

64708-3

64708-3

NO. 64708-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LUMPKIN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

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BRIEF OF RESPONDENT

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**A. ISSUE PRESENTED**<sup>1</sup>

To establish prosecutorial misconduct, a defendant must demonstrate that the prosecutor's actions were both improper and prejudicial. During opening statement and closing argument, the prosecutor referred to the defendant's two prior convictions of violating court orders, which were an element of the charged offense. Did the trial court abuse its discretion by denying the appellant's motion for a mistrial?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Robert Lumpkin with one count of Domestic Violence - Felony Violation of a Court Order. CP 36. At trial, Lumpkin was found guilty as charged, and the court imposed a

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<sup>1</sup> The State has reviewed the Statement of Additional Grounds filed by Lumpkin (not by his appellate counsel). The State believes the additional issues raised by Lumpkin are not supported by the record and are without merit. As such, the State is not responding to the Statement of Additional Grounds. However, if the Court of Appeals would like a response to any of the issues, the State would request an opportunity to file briefing.

standard range sentence of 38 months confinement. CP 145, 151-59; 8RP-10RP<sup>2</sup>, 11RP 5P.

## 2. SUBSTANTIVE FACTS

### a. Opening Statement

During the prosecutor's opening statement, the following exchange occurred:

[Prosecutor]: Ladies and gentleman [sic] this is a case about a man who has not yet learned his lesson. It's about the defendant's repeated and blatant defiance for a domestic violence no contact order.

[Defense counsel]: Your Honor, I'm going to object at this point. This is not opening statement. This is argument and it's prejudicial.

9RP 38.

The court sustained defense counsel's objection and instructed the parties to proceed. The prosecutor continued with her opening statement without any additional objections by defense counsel:

[Prosecutor]: On the morning of June 11<sup>th</sup> of 2009 the defendant defied not one but two separate no contact orders when he decided to go over to his ex-girlfriend's home. There were two separate orders in place for her protection. He's been convicted multiple times for violating no contact orders and he did it

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<sup>2</sup> The State adopts the appellant's numbering of the Verbatim Reports of Proceedings.

anyway. And unfortunately for the defendant he got caught. Again. Based on his actions the State has charged him with one count of violation of a no contact order. What that means is that we need to prove to you that in the State of Washington on June 11<sup>th</sup> 2009 there was a no contact order in place that was applicable to the defendant, he knew about the order, he knowingly violated a prohibition of the order and he has two prior convictions.

9RP 38.

The prosecutor went on to explain that defendant violated two different no contact orders in this case and that "the two no contact orders in this place were entered both at sentencing hearings following convictions of the defendant." 9RP 38. The prosecutor explained that the first order from Kent Municipal Court was entered on January 28, 2008 and was valid until January 28, 2010. 9RP 38-39. The second order from King County Superior Court was entered on October 17, 2008 and was valid until October 17, 2013. 9RP 38-39. The prosecutor also told the jury that "You're going to see both the no contact orders in this case, you're going to see where they were signed by the defendant, you're going to see all of the warnings on them, all of the penalties and consequences that the defendant is facing if he violates those orders." 9RP 39.

At the conclusion of opening statements, defense counsel moved for a mistrial claiming the prosecutor committed misconduct by "arguing propensity." 9RP 42. The prosecutor responded that the current felony charge was based on Lumpkin's two prior convictions. Id. The prior convictions were elements of the offense, and defense counsel had stipulated to them. Id. Therefore, she was allowed to mention the prior convictions to the jury. Id.

The court reviewed the audio recording of the opening statement and denied defense counsel's motion for a mistrial.

9RP 44. The court stated:

The Court gleaned the following two sentences from the recording, this "this is a case about a man who has not learned his lesson, this is a case about defendant's repeated and blatant defiance of domestic violence no contact orders."

Id.

The court reaffirmed its ruling on defense counsel's objection to the words "blatant defiance" by stating "...on the grounds of the statement was argumentative the Court sustained that objection."

