72564-5

FILED
August 18, 2015
Court of Appeals
Division I
State of Washington

NO. 72564-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AL-PENYO BROOKS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IAN ITH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Other Jurisdictions:

Constitutional Provisions

Federal:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. A defendant forfeits his Sixth Amendment right to confront a witness, and waives a hearsay objection, when clear, cogent and convincing evidence shows a defendant's wrongdoing was intended to, and did, procure the unavailability of a witness. While charged with assaulting his teenage girlfriend, Brooks phoned and emailed her hundreds of times from jail despite a no-contact order, including multiple calls and messages demanding that she not testify. After the calls and messages began, the victim's contact with the State ceased. Did the trial court have sufficient evidence to find it highly probable that the defendant intentionally caused the witness's unavailability, thus forfeiting his confrontation right?

2. A prosecutor's unobjected-to remarks during closing arguments may require a new trial if the remarks were improper, and were so flagrant and ill-intentioned that no instruction could have cured the prejudice. In Brooks's trial for witness-tampering, domestic-violence assault and several violations of a court order, the prosecutor explained the victim's absence and Brooks's control over her by discussing her pregnancy, school attendance and doctor's appointments, all of which were central themes in

hundreds of bullying phone calls and emails admitted into evidence. Has Brooks failed to show that the prosecutor's inferences from the evidence were improper, and so flagrant and ill-intentioned as to be incurable by instruction?

3. In a proceeding for violation of a no-contact order, the trial court must exclude void or inapplicable orders, with void meaning the issuing court lacked jurisdiction to issue the type of order; otherwise the order's validity may not be collaterally challenged. The Federal Way Municipal Court issued a clearly defined domestic-violence no-contact order against Brooks in a misdemeanor domestic-violence assault case arising in Federal Way, and the case was pending during all his charged violations. Is Brooks barred from collaterally attacking the validity of the order based on its expiration date?

B STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Al-Penyo Brooks was charged in King County Superior Court with Tampering with a Witness – Domestic Violence, Assault in the Fourth Degree – Domestic Violence, and five counts of Domestic Violence Misdemeanor Violation of a Court Order. CP 46-48. His

first trial ended in a mistrial. RP 262.[1] At his second trial, which was riddled with constant interruptions and disruptions by Brooks resulting in his repeated removal from the courtroom, a jury convicted Brooks as charged. CP 52-61. The court imposed 55 months of confinement. CP 97. Brooks timely appealed. CP 105.

2. SUBSTANTIVE FACTS

On January 20, 2014, Brooks visited his girlfriend, Alexis Wilturner, at her grandmother's home in Federal Way, King County, Washington. RP 376, 633. When Wilturner stepped out of the room, Brooks snooped in her cell phone and found messages from another man. RP 381, 633. He locked himself in the bathroom to read the messages as Wilturner pleaded on the verge of tears for her phone back. RP 639. At some point during the argument, Brooks punched Wilturner in the mouth, splitting her lip. RP 381. Brooks left the apartment, but forgot his own cell phone inside. RP 650. Wilturner's grandmother called 911 and reported that Brooks had punched Wilturner and was now outside banging on the door and would not leave. Ex. 1. Federal Way police officers arrived to find Brooks banging on the door, and detained him.

[1] The State follows Brooks's numbering of the verbatim report of proceedings. All relevant oral record is included in a multiple-volume transcript with consecutively numbered pages to 746.

RP 377. Wilturner told Officer Oscar Villanueva that Brooks punched her once in the mouth, causing the split lip. RP 381. The officers arrested Brooks and took him to the South Correctional Entity (SCORE) jail. RP 404.

The next day, January 21, 2014, Brooks was charged and arraigned in Federal Way Municipal Court on one count of Assault in the Fourth Degree – Domestic Violence. Ex. 13. Brooks had a public defender with him at the SCORE jail and appeared via video. Id. The judge signed a pre-trial Domestic Violence No-Contact Order prohibiting Brooks from contacting Wilturner, including "by phone, mail, or electronic means." Ex. 12. The expiration date was typewritten as January 21, 2063. Ex. 12. Brooks signed the order and was served with a copy. Ex. 12, 13.

Within a week, Brooks began calling Wilturner from the SCORE jail, often several times a day. Ex. 21; RP 446-48, 559. A supervising captain at the SCORE jail testified that between January 21 and March 6, Brooks called Wilturner's cell phone 65 times. RP 559. The jury heard recordings of 17 of the calls. RP 568-85; Ex. 26. A summary:

- On January 27, Brooks called to explain his case, and Wilturner told Brooks, "I am pregnant just so you know." Ex. 26.[2]

- On January 28, Brooks called Wilturner a "stupid-ass bitch," accused her of not wanting him released, and said, "I will never forgive you for this." Ex. 26.[3]

- Less than half an hour later, Brooks sobbed that Wilturner had set him up to violate the no-contact order, and said, "They're probably going to hit me with prison time." Ex. 26.[4] He accused her of having another boyfriend. Id.

