

NO. 41297-7

COURT OF APPEALS
DIVISION II
NOV 10 10 31 AM '09
BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KIMBERLY CLARK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 09-1-04894-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Has defendant waived any claim of prosecutorial misconduct where she failed to object at trial and the challenged statements were not flagrant, ill-intentioned, or prejudicial?..... 1

 2. Has defendant failed to show that counsel's performance was deficient when she did not object to proper argument? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 2

C. ARGUMENT..... 3

 1. DEFENDANT WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT WHERE SHE FAILED TO OBJECT AT TRIAL AND THE CHALLENGED STATEMENTS WERE NOT FLAGRANT, ILL-INTENTIONED, OR PREJUDICIAL. 3

 2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT NOR RESULTED IN PREJUDICE. 9

D. CONCLUSION..... 15

Table of Authorities

State Cases

| | |
|---|--------|
| <i>In re Davis</i> , 152 Wn.2d 647, 717, 101 P.3d 1 (2004) | 13 |
| <i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)..... | 11 |
| <i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996)..... | 4 |
| <i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996)..... | 10 |
| <i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997)..... | 5 |
| <i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988)..... | 11 |
| <i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)..... | 11, 14 |
| <i>State v. Dhaliwal</i> , 150 Wn.2d 559, 578-79, 79 P.3d 432 (2003). | 4 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) | 4 |
| <i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)..... | 3 |
| <i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985)..... | 4 |
| <i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)..... | 10, 11 |
| <i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)..... | 4 |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) | 10, 12 |
| <i>State v. Warren</i> , 165 Wn.2d 17, 26 at FN 3, 195 P.3d 940 (2008) | 5 |
| <i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952)..... | 4 |

Federal and Other Jurisdictions

Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955,
8 L. Ed. 2d 834 (1962) 4

Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990) 12

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995) 11

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582,
91 L. Ed. 2d 305 (1986) 10, 12

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237,
152 L. Ed. 2d 29 (2002) 12

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 10, 11, 12, 14

U.S. v. Necochea, 986 F.2d 1273, 1281 (9th Cir. 1993) 13

United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045,
80 L. Ed. 2d 657 (1984) 9

United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991) 12

Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1,
157 L. Ed. 2d 1 (2003) 11, 14

Constitutional Provisions

Sixth Amendment of the United States Constitution 10, 14

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant waived any claim of prosecutorial misconduct where she failed to object at trial and the challenged statements were not flagrant, ill-intentioned, or prejudicial?
2. Has defendant failed to show that counsel's performance was deficient when she did not object to proper argument?

B. STATEMENT OF THE CASE.

1. Procedure

On October 30, 2009, the State charged KIMBERLY CLARK, hereinafter "defendant," with one count of assault in the second degree, alleged to be an act of domestic violence. CP 1-2. Jury trial commenced September 1, 2010, before the Honorable Rosanne Buckner. RP 3. The jury found defendant guilty as charged. CP 104, 105.

The court declined defendant's request for an exceptional sentence downward and imposed a low-end, standard-range sentence of three months in custody with eighteen months of community custody. CP 120-32.

Defendant filed a timely notice of appeal. CP 137-50.

2. Facts

On August 22, 2009, at approximately 2:50 a.m., Pierce County Sheriff's Deputies Shaw and Cooke were on routine patrol when they responded to a 911 call reporting a domestic violence assault. RP 128, 229-30. When they arrived at the apartment, they found Undra Edwards, defendant's husband, sitting in the kitchen wearing just his underwear. RP 131, 231. Mr. Edwards was in obvious pain, and had discolorations and blisters on his right arm, torso, and leg. RP 131-32, 135, 232. Deputy Shaw observed that Mr. Edwards' skin was beginning to slough off. RP 134-35.

At the scene, Mr. Edwards informed the deputies and the responding paramedic that defendant had thrown boiling water on him after an argument. RP 136, 148, 215, 233. Mr. Edwards told Deputy Shaw that defendant had not been cooking prior to the event. RP 137. Neither deputy saw any sign of water in the kitchen, but Deputy Cooke observed a "sopping wet" bed in one of the bedrooms. RP 137, 236-37.

As the deputies were investigating, defendant called the apartment. RP 138. Mr. Edwards answered and handed the phone to Deputy Shaw. RP 138. Defendant refused to come back to the apartment to discuss the incident and hung up on Deputy Shaw when he asked where she was. RP 139.

Mr. Edwards was transported to the hospital where he was treated for second degree burns on his arm, leg, and torso. RP 196, 205. Mr.

Edwards informed the hospital staff that defendant threw boiling water on him and that he was experiencing extreme pain. RP 196, 201.

On August 25, 2009, Pierce County Sheriff's Deputy Curtis Seevers went to the scene for follow-up investigation. RP 274. Defendant was not present, but Deputy Seevers interviewed Mr. Edwards. RP 274-80. Mr. Edwards told Deputy Seevers that he and defendant had been arguing in the bedroom. RP 276. In the course of the argument, defendant left the room and returned to throw boiling water on him. RP 277. Defendant left the apartment immediately after assaulting Mr. Edwards. RP 277.

At trial, Mr. Edwards and defendant both testified that defendant had accidentally spilled boiling water on Mr. Edwards while she was cooking. RP 92, 96, 295.

C. ARGUMENT.

1. DEFENDANT WAIVED ANY CLAIM OF PROSECUTORIAL MISCONDUCT WHERE SHE FAILED TO OBJECT AT TRIAL AND THE CHALLENGED STATEMENTS WERE NOT FLAGRANT, ILL-INTENTIONED, OR PREJUDICIAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015

(1996). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). A new trial will be ordered only if there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578-79, 79 P.3d 432 (2003).

