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MAR 31 2010
King County Prosecutor
Appellate Unit

04308-1

COA NO. 64368-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THOMAS HALL, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
2010 MAR 31 PM 4:02
COUNTY CLERK'S OFFICE
SEATTLE, WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.
2. Appellant received ineffective assistance of counsel.

Issue Pertaining to Assignments of Error

1. The prosecutor misstated the law regarding reasonable doubt and urged jurors to convict based on emotion. Is a new trial required because the prosecutor's misconduct was flagrant and ill intentioned? In the alternative, was defense counsel ineffective in failing to object or request a curative instruction?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Thomas Hall, Jr. with two counts of felony violation of a no contact order (counts I and II) and one count of bail jumping. CP 11-12. The bail jumping count was severed from the trial involving the no contact order counts, but remained under the same cause number. 1RP 12; 2RP 3-4.¹

A jury found Hall guilty of violating a no contact order under count I and acquitted him on Count II. CP 40. The parties agreed to a

¹ This brief references the verbatim report of proceedings as follows: 1RP - 9/14/09; 2RP - 9/15/09; 3RP - 9/16/09; 4RP - 9/17/09; 5RP - 10/16/09.

bifurcated procedure where the jury was presented with stipulated evidence that Hall had previously been convicted of violating no contact orders on two previous occasions after it found him guilty on count I. 2RP 12-16; CP 36. By special verdict, the jury found Hall had two previous convictions for violating a new contact order. CP 41. Hall subsequently pleaded guilty to bail jumping. CP 42-62; 5RP 2-9.

The trial court imposed concurrent, standard range sentences of 13 months confinement for the no contact order violation and 12 months confinement for bail jumping. CP 66, 69. This appeal follows. CP 75-84.

2. Trial

Count I was based on the events of November 10, 2008. CP 25 (Instruction 8). Jessica Erickson met police in front of her apartment after they went to her address. 3RP 6-8. She was upset. 3RP 8-9. Her face was swollen and scratched and blood was coming from her mouth. 3RP 9-15. Police did not find anyone in her apartment. 3RP 18.

According to hospital records, Erickson went to the hospital later that night where she told a social worker that Hall, the father of her child, assaulted her. 3RP 67-69; Ex. 1. Hospital records showed Erickson complained of injury to her jaw and face, stating "she was grabbed on the jaw and her face hit the door while being dragged by her hair. And context was a fist punched and thrown." 2RP 29. The report included a

description of injuries. 2RP 26-35; Ex. 1. Erickson reported a long history of domestic violence by Hall. Ex. 1.

Count II was based on alleged phone contact between Hall and Erickson between August 1 and September 9, 2009. CP 26 (Instruction 9); 3RP 22-24, 27-37, 48-54. Erickson's mother, Lynn McPherson, testified she overheard Hall speaking with her daughter on the phone at one point during this time period. 3RP 43, 49-51. According to McPherson, Erickson and Hall began dating about six years ago. 3RP 43. McPherson did not know the current status of their relationship and had not spent any time with Hall in the past three years. 3RP 44, 50. McPherson and Erickson did not talk about Erickson's contact with Hall. 3RP 52-53. Erickson and Hall did not testify.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT IN MISSTATING THE STATE'S BURDEN OF PROOF AND URGING JURORS TO CONVICT FOR IMPROPER REASONS.

Prosecutors may not argue the reasonable doubt standard is equivalent to knowing someone is guilty by means of a gut reaction. The prosecutor undermined the burden of proof beyond a reasonable doubt by making this argument. The prosecutor committed further misconduct by appealing to passion and prejudice in urging jurors to convict Hall.

a. The Prosecutor's Flagrant Misconduct Requires Reversal.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may deprive the respondent of a fair trial and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A defendant's due process right to a fair trial and the right to be tried by an impartial jury is denied when the prosecutor makes improper comments and there is a substantial likelihood the comments affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22.

The prosecutor ended her initial closing argument as follows:

Ultimately, while the State is asking you to consider this case as the violation of a court order case, there is a lot more going on here than simply a court order violation. It doesn't really do it justice, but that's what we are going with, two court order violations.

And I ask you to convict the Defendant because he essentially refuses to abide by the court's orders. I am asking you to convict the Defendant because this toxic cycle for this girl needs to end somehow. Someone has to do it, and I am asking you to convict the Defendant because Jessica needs us to have the strength to compensate for her, but I'm asking you mainly to convict the Defendant because he is guilty of these crimes.

3RP 89.

Defense counsel argued the State had not proven the elements of the charged crimes beyond a reasonable doubt because the evidence showing Hall was the perpetrator amounted to no more than hearsay and assumption. 3RP 90-97. In rebuttal, the prosecutor argued as follows:

After listening to Defense Counsel, you must be left with the impression that beyond a reasonable doubt is some insurmountable mountain, Mt. Everest.

But 12 like minded people just like you across this country every single day gather in courthouses and deal with this same very workable standard. It is called reasonable for a reason.

If you know in your gut that the Defendant is guilty, then you know it beyond a reasonable doubt. It is not rocket science.

3RP 98 (emphasis added).

A prosecutor, as a quasi-judicial officer, has the duty to ensure that a defendant receives a fair and impartial trial, which means a verdict free from prejudice and based on reason. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Inflammatory comments that deliberately appeal to the jury's passion and prejudice are improper. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge and that otherwise prevent calm and

dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001); see, e.g., State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (prosecutor's statement to let the victim and the "children know that you're ready to believe them and enforce the law on their behalf" held to be an improper exhortation of the jury to send a message to society about the general problem of child abuse).