- On February 1, Brooks demanded that Wilturner get money for bail. Ex. 26.[5] Wilturner said she was busy with "doctor's appointments and everything else," but Brooks persisted. Id.

- On February 8, Brooks interrogated Wilturner about her bank balance, and Wilturner said she did not want to use "the baby's bank account" to bail him out. Ex. 26.[6]

- Less than half an hour later, Brooks called back and Wilturner again said she did not want to spend "my baby's

---

[2] In Ex. 26 (Final Jail Calls on CD), this call recording is labeled 15915556_28148_01-27-2014_195809_1-206-853-xxxx.mp3. The last four digits of the file names are redacted here to protect the victim's privacy.

[3] This is labeled 15933570_28148_01-28-2014_150853_1-206-853-xxxx.mp3.

[4] This is labeled 15934495_28148_01-28-2014_153442_1-206-853-xxxx.mp3.

[5] This is labeled 16062596_28148_02-01-2014_201445_1-206-853-xxxx.wav.

[6] This is labeled 16260369_28148_02-08-2014_110016_1-206-853-xxxx.mp3.

money to get you out." Ex. 26.[7] Brooks claimed to have a heart condition and said he could die from "all this stress you're putting me through." Id.

- On February 14, Brooks cursed at Wilturner for hanging up on him earlier and again accused her of not wanting him out. Ex. 26.[8] When she tried to reply, he yelled, "Shut the fuck up and let me speak." Id.

- Ten minutes later, Brooks called back to demand Wilturner's email address. Ex. 26.[9]

- On Feb. 18, as soon as Wilturner answered the phone, Brooks said, "Baby, listen, I'm going to tell you something right now, do not show up for court or they will charge me." Ex. 21, 26.[10] He added that, "If you show up, I'm fucked." Id. Wilturner expressed reluctance, saying "I'm going to have a warrant if I don't." Id. Brooks replied that she should "take the fucking warrant," and that she should trust him because, "I know what I'm talking about." Id. Wilturner worried that she could be charged with "failure to appear," but Brooks assured her, "They're just doing that to scare you so they can charge me." Id. Brooks demanded that Wilturner not show up to court 13 times. Id. He told her he "could get 33 months in prison." Id. He assured her that

[7] This is labeled 16261432_28148_02-08-2014_112641_1-206-853-xxxx.mp3.

[8] This is labeled 16477459_28148_02-14-2014_204707_1-206-853-xxxx.wav.

[9] This is labeled 16477573_28148_02-14-2014_205748_1-206-853-xxxx.mp3.

[10] This is labeled 16582972_28148_02-18-2014_100540_1-206-853-xxxx.mp3.

"you're the victim here, babe," and she would not be locked up. Id. "If you don't show up for court," Brooks said, "they're going to drop my charges and I'm going to be out; no-contact order will be lifted so we can be around each other." Id. He said he could spend two years in prison if she showed up to court. Id. If she loved him, Brooks said, she would want him out. Id. He finally said "Please, babe, I'm begging you, do not go!" Wilturner then said, "OK," and Brooks replied, I love you, man." Id.

- On February 21, Brooks called to read Wilturner a love poem and then insisted that she tattoo his full name on her neck. Ex. 26.[11]

- On February 22, Brooks was upset about Wilturner's recent emails because he was locked up. Ex. 26.[12] Wilturner reminded Brooks that she was dealing with pregnancy. Brooks replied, "If you gave a fuck, you would watch my feelings, man, for real, and make my time go better, not worse." Id.

- On Feb. 26, Wilturner said she was watching her diet because her doctor told her she was overweight. Ex. 26.[13] Brooks dismissively said she could just "go to the YMCA." Id. Brooks said he "should be out March 12 — that is, if you don't show up for court." Id. He then assured Wilturner

[11] This is labeled 16713419_28148_02-21-2014_200117_1-206-853-xxxx.mp3.

[12] This is labeled 16749286_28148_02-22-2014_201916_1-206-853-xxxx.mp3.

[13] This is labeled 16888704_28148_02-26-2014_201226_1-206-853-xxxx.mp3.

"they're not allowed to fucking arrest you," and "everybody's went through it," meaning "Assault 4 DV charges." Id.

- On February 28, Brooks angrily demanded to know why Wilturner went downtown but would not send him any money. Ex. 26.[14] She hung up on him.

