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NO. 65067-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
MIKAEL RASHID,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BRIAN GAIN, JUDGE

BRIEF OF RESPONDENT

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID A. BAKER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES

1. A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. When a question is objected to and the jury instructed to disregard, any possible prosecutorial misconduct is cured unless the prejudice is so flagrant and enduring that no instruction could neutralize the effect. Here, a question was asked to attack the credibility of a witness, the jury was instructed to disregard, and the trial court denied the defense motion for a mistrial. Has Rashid failed to establish the prejudice necessary to warrant reversal and remand?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Mikael Rashid was charged by amended information with assault of a child in the third degree – domestic violence. CP 1-4. On January 27, 2010, the jury returned a verdict of guilty. CP 39. The trial court imposed a standard range three-month sentence, and Rashid appealed. CP 42-48, 49-56.

2. SUBSTANTIVE FACTS

In late July of 2008, eight year old R.W. was beaten by the defendant, Mikael Rashid. 3RP 3-4; 4RP 10-12.¹ Rashid beat R.W. with a belt. 4RP 12. Rashid hit R.W. with the belt lots of times (more than ten); he beat R.W. for a period of about two minutes, which R.W. stated felt like an hour. 4RP 12-14. Rashid hit R.W. on his bottom, thighs, arms, and ankles. 4RP 16. R.W. was laying down on the bed and moving around as Rashid hit him. 4RP 16-17. The belt left marks/bruises on R.W.'s wrist, ankles, and thigh. 4RP 18-19.

R.W. attended summer school in July of 2008. 3RP 3-4. On July 28, 2008, R.W. was wearing shorts and a t-shirt; his teacher noticed bruises that appeared to be belt marks on R.W.'s wrist and ankle. 3RP 6-8. R.W.'s teacher could tell that the marks came from a belt because the marks had holes like those on a belt. 3RP 13-18. The marks had two rows of holes, indicating that the belt would have had two prongs. 3RP 13-18. R.W.'s teacher discussed the bruises with R.W., and then consulted with a number

¹ The Verbatim Report of Proceedings consists of five volumes, referred to in this brief as follows: 1RP (January 20, 2010); 2RP (January 21, 2010); 3RP (January 25, 2010); 4RP (January 26, 2010); and 5RP (January 27, 2010).

of staff members before notifying the principal, who called Child Protective Services on July 30. 3RP 8-9, 20.

CPS Social Worker Brad Stout conducted an investigation and interviewed R.W. on July 31. 3RP 65-70. During the interview, Mr. Stout observed what he described as significant bruising on R.W. and some scarring. 3RP 71-72. Mr. Stout observed that R.W.'s injuries appeared to have been inflicted by a belt. 3RP 72-74. Mr. Stout tried to photograph the injuries but in his opinion the photos don't really portray what he saw with the naked eye in that it was easier to see the injuries with the naked eye. 3RP 75-78.

After interviewing R.W., Mr. Stout attempted to contact R.W.'s mother, Sirrether Latoya Lanier. 3RP 80-81; 4RP 37-38. Mr. Stout went to Ms. Lanier's apartment on multiple occasions, made phone calls to her and left voice mails, and left two letters for her. 3RP 83-87. Eventually, Ms. Lanier called Mr. Stout back but she refused to cooperate in the investigation. 3RP 87-88.

On August 3, 2008, Emanuel Washington picked up R.W. from R.W.'s Grandfather's house. 3RP 105. R.W. lived with Mr. Washington and his family from that point on. 3RP 104-05. The day after R.W. arrived, Mr. Washington observed belt shaped

bruises on R.W. 3RP 107-08. Mr. Washington became concerned and arranged for R.W. to be interviewed again by DSHS. 3RP 108.

On August 8, 2008, another CPS social worker, Tara McGivern, conducted an interview of R.W. 3RP 22-23. Ms. McGivern saw bruises on R.W.'s thigh during this interview and attempted to take photos but had limited success. 3RP 24-26.

R.W.'s mother, Sirrether Latoya Lanier, was called as a witness by the defense. 4RP 37-38. During Ms. Lanier's testimony she indicated that R.W. lied about being abused, discussed the reasons that R.W. was disciplined, and testified that Rashid always disciplined R.W. in a reasonable manner. 4RP 40-49. During direct examination she also indicated that Rashid used a belt to "discipline" R.W. 4RP 47. Ms. Lanier stated during cross examination that she never checked to see if R.W. had been injured. 4RP 50-51.