Id. However, the court was "not persuaded" that the "sentence which refers to repeated and blatant defiance of no contact orders is propensity." Id. The court clarified its reasoning by stating:

One of the elements of the offense is that the defendant violated a no contact order when he had been previously convicted of the same thing. So propensity is part of the definition of the crime in this case

...if the prosecution had said this is a case about defendant's repeated violation of a domestic no contact order, I think that would be proper, the word repeated...accurately described that he must have been convicted twice.

Id.

The court concluded by giving "the defense an opportunity to propose a limiting instruction should the defense wish to make that proposal." 9RP 45. The following day, the defense proposed the following curative instruction that the court read to the jury:

Before we get started I wanted to give you an instruction relating to an objection at the very beginning of the State's opening statement. You may recall that at the very beginning of the State's opening argument Mr. Luer objected. I sustained the objection and I am going to instruct you to disregard the statements that were made by, in the opening statement that were subject to that objection and with that let's proceed.

10RP 2.

b. Trial Facts

Natasha Fagan and Robert Lumpkin were in a long-term relationship, and they had three children together before their

relationship ended. 10RP 4, 38. For the last 18 months, Fagan has lived with her fiancé Kevin Watson at 11440 SE 256<sup>th</sup> Street in Kent. 9RP 46-47, 65-67; 10RP 5. Fagan works at two different daycare facilities that are both located near her residence. 10RP 6.

There are two no contact orders prohibiting Lumpkin from contacting Natasha Fagan. 9RP 57-61. One of the orders prohibits Lumpkin from being within 1000 feet of Fagan's address; the other order prohibits Lumpkin from being within 500 feet of her address. 9RP 59. Lumpkin does not have any family members or friends that live close to Fagan. 10RP 53.

Kerry Smith and Danielle Williams live a few blocks away from Natasha Fagan at 14901 SE 272<sup>nd</sup> in Kent. 10RP 38. Danielle Williams is Natasha Fagan's sister, and Kerry Smith is engaged to Danielle Williams. 10RP 3-4, 38. Smith has known both Fagan and Lumpkin for more than seven years. 10RP 38-40. Even though Smith never had a close relationship with Lumpkin, they were "very cordial with each other." 10RP 39-40.

On June 11, 2009 at approximately 10:30 a.m., Smith drove to Natasha Fagan's house to pick up Kevin Watson to go to Worksource, which is a program that assists unemployed people return to the workforce. 10RP 41. When Smith pulled up to

Fagan's residence, Lumpkin "came storming out of the house hollering and screaming about...how could [Smith] get involved in his business." 10RP 42.<sup>3</sup>

Smith immediately drove back to his house and picked up Danielle Williams to go look for Fagan. 9RP 10-11; 10RP 48. As Smith pulled into the daycare driveway next door to Fagan's house, Williams saw Lumpkin coming out of Fagan's house with a suitcase. 9RP 12. Smith saw Lumpkin as he was walking away from the house pulling the suitcase. 10RP 48-49. Williams got out of the vehicle. 9RP 13; 10RP 49. Lumpkin was "really aggravated" and threatened that "he was going to kill everybody," so Williams told him that she was calling the police. 9RP 13-15; 10RP 49.

When Lumpkin realized that Williams was calling the police, he asked Smith for a ride down the street. 9RP 15; 10RP 49-51. Smith declined to give Lumpkin a ride, so Lumpkin walked down the street passing the daycare. 9RP 15-17; 10RP 51. Smith described Lumpkin's demeanor as "trying to get somewhere in a hurry because he knew the police were coming." 10RP 51.

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<sup>3</sup> Smith believed Lumpkin was upset about a recent incident when Smith went to Natasha Fagan's house to help her get Lumpkin to leave. 10RP 44-45.

Meanwhile, Officer Kevin Eades and Officer Christopher Mills had been dispatched to Natasha Fagan's residence at 11440 SE 256<sup>th</sup> in Kent. 9RP 46-47, 65-67. On the way to the location, Officer Mills saw a male matching the description of the suspect standing at a bus stop approximately two or three blocks away from the residence. 9RP 49. The distance between the bus stop and Natasha Fagan's residence was subsequently determined to be 1109 feet. 9RP 56. Officer Mills stopped, confirmed Lumpkin's identity, and arrested him for violating a court order. 9RP 70-71. Officer Eades briefly stopped at the scene as Officer Mills was detaining Lumpkin, but Officer Eades soon continued on to Fagan's residence. 9RP 71.