- About 15 minutes later, Brooks insisted that Wilturner not go downtown any more, and accused her of seeing her "Westlake boyfriend." Ex. 26.[15]

- On March 1, Brooks demanded to know whether Wilturner "did what I told you to do." Ex. 26.[16] When she said she did, Brooks ordered her to do it again, and "hurry up and make it snappy." Id. She hung up. Id.

- Less than 15 minutes later, Brooks called Wilturner a "ho" for hanging up on him. Ex. 26.[17] They screamed at each other. Id. Brooks again demanded that Wilturner "do what the fuck I said," and when she said she did it, he yelled, "Bitch, I told you to do it again!" Id. He called her a "bitch" more than a dozen times and warned her, "Watch when I get out, bitch." Id.

---

[14] This is labeled 16956090_28148_02-28-2014_193005_1-206-853-xxxx.mp3.

[15] This is labeled 16956705_28148_02-28-2014_194414_1-206-853-xxxx.mp3.

[16] This is labeled 16969016_28148_03-01-2014_104128_1-206-853-xxxx.mp3.

[17] This is labeled 16969558_28148_03-01-2014_105538_1-206-853-xxxx.mp3.

- About five hours later, Brooks sang Wilturner a love song. Ex. 26.[18] As soon as Wilturner giggled and said she liked the song, Brooks ordered her to "hurry up and put that money on my books." Id.

The State also introduced a 107-page printout of more than 600 email exchanges between Brooks and Wilturner between February 15 and March 6. Ex. 8; RP 499, 504-05. Wilturner's replies frequently discussed her pregnancy, her doctor's appointments, starting back at school and doing homework. Ex. 8.[19] Brooks's messages typically were jealous, accusatory and demanding, with his focus on Wilturner complying with his requests for money, letters and photos. Ex. 8. In response to angry accusations about not responding promptly enough, Wilturner reminded him of her school and doctor obligations. Id. On February 18, she replied to a demand by typing, "im trynna make this shit happen, but I got hella shit on my hands daddy." Id. at 24.

The emails also discussed her being a witness in Brooks's court case. Ex. 8. On February 17, she noted, "you know Igatta go to court for yu on march 4 and 12, orima have a warrant, but I'm not

[18] This is labeled 16982022_28148_03-01-2014_154112_1-206-853-xxxx.mp3.

[19] For example, in Ex. 8, see pages 13, 27, 38, 43-44, 50-52, 62 (nurse and doctor visits); pages 20-21, 27, 37, 44, 45 (starting school).

ganna say nun." Id. at 14. On March 5, Brooks emailed to say, "WELL ITS ALL UR FAULT Y IM GETTING A YEAR IN JAIL IF U COME TO COURT." Id. at 106.

The State's final witness was Federal Way Police Detective John Kamiya, who said he had tried to contact Wilturner about her upcoming testimony, but could not find her. RP 606-07.

Brooks testified in his defense about the fight with Wilturner on January 20, but denied hitting her. RP 631-53. On cross-examination, Brooks admitted calling Wilturner many times a week from the SCORE jail during all the time periods alleged in the charges. RP 661-63. He admitted emailing Wilturner more than hundreds of times. RP 664. Brooks also acknowledged the no-contact order and agreed that it prohibited him from contacting Wilturner by phone, mail or electronically. RP 665. However, Brooks claimed he had refused to sign the document, and that his signature must have been forged. RP 668.

C. ARGUMENT

1. WILTURNER'S HEARSAY STATEMENTS WERE PROPERLY ADMITTED BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED FORFEITURE BY WRONGDOING.

Brooks contends that the trial court lacked clear, cogent and convincing evidence that Brooks's persistent telephone and email

badgering of Wilturner to not testify was the actual cause of her unavailability because it is possible she may have "independently" chosen not to support the prosecution. To the contrary, the trial court was presented with evidence of dozens of telephone calls and hundreds of emails showing an aggressive, single-minded campaign to dissuade Wilturner from appearing, even though she explicitly worried that she might get arrested and charged with a crime. Additionally, the trial court accepted the State's assertions that Wilturner had been in contact with the State about the case until the illegal contact with Brooks began. Forfeiture by wrongdoing does not require a trial court to be convinced beyond a reasonable doubt or rule out all other possibilities. Nor does the doctrine specify the degree or nature of conduct, so long as it caused the absence. The trial court had more than sufficient evidence to find it highly probable that Brooks's egregious actions caused Wilturner's unavailability.

a. Additional Relevant Facts.

The State moved pretrial to admit the hearsay statements of Wilturner via Officer Villanueva because the State had lost all contact with Wilturner. CP 136-45; RP 185-99. The State presented records of dozens of phone calls made by Brooks to

Wilturner in violation of the Federal Way no-contact order, and played three of the calls for the court pretrial. Pretrial Ex. 7, 8; RP 190. Those three calls also were later admitted at trial and are summarized in the Substantive Facts section, *supra:*

1. a call on February 14 where Brooks demands Wilturner's email address;
2. a call on February 14 where Brooks berates her for hanging up on her, accuses her of not wanting him "out," and tells her to "shut the fuck up;" and
3. the lengthy call on February 18 where he demanded 13 times that she not come to court, and assured her, despite her expressed worries, that she would not get a warrant for her arrest or be charged with a crime for not showing up.