During the cross examination of Ms. Lanier, the prosecutor inquired about Jori, R.W.'s sister, being unavailable to testify because she was sent to Mississippi by Ms. Lanier. 1RP 37-41; 4RP 54-61. In the course of this line of questioning the prosecutor asked "Did you know that Jori had indicated that [R.W.] had, in fact, been beaten and bruised by Mr. Rashid?" 4RP 60. Ms. Lanier

answered "No, I didn't." 4RP 60. The prosecutor then asked "Did you know that she had indicated that she had been abused by Mr. Rashid?" 4RP 60. The subject matter of this question was raised during motions in limine and ultimately excluded by the court. 1RP 22-32. After the question was asked, Ms. Lanier answered "no." 4RP 60. The defense immediately objected; the court sustained the objection and ordered the jury to disregard. 4RP 60.

Sometime later, outside of the presence of the jury, the defense moved for a mistrial because of the objected to question and answer discussed above. 4RP 72-73. The court specifically noted that it sustained the defense objection, that it told the jury to disregard, and that the jury is presumed to follow the court's instructions before denying the defense motion. 4RP 74. The court then went on to note that the testimony that it allowed concerned the bias or prejudice that Ms. Lanier may have had, and that the jury could make the conclusion that Jori was sent to Mississippi because she talked to the prosecutor about R.W. 4RP 74-75.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RASHID'S MOTION FOR A MISTRIAL.

Rashid argues that the trial court should have granted his motion for a mistrial and that his trial must be reversed due to prosecutorial misconduct. He maintains that during cross examination, a question asked by the prosecutor was inappropriate as evidence of other crimes, wrongs, or acts under ER 404 and that this affected the jury's verdict. Rashid's claim should be rejected because any possible prejudice was cured with an instruction and the State presented substantial evidence inculpatory Rashid such that it is unlikely that any possible prejudice affected the jury's verdict.

Denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A jury is presumed to follow the court's instructions. Id. at 77.

To establish prosecutorial misconduct, a defendant must show that the conduct complained of was both improper and prejudicial. State v. Luvone, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Prejudice is established only if the defendant demonstrates

a substantial likelihood that the instances of misconduct affected the jury's verdict. Luvene, 127 Wn.2d at 701 (citing State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)); State v. Thach, 126 Wn. App. 297, 316, 106 P.3d 782 (2005).

"A trial court ruling on prosecutorial misconduct will be given deference on appeal. 'The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.'" Luvene, 127 Wn.2d at 701 (citing State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)). When the trial court issues a curative instruction, a new trial is the remedy only if the misconduct is so flagrant that no instruction can cure it. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (citing State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988)).

The trial court did not abuse its discretion by denying the defense motion for a mistrial. Rashid asserts that he should have a new trial because the prosecutor asked Ms. Lanier "Did you know that [Jori] had indicated that she had been abused by Mr. Rashid?" 4RP 60. While this question did encompass a subject previously excluded by the trial court in motions in limine, the circumstances

were such that the trial court's instruction to disregard was a sufficient remedy.

The question at issue was ultimately asked because Ms. Lanier's bias and credibility were at issue. During direct examination Ms. Lanier testified that R.W. lied about being abused, that she gave Rashid the authority to discipline R.W., and that Rashid always disciplined R.W. in a reasonable manner. 4RP 40-49. In addition, Jori, R.W.'s sister and a witness, was unavailable to testify because she was sent to Mississippi by Ms. Lanier. 1RP 37-41; 4RP 54-61.

The prosecutor appropriately used cross examination to inquire into Ms. Lanier's bias and attack her credibility. Indeed, Ms. Lanier admitted that she never even checked to see if R.W. had been injured. 4RP 50-51. During the course of that cross examination Ms. Lanier testified that she sent Jori to Mississippi because it was already planned with the possibility of her starting high school there. 4RP 55. The prosecutor then inquired into Ms. Lanier's other motivations, including the possibility that Ms. Lanier may have sent Jori to Mississippi to prevent her from talking with the State and/or being called as a witness. 4RP 54-61. It was during this inquiry that the question at issue was asked,

objected to, and the jury was instructed to disregard. The subject matter of the question at issue was never raised again in the presence of the jury.