When Officer Eades arrived at the residence at 11440 SE 256<sup>th</sup>, he contacted several people on the driveway, including Natasha Fagan, Kevin Watson and Kerry Smith. 9RP 51. Officer Eades described the scene as "hectic." 9RP 50. During his testimony at trial, Officer Eades identified two valid no contact orders prohibiting Lumpkin from contacting Natasha Fagan. 9RP 57-61.

After the testimony of the State's witnesses, the court read the following stipulation to the jury:

The parties stipulate for purposes of the trial that the defendant has twice previously been convicted for violating the provisions of a no-contact order.

10RP 68.

c. Closing Argument

The prosecutor began her closing argument with the following statements:

On June 11<sup>th</sup>, 2009, the defendant knew exactly what he was doing. He knew about the no contact order, he knew he wasn't supposed to be anywhere near his ex-girlfriend's home and he did it anyway. The defendant is truly a man who has not learned his lesson. Based on his actions on June 11<sup>th</sup> 2009 the State has charged him with one count of violation of a no contact order.

10RP 83.

Defense counsel did not object, and the prosecutor continued with her closing argument by discussing jury instructions, trial testimony, credibility of witnesses, the two no contact orders that the defendant violated in this case, and the defendant's stipulation that he "has been twice previously convicted for violating a no contact order." 10RP 83-91. At the end of her closing argument, the following exchange occurred:

[Prosecutor]: Folks keep in mind that domestic violence no contact orders are put in place for a reason. This is a man.

[Defense counsel]: Your honor I am going to object at this point.

[Judge]: Sustained.

[Defense counsel]: Move to strike.

[Judge]: Stricken.

[Prosecutor]: This is a man who has prior convictions for violating no contact orders.

[Defense counsel]: Objection your Honor move to strike. This is an improper use of that fact.

[Judge]: Why don't you rephrase.

[Prosecutor]: That would be an element of this crime.

[Defense counsel]: It's not being argued as an element at this point.

[Prosecutor]: As an element of what the State is required to prove to you which has been stipulated and agreed to the defendant has prior convictions for violating no contact orders. Two separate judges in different court houses made a decision that the defendant was not allowed to have contact with his ex-girlfriend and that he was not allowed to go to her house or anywhere near her house. The defendant does not get to choose whether or not he feels like following that order. No contact orders imposed by a judge in court are not discretionary and they are not

optional. Folks there is no reasonable doubt that the State has proved this case beyond a reasonable doubt. At the beginning of this case in opening I said that State asked you to listen. Upon listening we asked you to believe Kerry and to believe Danielle. We asked you to find the defendant guilty as charged.

10RP 91-92.

Defense counsel then presented his closing argument, and the State followed with her rebuttal argument. 10RP 92-103. There were no objections during defense counsel's closing argument or during the State's rebuttal argument.

During deliberations, the jury submitted a question to the court asking, "May we consider the workplace of Natasha in the determination of the distance to the bus stop and do we know what the distance is?" 10RP 104; CP 146. The court responded to the jury as follows: "The Court cannot tell you whether a particular point is supported by the evidence or not. That is for you to determine. Your consideration of this issue must be based on the evidence, not on speculation." 10RP 107; CP 147.

C. **ARGUMENT**

1. **THE COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR A MISTRIAL BECAUSE THE PROSECUTOR'S CONDUCT WAS PROPER.**

a. Standard Of Review

Prosecutorial misconduct allegations are reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When the defendant moves for a mistrial based on prosecutorial misconduct, the court gives deference to the trial court's ruling since "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial." Id. at 719 (quoting State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

b. The Prosecutor's Conduct Was Proper.