Pretrial Ex. 8.[20]

The State also attested to more than 650 emails exchanged between Brooks and Wilturner. CP 141. The State urged the court to consider the totality of Brooks's behavior in the context of the dynamics of a domestic-violence relationship, including playing upon Wilturner's pregnancy. Id. The State additionally attested that Wilturner had been in contact with the prosecution early on, but ceased contact as soon as her contact with Brooks began.

[20] The February 18 call is transcribed in the State's Supplemental Trial Memorandum, CP 141-44.

CP 144; RP 187, 197. The State said an hours-long effort by a Federal Way police officer to find Wilturner was unsuccessful, and she didn't return the prosecutor's recent phone calls. CP 144; RP 197.

Brooks objected on the grounds that there was no evidence of coercion or threats to kill Wilturner, and that the State had not tried hard enough to procure Wilturner's testimony.

The trial court said that the State's burden to show that Brooks engaged in wrongdoing with a specific intent to prevent the witness's testimony was "clearly satisfied." RP 196. While the State was arguing causation, the judge commented that "I have never seen a case like this before where there's this type of effort." RP 198. The court then summarily stated, "I'm going to grant" the State's motion to admit the hearsay statements of Wilturner. RP 200. The court added that it accepted the State's attestations about its efforts to procure Wilturner's testimony because they were representations of an officer of the court. RP 209.

b. The Court Had Ample Evidence To Find Forfeiture By Wrongdoing.

Constitutional issues, such as potential violations of the Sixth Amendment right to confront witnesses, are subject to de novo

review. State v. Price, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006). A trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Evidentiary rulings are reviewed for abuse of discretion. State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. Id.

"[A] defendant forfeits the Sixth Amendment right to confront a witness when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying." State v. Dobbs, 180 Wn.2d 1, 11, 320 P.3d 705 (2014). When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be "highly probable." Id. Thus, the standard of review is whether there is substantial evidence to support the findings in light of the highly probable test. State v. Fallentine, 149 Wn. App. 614, 620, 215 P.3d 945 (2009). It is for the trial court, not the reviewing court, to actually weigh the evidence and determine whether it is clear, cogent and convincing. Id. at 621. Accordingly,

the reviewing court should not disturb findings supported by evidence that the trial court could reasonably have found to be clear, cogent and convincing. Id.

Our Supreme Court first adopted the forfeiture-by-wrongdoing doctrine in State v. Mason, 160 Wn.2d 910, 925, 162 P.3d 396 (2007) (confrontation right forfeited by killing witness). The Mason court "explained that the doctrine is grounded in the principle of equity, and that a defendant cannot complain of his inability to confront a witness when his own actions caused that witness to be unavailable." Dobbs, 180 Wn.2d at 11 (forfeiture by telling domestic-violence victim that she would "regret it" if she pressed charges). Mason did not require proof of intent. Id.

The next year, the United States Supreme Court held that the doctrine requires proof "that the defendant intended to prevent a witness from testifying." Giles v. California, 554 U.S. 353, 361, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (no forfeiture without evidence murder was committed with intent to silence the victim). Last year, our Supreme Court read Giles and Mason together and announced the present test in Washington, requiring both causation and intent. Dobbs, 180 Wn.2d at 11.

Forfeiture by wrongdoing "does not require a showing beyond a reasonable doubt." Id. at 16. "A court does not need to rule out all possibilities for a witness's absence; it needs only to find that it is highly probable that the defendant intentionally caused it." Id. And the courts "cannot and do not require a direct statement from the witness who is intimidated into silence because ... [t]his would be an extreme and inappropriately high bar because, by definition, a witness who was intimidated into silence will not come forward to say as much." Id. at 15.

When a defendant forfeits his confrontation rights by wrongdoing, he also waives his hearsay objections to that witness's out-of-court statements. Id. at 16.[21] "If such wrongdoing did not result in a waiver of hearsay objections, a defendant would have a perverse incentive to use threats, intimidation, or violence to prevent a witness from coming to court." Id. at 17.

While the doctrinal cases for forfeiture by wrongdoing dealt with murder and clear threats of physical harm, the doctrine does not specify the degree or nature of wrongdoing required for

[21] See also ER 804(b)(6), effective September 1, 2013: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness ... *Forfeiture by wrongdoing.* A statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

forfeiture. See Giles, 554 U.S. at 359 (rule "permit[s] the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant"); Mason 160 Wn.2d at 927 (witness broadly must be "made unavailable by the wrongdoing"); Dobbs, 180 Wn.2d at 11, 16 (same wording, plus "actions" of the defendant, or defendant "procures" unavailability).