The prosecutor's argument regarding why the jury should convict Hall falls squarely into this category. The jury may properly convict only if it finds each element of the offense proven beyond a reasonable doubt. The prosecutor's appeal to convict in order to end the "toxic cycle" for "this girl" is an improper appeal to emotion. The jury should not find the accused guilty of a crime in order to protect an alleged victim from a dysfunctional relationship.

The prosecutor likewise should not have urged the jury to find the strength to compensate for Erickson's failure to testify against Hall. The jury has no business compensating for any shortcomings in the prosecutor's case or the alleged victim.

Asking jurors to convict Hall "because he essentially refuses to abide by the court's orders" also constitutes misconduct. 3RP 89. Because the parties agreed to a bifurcated trial procedure involving previous

convictions for violating a no contact order,² the jury had not yet heard evidence that Hall had previously violated no contact orders when the prosecutor asked the jury to convict Hall for refusing to abide by the court's orders. Prosecutors may not make prejudicial statements unsupported by evidence in the record. State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). Prosecutors are also forbidden from asking the jury to convict someone based on propensity to commit the crime charged. State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009).

Ending with asking the jury to convict "mainly" because Hall was guilty of the crimes only served to confirm the impropriety of the previous remarks. 3RP 89. A conviction "mainly" based on guilt is still improper if conviction was based "partly" on the improper reasons urged by the prosecutor.

In sum, "[r]eferences to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct." Fisher, 165 Wn.2d at 747. That is what happened here.

But that was not all. The prosecutor committed further misconduct in arguing the standard of beyond a reasonable doubt was satisfied "if you know in your gut that the Defendant is guilty." 3RP 98.

² 2RP 12-16; CP 36.

The presumption of innocence and the corresponding burden to prove every element of the crime charged beyond a reasonable doubt is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The determination of guilt beyond a reasonable doubt as to each element of a crime cannot be based upon a juror's individual "gut feeling." United States v. Hernandez, 176 F.3d 719, 731 (3d Cir. 1999). Although a juror must subjectively believe a defendant has been proven guilty, that subjective belief must be based upon a reasoned, objective evaluation of the evidence. Hernandez, 176 F.3d at 732. Whether the accused is guilty beyond a reasonable doubt does not, as urged by the prosecutor, come down to whether jurors feel the accused is guilty in their guts.

In State v. Oxier, the prosecutor wrongly suggested the concept of proof beyond a reasonable doubt was like an intuition or a gut reaction, and admonished the jury not to be mealy-mouthed over the State's proof, but to follow their gut reactions. State v. Oxier, 175 W. Va. 760, 764, 338 S.E.2d 360 (W. Va. 1985). The prosecutor's remarks "were directed at having the jury disregard one of the most fundamental concepts in the criminal law — the State must prove its case beyond a reasonable doubt." Oxier, 175 W. Va. at 764. These egregious comments constituted clear misstatements of the reasonable doubt law and were highly prejudicial. Id.

The prosecutor's argument that the jury would know Hall was guilty beyond a reasonable doubt "If you know in your gut that the Defendant is guilty" likewise constitutes misconduct. 3RP 98. A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Thus, a prosecutor may not attempt to diminish the burden of proof in closing argument. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

Defense counsel did not object to the prosecutor's improper arguments. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. Fisher, 165 Wn.2d at 747. The standard for showing prejudice remains a substantial likelihood that the misconduct affected the verdict. Id.

Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them.

Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand

the evidence and apply the law." CP 17 (Instruction 1). One problem here is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the trial court's instructions. The prosecutor's argument equating guilt beyond a reasonable doubt with a gut feeling has a seductive attraction even though it is wrong.

Misstatements of law pertaining to the role of the jury and burden of proof cannot be easily dismissed. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (argument that jury could only acquit if it found a witness was lying misstated State's burden of proof, was "flagrant and ill intentioned," and required new trial). Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal).

The prosecutor's remarks in this case were not accidental and were designed to win conviction. Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn.

App. at 215. The evidence against Hall was not overwhelming. Erickson was clearly assaulted but evidence showing Hall was the assailant consisted only of Erickson's hearsay statement. A rational juror had reason to doubt the strength of the State's case because the alleged victim did not testify against Hall.

A prosecutor's disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. Id. at 214. This Court should hold the prosecutor's improper statements regarding why it should find Hall guilty was flagrant and incurable misconduct. Moreover, the cumulative effect of error may be so flagrant that no instruction can erase their combined prejudicial effect. Case, 49 Wn.2d at 73; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Courts are not required to "wink" at prosecutorial misconduct under the guise of harmless error analysis. State v. Neidigh, 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995) (when asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct.

b. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request a Curative Instruction.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Killo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient

performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226.

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). There was no legitimate reason supporting the failure to object given the prejudicial nature of the prosecutor's improper arguments on the reasonable doubt standard and why the jury should convict Hall.

Reasonable attorney conduct includes a duty to investigate and research the relevant law. Kyllo, 166 Wn.2d at 862; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). As this Court recognized in Neidigh, "defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." Neidigh, 78 Wn. App. at 79.

If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comments to fester in the juror's minds without

instruction from the court that its improper argument should be disregarded and play no role in deliberations.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. Strickland, 466 U.S. at 684. Charlton, 90 Wn.2d at 664-65.

A new trial for violating a no contact order is required because defense counsel was ineffective in failing to object to the prosecutorial misconduct.

D. CONCLUSION

For the reasons set forth above, this Court should reverse conviction for violating a no contact order and remand for a new trial on that count.

DATED this 31~~st~~ day of March 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64368-1-I
)	
THOMAS HALL, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS HALL, JR.
DOC NO. 300221
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2010.

x *Patrick Mayovsky*