To succeed on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); State v. Luvene, 127 Wn.2d at 701. Allegations of prosecutorial misconduct should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

During an opening statement, a prosecutor may state what the State's evidence it expected to show. State v. Magers, 164 Wn.2d 179, 191, 189 P.3d 126 (2008). A prosecutor may not refer to evidence not presented at trial, but in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Id.; State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

To convict Lumpkin of Felony Violation of a Court Order, the State was required to prove that Lumpkin had at least two prior convictions for violating a court order. CP 139 (Instruction 7);

CP 141 (Instruction 9); and RCW 26.50.110(1) and (5). Lumpkin concedes these convictions were "legally relevant to the jury's consideration of the current charge" and did not argue against admissibility (Brief of Appellant, page 12). Therefore, as relevant and admissible evidence of the charged crime, the State was entitled to reference Lumpkin's prior convictions in both the opening statement and closing argument.

There is no dispute that Lumpkin's prior convictions were admissible at trial to satisfy an element of the charged crime. However, Lumpkin is not arguing that his prior convictions for violating court orders should have been inadmissible. Instead, Lumpkin is mistakenly characterizing the references about his admissible prior convictions of violating court orders as improper references to inadmissible 404(b) evidence or other evidence that was not properly admitted at trial.

For example, in Ra, the prosecutor questioned the detective about the police department's gang unit, questioned the occupant of the defendant's vehicle about the group's gang-like behavior, and even referenced gang culture in closing argument. State v. Ra, 144 Wn. App. 688, 694-99, 175 P.3d 609 (2008). The Court of Appeals (Division II) noted:

Because of the indirect manner in which the State presented the evidence, the trial court never had the opportunity to conduct an ER 404(b) analysis. And the State never presented evidence that Ra was a gang member and, if so, what the gang mores were. Without such evidence, we have no basis to conclude the State's gang evidence was admissible under 404(b).

Id. at 702.

The court held that the "wrongly admitted evidence" about the defendant's involvement in gangs "invited the jury to make the 'forbidden reference' underlying ER 404(b) that Ra's prior bad acts showed his propensity to commit the crimes charged." Id. at 702. As such, the prosecutor committed misconduct by improperly referring to inadmissible gang evidence that invited the jury to infer propensity.

Lumpkin's reliance on State v. Wade is similarly misplaced. 98 Wn. App. 328, 989 P.2d 576 (1999). In Wade, the defendant was charged with possession of cocaine with the intent to deliver. Id. at 332. The trial court erroneously allowed evidence of the defendant's prior cocaine sales as 404(b) evidence to prove intent to sell the cocaine that he possessed in the current charge. Id. at 333. The Court of Appeals (Division II) noted:

The only reasonable inference to be drawn from Wade's prior acts is as follows: Because the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have the same intent on the current occasion.

Id. at 337. In other words, the only reasonable inference that could be drawn from the 404(b) evidence was that the defendant had the propensity to sell cocaine.

In contrast to Ra and Wade, Lumpkin's prior convictions for violating court orders were admissible as elements of the charged offense. The prior convictions were not evidence that could have been excluded, such as 404(b) evidence. The prosecutor in Lumpkin's trial properly referred to the admissible evidence of Lumpkin's prior convictions for violating court orders.

During opening statement, the prosecutor referred to the defendant's "repeated" violations of court orders because those convictions were both admissible evidence and elements of the charged crime. 9RP 38. A short time later, the prosecutor explained the relevance of the prior convictions to the jury by clarifying, "we need to prove to you that...there was a no contact order in place that was applicable to the defendant, he knew about the order, he knowingly violated a prohibition of the order and he has two prior convictions." (emphasis added). 9RP 38. As such,

the prosecutor's purpose of referring to Lumpkin's prior convictions was not to somehow argue propensity. Instead, the prosecutor referred to the convictions because the convictions were elements of the charged crime.

In her closing argument, the prosecutor again referred to Lumpkin's prior convictions as elements of the charged crime. After defense counsel objected to her statement, "This is a man who has prior convictions for violating no contact orders,"<sup>4</sup> the prosecutor explained that the convictions were "an element of this crime." The prosecutor then immediately clarified to the jury:

As an element of what the State is required to prove to you which has been stipulated and agreed to the defendant has prior convictions for violating no contact orders.

10RP 91-92.

This exchange illustrates that the prosecutor referred to Lumpkin's prior convictions because they were an element of the charged crime. The prosecutor did not argue that the jury should convict the defendant because he had the propensity to commit this type of crime. Instead, as she had already done during her opening statement, the prosecutor even took the additional time to explain

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<sup>4</sup> The court did not sustain the defense objection. Instead, the court asked the prosecutor to "rephrase" the statement.

to the jury that Lumpkin's prior convictions were relevant as elements of the charged crime.

The prosecutor's references to Lumpkin's prior convictions were not a "forbidden reference" to propensity because Lumpkin's convictions were elements of the charged crime. In addition, when the prosecutor's statements are reviewed in the context of total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury, Lumpkin fails to establish misconduct. In his Appellate Brief, Lumpkin only quotes the prosecutor during two brief exchanges to support his claim of misconduct. However, it is noteworthy that there were no other defense objections during opening statement and closing argument.

Lumpkin has failed to meet his burden of establishing that the prosecutor's conduct was both improper and prejudicial, especially in the context of the entire record and circumstances at trial. In addition, Lumpkin has failed to establish that the trial court's denial of his motion for mistrial was manifestly unreasonable or exercised on untenable grounds.

c. Lumpkin Has Failed To Demonstrate Prejudice Requiring Reversal.

Even where prosecutorial misconduct takes place, reversal is only warranted where the defendant has demonstrated prejudice. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991). Prejudice requiring reversal is established only if the defendant can show that there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Lumpkin argues that the jury question about the proximity of the victim's workplace to the bus stop established that the "jurors indicated they did not believe Williams and Smith." (Brief of Appellant, page 15). There could be many interpretations of this question. However, Lumpkin's strained interpretation of this inquiry does not show that there is a "substantial likelihood" that misconduct affected the jury's verdict. Both of the State's witnesses testified that Lumpkin was at the victim's residence in violation of a court order. If the jurors did not believe the State's

witnesses, then they would have simply returned a verdict of not guilty instead of asking additional questions of the court.

Lumpkin's assertion of prejudice is further undermined by the fact that the court gave the jury a curative instruction after sustaining defense counsel's argumentative objection during the opening statement. The jury is presumed to follow the instructions of the court. State v. Yates, 161 Wn.2d 714, 780, 168 P.3d 359 (2007). Therefore, the presumption is that the jury disregarded the prosecutor's comment.

In spite of Lumpkin's assertions to the contrary, the guilty verdict shows that the jury believed the State's witnesses that Lumpkin violated the court order. Both witnesses were subject to vigorous cross-examinations. Thus, the jury had the opportunity to observe them and make its own independent judgment as to veracity and credibility based on their demeanor and testimony in court. Furthermore, the jury was properly instructed that it was the sole judge of the credibility of the witnesses and to disregard the argumentative comment by the prosecutor during her opening

statement. Absent evidence to the contrary, the jury must be assumed to have followed that instruction. As the court held in State v. Kirkman, “[o]nly with the greatest reluctance and with the clearest cause should judges – particularly those on the appellate courts – consider second-guessing jury determinations or jury competence.” 159 Wn.2d 918, 938, 155 P.3d 125 (2007).

As a result, the possibility that any prosecutorial misconduct so completely overwhelmed the jury that it overcame its ability to judge the credibility of testifying witnesses, or caused it to abdicate its responsibility to do so, is purely speculative. Thus, the untainted evidence is so overwhelming that any reasonable jury – like this jury – would have found Lumpkin guilty.

**D. CONCLUSION**

The trial court did not abuse its discretion by denying Lumpkin's motion for a mistrial. In the context of the entire record, Lumpkin has failed to meet his burden of establishing that the prosecutor's conduct was both improper and prejudicial and that

there was a substantial likelihood that the claimed misconduct  
affected the outcome of the trial.

DATED this \_\_\_\_\_ day of December, 2010.

Respectfully submitted,

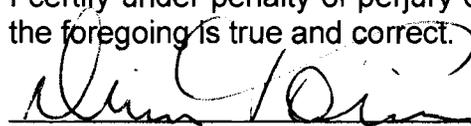
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson , the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent and Certificate of Mailing, in STATE V. ROBERT LUMPKIN, Cause No. 64708-3-I, 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.

  
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Done in Kent, Washington

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