And many other jurisdictions define applicable conduct broadly:

This summer, the Ninth Circuit specifically addressed "the kind of action a defendant must take to effectuate" the intent to prevent a witness from testifying. Carlson v. Att'y Gen. of Cal., — F.3d. —, 2015 WL 3916718, at *6 (June 26, 2015) (forfeiture where defendant had kept his family away from police). The court found that forfeiture requires only some "affirmative action on the part of the defendant that produces the desired result," meaning actions that "'cause' or 'effect' or 'bring about' or 'procure' a witness's absence," but not "simple tolerance of, or failure to foil, a third party's expressed decision ... to skip town himself." Id. at *7.

In Colorado, "interference with a witness" is sufficient, criminal conduct is not required, and preventing testimony need not be the sole motivation for the actions. Vasquez v. People, 173

P.3d 1099, 1103-05 (2007). In New Jersey, "wrongful conduct" can include "psychological injuries." State v. Byrd, 198 N.J. 319, 352, 967 A.2d 285 (2009). In New York, forfeiture can result from "chicanery," including "seemingly innocuous calls" that have a "coercive effect" in the backdrop of domestic violence. People v. Byrd, 51 A.D.3d 267, 273-74, 855 N.Y.S.2d 505 (2008). Also in New York, forfeiture was upheld where a defendant called his victim more than 59 times and "implored her not to testify against him." People v. Jernigan, 41 A.D.3d 331, 332, 838 N.Y.S.2d 81 (2007).

Perhaps most comparable here, the Supreme Judicial Court of Massachusetts, in its seminal case on the doctrine, held that even where the witness was *independently reluctant to testify*, forfeiture is appropriate where the defendant "was involved in, or responsible for," the witness's unavailability. Massachusetts v. Edwards, 444 Mass. 526, 540-41, 830 N.E.2d 158 (2005) (emphasis added) (reversing a trial court's denial of forfeiture based on finding the witness "on his own had decided that he wasn't going to testify"). The Massachusetts high court held that wrongdoing is established where "a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or

pressure." Id. And it is also established if "a defendant *actively facilitates the carrying out of the witness's independent intent not to testify*" or colludes with a witness to become unavailable. Id. (emphasis added).

Brooks's behavior fits squarely within this doctrine. The court had more than enough evidence — recorded phone calls and a massive volume of email communication — to find that Brooks had illegally contacted Wilturner with the focused intent of preventing her testimony. The court also had ample evidence that Brooks caused Wilturner's absence, rather than simply tolerating a predisposition: Though she certainly was emotionally bound to Brooks, Wilturner expressly stated she feared an arrest warrant and criminal charges. She finally relented only after Brooks continually pressured, cajoled, assured and guilt-tripped her with the specter of her baby's father in prison. Even if Wilturner did have "personal disdain" for the prosecution, as Brooks asserts, the evidence shows that Brooks's bullying was the actual cause of her decision not to cooperate.

Because the trial court had ample evidence to find it highly probable that Brooks succeeded in his intent to cause Wilturner's

unavailability, the admission of Wilturner's hearsay statements to Officer Villanueva was proper.

2. THE PROSECUTOR'S CLOSING ARGUMENTS WERE PROPER.

Brooks further complains that the trial prosecutor's comments in closing argument — about Wilturner's pregnancy, doctor's visits and schooling — created a "fantasy" that flagrantly and irrelevantly played to the jurors' emotions and misstated the evidence. Brooks ignores the 17 published phone-call recordings and more than 600 admitted emails, all of which made central themes out of Wilturner's pregnancy and her efforts to live normally in the midst of Brooks's relentless browbeating. The prosecutor's remarks on those themes in a witness-tampering trial were not improper. Even if they were improper, there was no objection, and Brooks has not shown that the remarks were so flagrant and ill-intentioned that they could not have been cured by an instruction — such as simply repeating the instruction that lawyers' remarks are not evidence.

a. Additional Relevant Facts.

Before closing arguments, the court read and presented the jurors with copies of Instruction No. 1, which was taken verbatim

from WPIC 1.02. CP 69; RP 679, 681-82; WPIC 1.02. The instruction included this:

> 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.

Id.

The State began its closing argument by quoting at length from Brooks's February 18 phone call, in which he urged Wilturner 13 times not to come to court. RP 695-96. The prosecutor then wondered aloud, "Why was he trying so hard? Why was he begging, singing, pleading, screaming, cussing, and ordering? ... Because he didn't want you guys to hear the truth." RP 696. "He didn't want her to have to get up here, and under oath, have to tell you what happened to her, that she was punched in the face by somebody that says he loves her, the father of her unborn baby." Id.