If an instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App. at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

During closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). A prosecutor's remarks must 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).

Here, defendant claims that the prosecutor committed “serious, prejudicial, and constitutionally offensive” misconduct¹ during closing argument by minimizing the State’s burden of proving defendant’s guilt beyond a reasonable doubt. Appellant’s Opening Brief at 18. Yet defendant did not object to any of the statements to which she now assigns error. Defendant has waived this issue unless she can show that the statements were so flagrant or ill-intentioned that any prejudice could not have been cured by instruction. As the prosecutor’s arguments were neither improper nor prejudicial, defendant has failed to make this showing.

Defendant’s challenge is solely based on the prosecutor’s statements regarding reasonability, which are taken out of context of the entire argument. Unlike defendant’s contention, the statements about reasonableness were not related to the State’s burden of proof beyond a reasonable doubt, but when viewed in the context of the entire argument, were proper arguments regarding the credibility of the witnesses. *See* RP 354-60, 374-79.

¹ Defendant’s argument encourages the court to adopt a constitutional harmless error analysis rather than the well-established standard of review for prosecutorial misconduct. The Washington Supreme Court has declined to adopt a constitutional harmless error standard for claims of prosecutorial misconduct. *See State v. Warren*, 165 Wn.2d 17, 26 at FN 3, 195 P.3d 940 (2008).

Here, the court gave the jury the following instructions:

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely on the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial.

...

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

CP 78-103 (Jury Instruction 1); RP 341; and

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration,

you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 78-103 (Jury Instruction 3); RP 341. These instructions were proper statements of the law.

During closing argument, the prosecutor stated that he was required to prove the elements of the crime beyond a reasonable doubt in order for the jury to convict defendant of assault. RP 344. The prosecutor noted that the element of location was not contested, and the element of injury was addressed through the lesser included instructions. *See* RP 344, 348-53. Based on the evidence presented at trial, the prosecutor focused on the only contested element, which was whether defendant intended to assault the victim. RP 344-45. As the victim had informed the first responders and investigating officers that defendant had intentionally thrown boiling water on him, but later testified that it had been an accident, the prosecutor correctly informed the jury that it was going to have to decide which version of the event was credible. RP 354. In order to determine which version of the event was more credible, the prosecutor argued for the jury to “look at the reasonableness of the testimony in the context of the evidence.” RP 354. Every statement regarding reasonableness during the prosecutor’s initial closing argument was related to the jury’s duty to decide credibility. RP 354-55, 357-60. The

prosecutor informed the jury that the evidence supported a reasonable inference that defendant's action was purposeful. RP 360.

In rebuttal closing argument, the prosecutor read part of the jury instruction definition on reasonable doubt verbatim:

Ms. Carnell talked a little bit about reasonable doubt, so let's talk about that. You look in your jury instructions, okay, and your jury instructions say that reasonable doubt - - you know, it defines reasonable doubt for you. There is a last sentence on your jury instructions. And it says if you have an abiding belief in the truth of the charge, then you are convinced beyond a reasonable doubt. If you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt. What that means is when you go back into that jury room and you talk about the evidence, you say to yourselves, you know what, she threw that water on him, that's an abiding belief. You believe it, and you say to yourself that's what happened.

RP 381. He then responded to defendant's argument that, when there are two reasonable interpretations of an event, reasonable doubt exists, by repeating his earlier arguments that defendant's version was not reasonable in light of the evidence presented at trial. RP 381, 384.

Nothing in the prosecutor's closing argument minimized the State's burden of proof beyond a reasonable doubt. The prosecutor did not encourage the jury to arbitrarily "pick a side," but to determine whether it found defendant's conduct was purposeful or accidental based on the evidence presented at trial. The prosecutor's statements during closing argument were reasonable inferences based on the evidence presented at trial and were proper comments on witness credibility.

While the State denies that the prosecutor committed misconduct at all, defendant's claim still fails on the merits. Defendant has failed to show that, even if improper, the prosecutor's statements were so flagrant and ill-intentioned that any prejudice could not have been cured by instruction. That defendant was responsible for causing boiling water to hit the victim was uncontested at trial. The only issue was whether the incident was an accident that happened in the kitchen as defendant and the victim claimed at trial, or whether defendant intended to throw the water on the victim in the bedroom, as the evidence presented by independent witnesses suggested. The prosecutor's use of the word "reasonable" while discussing the witnesses' credibility was neither flagrant nor ill-intentioned, and defendant has failed to show any prejudice based on the prosecutor's credibility arguments

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL'S PERFORMANCE WAS NEITHER DEFICIENT NOR RESULTED IN PREJUDICE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United

States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also*, ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, ***Strickland***, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn. 2d at 226. A defendant carries the burden of

demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990). Generally, a defense attorney's failure to object to a prosecutor's closing argument is not deficient performance because lawyers "do not commonly object during closing statement

‘absent egregious misstatements.’” *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *U.S. v. Necochea*, 986 F.2d 1273, 1281 (9th Cir. 1993)).

Here, defendant claims that she received ineffective assistance of counsel for her counsel’s failure to object to the prosecutor’s “repeated, comprehensive and compelling misstatements of the law and reduction of his constitutionally mandated burden of proof and invocation of a presumption of guilt.” See Appellant’s Opening Brief at 31-32. Notably, defendant argues that the error could have been cured if counsel had objected and requested a curative jury instruction. