms. McAlpin reported that she was choked. You heard from none of them that, well, she never claimed she was choked, or I thought he was choking her, but I might have been mistaken . . . And that's what I'm - - that's what I'm implying when I say

there is no evidence. You've heard nothing to contradict that - - those assertion.

And I'm not here minimizing inconsistencies. I'm trying to say, well, don't worry about that those, they're not important.

3RP 90-91. At the conclusion of the rebuttal, the court provided a curative instruction to the jury:

Ladies and Gentlemen, the Prosecutor argued to you that the Defense had not disproved that strangulation occurred. Defense counsel objected, I sustained the objection, and I want to reiterate that. And I'm reading from Instruction No. 3, the State is the Plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists as to these elements.

3RP 92.

After the jury was excused, the prosecutor clarified for the record that it was not his intent to shift any burden to Mendoza-Escatel. 3RP 93-94. When asked if defense counsel had anything, defense counsel stated,

There was one additional matter . . . that I did not object to which I thought was objectionable. The prosecutor also said there's no claim of self-defense, which also shifts the burden. However, my objections were technical in nature and they were not meant as any animus to the Prosecutor. He's been absolutely straightforward in this case and other cases I've had with him, and I just viewed it as in the heat of the moment advocacy, but I objected because I did believe that it inferred a shifting of the burden.

3RP 94-95.

The Court replied: “And that was the Court’s conclusion based on what the Court heard, but we’ll let the record speak for itself on that issue.” 3RP 95.

C. ARGUMENT

Mendoza-Escatel argues there is insufficient evidence to support his conviction for second degree assault by strangulation. This argument should be rejected; the State provided sufficient evidence for a reasonable jury to find beyond a reasonable doubt that Mendoza-Escatel obstructed Katie’s breathing, or that he intended to do so.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 199 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 199 Wn.2d at 201. A claim of insufficiency admits the truth of the State’s evidence and all inferences that

reasonably can be drawn therefrom. Id. Circumstantial evidence and direct evidence are equally reliable and credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

1. SUFFICIENT EVIDENCE SHOWED THAT
MENDOZA-ESCATTEL STRANGLED KATIE
McALPIN BY OBSTRUCTING HER BREATHING.

A person is guilty of the crime of second degree assault by strangulation where he “[a]ssaults another by strangulation.” RCW 9A.36.021(1)(g). Strangulation is defined as “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, *or doing so with the intent* to obstruct the person’s blood flow or ability to breathe.” RCW 9A.04.110(26) (bold and italics added).

An unambiguous statute means what it says. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). By the plain language of this statute, there are two ways the State can prove assault by strangulation. First, if the defendant intentionally assaults another by compressing that person’s neck and *actually obstructs* either the person’s blood flow or ability to breathe, or second, if the defendant intentionally assaults another by compressing that person’s neck

with the intent to obstruct the person's blood flow or ability to breathe. The State is required to prove a specific intent to obstruct only when blood flow or ability to breathe is not *actually* obstructed. When blood flow or the ability to breathe is obstructed, the State is required to prove only the *mens rea* of intent to assault.

The State presented evidence from which a reasonable trier of fact could find Mendoza-Escatel compressed Katie McAlpin's neck and actually obstructed her ability to breathe. Mendoza-Escatel placed his hands on Katie's windpipe and squeezed. 2RP 154-55. Katie testified that at one point during the first choking, "he's like, at this point like on top me of [sic] holding me down and I can't breathe." 2RP 155. Katie testified that she was unable to talk or breathe the second time Mendoza-Escatel choked her. 2RP 156. Molly confirmed that when she walked out of the bathroom and interrupted the second choking, Katie's eyes were "popping out like she was being—she was red and her eyes were like popping out." 2RP 90. When Mendoza-Escatel let go of Katie, "she was crying and she was gasping for air." 2RP 82.

The jury was able to evaluate the witnesses' credibility in light of the 911 calls. The 911 calls were placed either during the third choking or in its immediate aftermath. 2RP 84-85, 157, 160.

The jury could hear the sounds Katie made while having Mendoza-Escatel's fist in her mouth, Mendoza-Escatel's laughter and nonchalant report of abuse, the urgency in Molly's tone of voice ("He just did it again he's done it three times. You have to come here now."), and Katie's adrenaline and fear ("I'm sorry, I'm trembling." "And I'm sorry that you're so angry, but I am terrified."). Ex. 18 Track 1 at 1:12; Ex. 18 Track 2 at 0:01, 1:01, 1:30, 2:31, 2:59; Ex. 6 at 2. These facts are sufficient for a reasonable juror to conclude that Katie's airway was obstructed.

Mendoza-Escatel suggests that because Katie never lost consciousness, the State has failed to prove actual obstruction. Br. of App. at 8. But the statute does not require that obstruction of the airway cause a loss of consciousness, it simply requires that obstruction occur. From the above testimony, a rational trier of fact could conclude that Katie's breathing was obstructed, whether or not it was obstructed long enough to make her pass out.

The State also presented evidence from which a reasonable trier of fact could find that Mendoza-Escatel intentionally tried to obstruct Katie McAlpin's airway, regardless of whether he achieved obstruction. Mendoza-Escatel grabbed the windpipe portion of Katie McAlpin's neck and was "squeezing it really hard." 2RP 154.

The force applied by Mendoza-Escatel's squeezing caused severe pain to Katie McAlpin. 2RP 156 ("It was really hard. It hurt really bad. It felt like something maybe was even like fractured in there . . ."). Mendoza-Escatel continued to grip and apply pressure to Katie's throat even as her body changed positions from standing to sitting on the couch, to him being on top of her and holding her down. 2RP 154-55.

That Mendoza-Escatel three times tried to restrict Katie's breathing, with only seconds between each choking, plainly shows his intent. 3RP 38. Mendoza-Escatel released his initial grip on Katie's throat for a second when she kicked him, but then again "grabbed it just as quickly." 2RP 155-56; 3RP 39. Mendoza-Escatel released this second grip of Katie's throat only when Molly intervened by entering the room. 2RP 90. Once Molly left the room to call 911, Mendoza-Escatel grabbed the throat of Katie for the third time. 2RP 157; 3RP 39. Thus, even if there was insufficient evidence to prove actual obstruction of Katie's airway, the evidence clearly showed an intent by Mendoza-Escatel to cut off her breathing.

For these reasons, Mendoza-Escatel's sufficiency argument should be rejected.

2. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S ARGUMENT WAS IMPROPER AND THAT ANY PREJUDICIAL EFFECT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT, ESPECIALLY IN LIGHT OF THE CURATIVE INSTRUCTION.

Defendants claiming prosecutorial misconduct must “show both that the prosecutor made improper statements and that those statements caused prejudice.” State v. Lindsay, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). In order to establish prejudice, a defendant must show a substantial likelihood the improper conduct affected the jury’s verdict. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Reviewing courts view a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998).

A prosecutor has wide latitude in drawing and expressing reasonable inferences from the evidence during argument. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). It is not misconduct for a prosecutor to argue that the evidence does not

support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

In the closing arguments, both lawyers discussed the inconsistency between the State's witnesses, primarily Molly and Katie McAlpin, and how those inconsistencies affected the witnesses' credibility. 3RP 71 (Prosecutor - "You may be sitting there thinking well, these inconsistencies I cannot find beyond a reasonable doubt that this happened."); 3RP 78 (Defense counsel - "Consistency matters . . . We can't determine what actually happened because there's inconsistencies in the statement. But on this one piece we're going to find that to be reliable. We're going to ignore all the other inconsistencies.").

The prosecutor said during rebuttal, "[t]here has been no evidence in this case whatsoever to disprove that he strangled her." In this context, this argument refers to the consistency *among the State's witnesses* as to whether or not Katie was strangled. 3RP 90. The prosecutor's statement was not a comment on the defendant's production of evidence; the argument attempted to deflect the attacks on credibility by pointing out that the witnesses did not differ as to the core acts constituting the crime. The prosecutor previously made his intention clear to the jury, "[w]hat's

not inconsistent is the actions that this man took against [Katie McAlpin], and that's what I want you to focus in on." 3RP 71. After the jury was excused, the prosecutor explained for the record his purpose in making the argument. 3RP 93-94. Both defense counsel and the Court found no ill intentions on the part of the prosecutor. 3RP 94-95.

As can be seen from the trial court's cautionary instruction, the court did not remember the prosecutor's precise argument. The prosecutor did not say that "defense had not disproved that strangulation occurred." 3RP 92 (oral cautionary instruction). Rather, the prosecutor said: "There has been no evidence in this case whatsoever to disprove that he strangled her." 3RP 90. The former statement suggests the defendant has a burden to disprove the charges, and thus shifts the burden of proof. The latter statement is simply a correct observation about the state of the evidence, and does not shift the burden. The trial court's mistaken recollection of the prosecutor's comment led the court to provide a curative instruction where one was not needed. The defendant's arguments on appeal could be rejected on this basis alone.