The prosecutor then discussed the elements of all the charged crimes at length. RP 697-700. When she then turned to discussing the evidence supporting the assault charge, Brooks

erupted with another of his many outbursts, saying in front of the jury that none of the evidence applied "if the victim doesn't testify against me," and that he had "a right to face my accuser." RP 701-02. The court was forced to take a recess, but Brooks continued his rant as the jury filed out. RP 702.

After Brooks calmed down and the proceedings reconvened, the prosecutor continued her lengthy discussion of the evidence, including the jail phone calls, the "hundreds, hundreds of emails that will go back with you to the jury room," and the fact that Brooks had himself testified that he knew the no-contact order's prohibitions yet had called and emailed Wilturner during all the time periods charged. RP 704-10.

The prosecutor then turned to the witness-tampering charge. She again played the February 18 phone call (the "do not come to court" call). RP 711. She discussed the lengths to which Brooks went, using "every manipulation in the book," to get Wilturner to stay away. RP 712.

The prosecutor then concluded by "talking about the elephant in the room," the fact that Wilturner did not testify. RP 720. "Everything you need to know to answer that question is contained in this case," the prosecutor said. "She's not here

because he made sure she wasn't. He called her again and again and again, a 17-year-old pregnant mother of his unborn child." The case was important, the prosecutor said, because Brooks "doesn't get to assault someone and then harass and harass until she breaks and gets his way." RP 721. The prosecutor then said:

> He can't control this Court, and even though he might have been able to control her through all of his manipulations, he doesn't get to control the Judge, the Prosecutor, or you.
>
> Ms. Wilturner is 17. She should be having her first week of high school, or first week of her senior year in high school, having fun with her friends, shopping for school clothes, getting excited for the year to come.
>
> She's not. She's fielding angry, abusive phone calls from him, over and over and over. "Buy me money, put money on my books, you better call me more, send me more pictures, send me more letters, talk to this person, do this, do that, do this, do that."
>
> But she's running around, trying to go to her doctor's visits for this baby. She's not enjoying life, like she should be. But we're going to punish her because she falls prey to his manipulations? And he is able to control her? She's young. She's scared. That's not okay.
>
> And that's why this is important. So we've shown you that the State has proven every one of these charges beyond a reasonable doubt.

RP 721-22.

No objections were made to any of the State's arguments, and Brooks did not ask for a mistrial afterward. RP 695-731.

b. The State's Arguments Properly Fit The Admitted Evidence.

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 that 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).

A defendant has a duty to object to a prosecutor's allegedly improper argument. 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 that (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). If a curative instruction was possible with a timely objection, the "claim necessarily fails and [the] analysis need go no further." Emery, 174 Wn.2d at 764. Furthermore, "the jury is presumed to follow the instruction that counsel's arguments are not evidence." State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

In this case, the State's discussion of Wilturner's pregnancy was absolutely appropriate in the context of witness tampering and the litany of phone calls and emails. The State was obliged to prove that Brooks attempted to induce Wilturner to absent herself from an official proceeding. CP 79. Large parts of the evidence of inducement were Brooks's constant warnings, in the immediate context of their relationship and her pregnancy, that he would go to prison for years. The implication was overt: If Wilturner showed up, she would be alone and her baby would be fatherless.

Brooks suggests that the prosecutor's mere mention of the pregnancy whipped up an emotion-wrenching inference that Brooks

knew Wilturner was pregnant when he punched her in the mouth. But that is not what the context of the comment shows. The prosecutor said that Brooks did not want Wilturner to "have to tell you what happened to her, that she was punched in the face by somebody that says he loves her, the father of her unborn baby." In the proper context, it means exactly what the prosecutor said: Brooks feared the impact of the jury seeing and hearing his pregnant teenage girlfriend testifying about what happened to her.

The prosecutor's comments about Wilturner starting school and going to doctor's appointments were fully supported by the hundreds of emails and phone calls where she discussed "starting school," and being unable to respond to him because she was at the doctor's office. Ex. 8. At least one of the admitted phone calls specifically addressed this: On Feb. 1, Wilturner said that she was busy with "doctor's appointments and everything else," while Brooks was pushing her for bail money. Ex. 26, summarized *supra*. And Wilturner's emails also addressed these kinds of difficulties: "im trynna make this shit happen, but I got hella shit on my hands daddy." Ex. 8 at 24. Rather than crafting a "fantasy," as Brooks avers, the prosecutor was rightly illustrating how Brooks's selfish hectoring affected Wilturner and induced her absence from trial.

Rather than prejudicial speculation, the prosecutor drew solid inferences from Wilturner's own words in the calls and emails.