The trial court observed all of this first hand and was in the best position to determine if the question at issue affected Rashid's right to a fair trial. Luvene, 127 Wn.2d at 701. Given those circumstances and other testimony of Ms. Lanier, the trial court did not abuse its discretion in denying Rashid's motion for a mistrial. Any prejudice caused would have weighed more heavily on Ms. Lanier's credibility, which was the focus of the line of questioning, than on Rashid's character. More importantly, any possible prejudice from the question at issue would have been cured and counterbalanced by the curative instruction given and the rest of Ms. Lanier's testimony, particularly the portions where she indicated that R.W. lied and that Rashid always used reasonable discipline. 4RP 40-49. Nothing in the question at issue or surrounding circumstances indicates that the question at issue caused Rashid a vast incurable prejudice.

Moreover, any possible prejudice was extremely unlikely to affect the jury's verdict. The State presented substantial evidence through R.W. and multiple other witnesses that established the

severity of the marks/bruising caused by Rashid beating R.W. with a belt. In addition, portions of Ms. Lanier's testimony corroborated the evidence presented by the State, which indicated that Rashid beat R.W. with a belt. 4RP 47. Considering the evidence presented against Rashid, the context of the question at issue, and the curative instruction issued, it is very unlikely that the question at issue affected the jury's verdict. As such, Rashid has not met his burden of showing a substantial likelihood that the instances of alleged misconduct affected the jury's verdict and this Court should affirm Rashid's conviction.

Rashid cites three cases in arguing that some errors cannot be fixed with an instruction: State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); and State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987). None of those cases present a factual situation similar to this where the error could not have been cured with an instruction.

In Copeland, the court found that the error resulting from an improper question was cured by the court's instruction, somewhat similar to how the possible error in the instant case was cured by instruction. Copeland, 130 Wn.2d at 284-85. In Copeland, the

prosecutor asked the following inflammatory question of a defense witness, Siemering: “You beat her [the victim, Siemering's wife] black and blue and you burned her abdomen with a cigar, didn't you?” Id. at 284. The Copeland court found that the curative instruction was sufficient after considering the surrounding circumstances, that the single question occurred in a lengthy trial, that the defense objected, and that the court sustained the objection and instructed the jury to disregard. Id. at 285.

In a situation with extremely flagrant misconduct that is completely distinguishable from the instant case, the Belgarde court found that the prosecutor's remarks in closing argument demanded a retrial. Belgarde, 110 Wn.2d at 506-10. The prosecutor in Belgarde argued in closing that “the defendant is ‘strong in’ a group which the prosecutor describes as ‘a deadly group of madmen’, and ‘butchers that kill indiscriminately’. The prosecutor likened the American Indian movement members to ‘Kadafi’ and ‘Sean Finn’ of the IRA.” Id. at 508.

In another distinguishable case, the Escalona court found that a curative instruction could not cure the error because of serious irregularity combined with the weakness of the State's case. Escalona, 49 Wn. App. at 255-56. In Escalona, the alleged

victim testified that the defendant in that matter had “a record and had stabbed someone before.” Id. at 253-54. However, there was inconsistent testimony from the alleged victim and police testimony corroborated much of Escalona’s testimony. Id. In finding that this error could not have been cured, the Escalona court was extremely concerned with the “paucity of credible evidence against Escalona.” Id. at 255. In contrast, the weight of the evidence against Rashid in the instant case makes it extremely unlikely that the question at issue would have affected the jury’s verdict.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Rashid's conviction for assault of a child in the third degree.

DATED this 15th day of November, 2010.

Respectfully submitted,

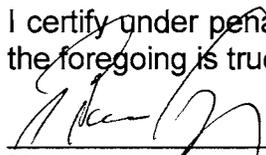
DANIEL T. SATTERBERG
King County Prosecuting Attorney

for By: David A. Baker #18887
DAVID A. BAKER, WSBA #41998
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 David B. Koch, 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, in STATE V. MIKAEL RASHID, Cause No. 65067-0-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.



Name

Done in Seattle, Washington

11-16-2010

Date