Even if the prosecutor's statement was improper, it was not reversible error. If a defendant has demonstrated a prosecutor's

conduct to be improper, the reviewing court will evaluate the claims under two different standards of review, depending on whether the defendant objected at trial. State v. Sakellis, 164 Wn. App. 170, 183, 269 P.3d 1029 (2011). If a defendant objected to the misconduct, the reviewing court determines whether the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. Id. at 184. If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, then the claim fails. Id.; see also State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Here, Mendoza-Escatel has failed to show the prosecutor's comment resulted in prejudice that had a substantial likelihood of unfairly affecting the verdict.

Defense objected to the prosecutor's statement, "There has been no evidence in this case whatsoever to disprove that he strangled her." 3RP 90. The objection was sustained by the trial court. 3RP 90. At the conclusion of the prosecutor's rebuttal, the court provided a curative instruction:

Ladies and Gentlemen, the Prosecutor argued to you that the Defense had not disproved that strangulation occurred. Defense counsel objected; I sustained the objection, and I want to reiterate that. The State is the Plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The

Defendant has no burden of proving that a reasonable doubt exists as to these elements.

3RP 92. This instruction was sufficient to prevent any prejudice.

In State v. Warren, the Washington State Supreme Court determined that a prosecutor “sought to undermine the State’s burden of proof beyond a reasonable doubt” by repeated statements that “mislead the jury.” 165 Wn.2d 17, 27, 195 P.3d 940 (2008). However, the statements were timely objected to by Warren and the trial court provided curative instructions. Id. at 28. It was held that any error was cured as reviewing courts “presume the jury was able to follow the court’s instruction.” Id.

The present case involves argument far less egregious than the argument in Warren. There was a timely objection, it was sustained, and there was a curative instruction provided at the conclusion of the prosecutor’s rebuttal. 3RP 90, 92. Defense counsel never argued that the instruction was insufficient to prevent taint. If the statement by the prosecutor was improper, the curative instruction provided by the trial judge clarified to the jury that the State had the burden to prove every element and that Mendoza-Escatel had no burden to prove or disprove anything. Thus, prejudicial error was avoided.

Mendoza-Escatel claims that the prosecutor's argument made after his objection was error, but he never objected to this argument. A defendant has a duty to object to a prosecutor's allegedly improper argument. State v. Emery, 174 Wn.2d at 761. If there is no contemporaneous objection, the defendant waives any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice. Id. at 760-61. If a defendant fails to object to misconduct, he must show (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) prejudice resulted that had a substantial likelihood of affecting the jury verdict. State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

In State v. Emery, the prosecutor's statements were determined improper because they shifted the burden of proof to the defendant. 174 Wn.2d at 759-60. However, neither defendant objected. Id. at 762. "Rather than determining that the prosecutor's improper argument about the role of the jury and the burden of proof caused an automatic mistrial, a reviewing court must consider what would likely have happened if the defendant had timely objected." Id. at 763. The Court found that if either defendant had objected, allowing the trial court an opportunity to

reiterate that the State bears the burden of proof and the defendant bears no burden, “[s]uch an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor’s improper remarks.” Id. at 764. Because a curative instruction was possible with a timely objection, the “claim necessarily fails and our analysis need go no further.” Id.

The absence of a motion for mistrial at the time of the allegedly improper argument by a prosecutor strongly suggests that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). In the present case, there was no motion for mistrial by the defendant. After the jury was excused, defendant’s only mention of potentially objectionable actions by the prosecutor was unrelated to evidence of strangulation. 3RP 94. There is nothing in the record to suggest that either defense counsel or the trial judge felt that Mendoza-Escatel was deprived of a fair trial.

Mendoza-Escatel makes a conclusory assertion that no curative instruction could have cured prejudice, but he has failed to offer any persuasive argument on that point. Br. of App. at 11-12. The curative instruction was given after both the objected-to

statement and the non-objected-to statements. The jury likely applied the instructions to the prosecutor's entire rebuttal argument. Both of Mendoza-Escatel's claims relate to the same alleged misconduct—burden shifting—so the curative instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the non-objected-to statements.


D. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

DATED this 17th day of September, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA, 98101, containing a copy of the Brief of Respondent, in State v. Pedro Mendoza-Escatel, Cause No. 71218-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of September, 2014.

U Brame
Name
Done in Seattle, Washington

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