Even if the prosecutor's comments somehow strayed from the evidence, the jury was instructed that the lawyer's comments are not evidence. CP 69. Had Brooks objected, the court simply could have repeated that portion of the instructions. Any conceivable harm would have been erased.

Lastly, even if the prosecutor's unobjected-to remarks rose to impropriety, they are not the kind of flagrant and inflammatory arguments that our courts find incurable. See Lindsay, 180 Wn.2d at 444 (denigrating defense counsel, misstating burden of proof, expressing personal belief about defendant, whispering to the jury); State v. Glasmann, 175 Wn.2d 696, 709-10, 714, 286 P.3d 673 (2012) (flashing "visual shouts" of "GUILTY, GUILTY, GUILTY!" across defendant's booking photo); State v. Monday, 171 Wn.2d 667, 681, 257 P.3d 551 (2011) (personal comments and racist language); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (calling American Indian Movement a "deadly group of madmen" and "butchers"). See also Warren, 165 Wn.2d at 28-31 (misstating evidence, misstating burden of proof and denigrating defense lawyers not incurable); State v. Brett, 126 Wn.2d 136,

179-80, 892 P.2d 29 (1995) (arguing witness was credible because she watched her husband "being blown away" not incurable); State v. Russell, 125 Wn.2d 24, 89, 882 P.2d 747 (1994) (portraying defendant as serial killer who will keep killing not incurable).

The prosecutor's arguments about Brooks's unrelenting harassment of his pregnant, teenage girlfriend, in a trial for witness tampering, were proper comments and inferences on the evidence admitted to the jury. Even if they were not, the comments were neither flagrant nor ill-intentioned, and the jury had been properly instructed to ignore them if they didn't match the evidence.

3. BROOKS IS BARRED FROM COLLATERALLY ATTACKING THE NO-CONTACT ORDER.

Lastly, Brooks contends that he should escape punishment for repeatedly violating the no-contact order issued by the Federal Way Municipal Court because the expiration date on the order allegedly exceeded the possible duration of the municipal-court misdemeanor case. This is precisely the kind of collateral attack on the validity of a no-contact order that our Supreme Court has rejected and expressly forbids in order-violation cases. Brooks's order was neither void nor inapplicable, so it was properly admitted.

a. Additional Relevant Facts.

The Domestic Violence No-Contact Order issued by the Federal Way Municipal Court listed Brooks as the defendant and Wilturner as the protected person. Ex. 12. It listed specific prohibited behavior, including contacting Wilturner by phone, mail or electronic means. Id. In section 4, the expiration date was typewritten as "01/21/2063." Id. In a space highlighted by a box, the order warned that a violation is a criminal offense. Id. In boldface type, it stated, "You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions." Id.

The underlying misdemeanor case remained open until March 12, 2014, when the City moved to dismiss because the charge was being filed in Superior Court. Ex. 13. When the case was dismissed the no-contact order was simultaneously recalled. Id.

b. Brooks Is Barred From Challenging The Validity Of The No-Contact Order.

Evidentiary rulings are reviewed for abuse of discretion. Garcia, 179 Wn.2d at 846. Our Supreme Court has held in no uncertain terms that the collateral-bar rule precludes challenges to

the validity of a court order in a proceeding for violation of such an order. City of Seattle v. May, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011). The rule "recognize[s] that flaws which do not go to the heart of the judicial power are insufficient to justify the flaunting of an otherwise lawful order." Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n, 85 Wn.2d 278, 284, 534 P.2d 561 (1975). A party's remedy for an erroneous order or decision is to appeal it, not to disregard it contemptuously. Deskins v. Waldt, 81 Wn.2d 1, 5, 499 P.2d 206 (1972).

The trial courts must exclude orders that are void. May, 171 Wn.2d at 852. For "an order to be void, the court must lack the power to issue the *type* of order." Id. (emphasis in original). "Provided that such power exists, any error in issuing an order may not be collaterally attacked." Id. "Talismanic invocation of the phrase 'lack of jurisdiction'" is insufficient to collaterally attack the court order. Id. (quoting Mead Sch. Dist., 85 Wn.2d at 284).

The trial courts must also exclude orders that are "inapplicable." May, 171 Wn.2d at 852. Inapplicable means "the order either does not apply to the defendant or does not apply to the charged conduct," or "orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the

restrained party fair warning of the relevant prohibited conduct)." May, 171 Wn.2d at 854.

In May, the defendant appealed the admission of a domestic-violence no-contact order into evidence because the order lacked a required written statutory finding necessary to extend it beyond a year. 171 Wn.2d at 851. May, as Brooks does here, relied on State v. Miller, which held that the trial court "as part of its gatekeeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged." 156 Wn.2d 23, 31, 123 P.3d 827 (2005).

In so holding, however, Miller had expressly noted that "[w]e do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge." 156 Wn.2d at 31 n.5. May clarified Miller, establishing firmly that the trial court's gatekeeping role is limited to excluding orders that are void or inapplicable. May, 171 Wn.2d at 854.

The high court concluded that May's no-contact order was not void because the Seattle Municipal Court had jurisdiction to issue such an order. Id. at 855. The Court also rejected May's

technical argument that the order lacked notice that violation would result in criminal penalties, holding that May had fair warning of the type of conduct that was criminal. Id. at 856.

"May made a choice to violate the plain and unambiguous terms of the domestic violence protection order," the high court concluded. "May might earnestly believe that the order is invalid, but his remedy is to seek modification of the order by the court that issued it; he is not free to violate the order with impunity." Id. at 857.

So it was with Brooks, and his case is no different. The Federal Way Municipal Court had unchallenged jurisdiction to issue the domestic-violence no-contact order. It was not void. Brooks was informed in explicit language that he was not to contact Wilturner by any means. The order was not inapplicable. Brooks now may not argue about the expiration date to escape penalty for immediately and brazenly flouting the order. That argument was for the issuing court in Federal Way.

Nonetheless, Brooks points to In re Pers. Restraint of Rainey to argue that the order violated his rights. 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010). But Rainey was a direct appeal on the parameters of a no-contact order issued as a sentencing condition.

Id. at 370. Rainey might have helped Brooks in directly challenging the order with the issuing court, but it does not help him here.[22]

Brooks further argues that the order exceeded the municipal court's statutory authority because the expiration date exceeded all possible duration of the case. To begin with, that is not so. The expiration date was irrelevant because Brooks's order was to expire by statute — and become criminally unenforceable — upon dismissal or acquittal of the underlying case, regardless of the date on the order. See State v. Anaya, 95 Wn. App. 751, 760, 976 P.2d 1251 (1999) (pretrial no-contact orders issued under RCW 10.99 expire upon dismissal of the underlying domestic-violence charge regardless of whether they remain in the police files); State v. Schultz, 146 Wn.2d 540, 545, 48 P.3d 301 (2002) (Legislature amended RCW 10.99.040(3) post-Anaya to add qualification that "[t]he no-contact order shall terminate if the defendant is *acquitted* or the charges are *dismissed*"). In fact, Brooks's order did so expire. Ex. 13.

---

[22] Brooks also cites State v. Gitchel as an example of an unconstitutional order. 5 Wn. App. 93, 95, 486 P.2d 328 (1971). But the order — a lifetime banishment from Washington — was a post-conviction order that had been modified later, and was not at issue in the case. Id. The Court of Appeals was "not called upon to reach the illegality of the original sentence" (though it agreed it was illegal), but instead held that the modified order was valid despite a lack of counsel at the modification hearing and the unconstitutionality of the original order. Id. at 96.

Moreover, it is unremarkable that a pretrial no-contact order issued at arraignment would carry an expiration date well past the likely pendency of the case because the actual duration of any criminal case is unknowable at arraignment; it could last for years or even decades if, for example, the defendant were to abscond. See State v. Navarro, — P.3d —, 2015 WL 3970495 at *3 (Div. 1, June 29, 2015) (post-conviction sexual-assault protection order should bear no expiration date because actual statutory expiration date is "unknowable at the time of sentencing"). And the order could survive after conviction. Schultz, 146 Wn.2d at 547 (pretrial no-contact order under RCW 10.99 does not automatically expire upon conviction, and may be extended as a sentencing condition). See also State v. Luna, 172 Wn. App. 881, 885, 292 P.3d 795, review denied, 177 Wn.2d 1010 (2013) (checking an "NCO" box on a judgment-and-sentence form serves to extend the pretrial no-contact order).

Nevertheless, Brooks's statutory-authority argument is a nonstarter because it is the same argument rejected in May. In fact, Brooks's reasoning resembles the rejected reasoning in the May dissent, except that Brooks does not even assert that the order was void, only facially invalid. 171 Wn.2d at 865 (Sanders, J.,

dissenting) (relying on cases from 1916, 1917 and 1951 to opine that facial invalidity voids the order, so a challenge on that basis is not a collateral attack).

Even if the expiration date on Brooks's no-contact order somehow made it invalid during the pendency of his municipal-court case, the order was not void or inapplicable. The trial court properly admitted it into evidence.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Brooks's conviction and sentence.

DATED this 18TH day of August, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
IAN ITH, WSBA #45250
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Dana Nelson, the attorney for the appellant, at Nelsond@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Al-Penyo Kniar-James Brooks, Cause No. 72564-5, 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 18 day of August, 2015.

Name:
Done in Seattle, Washington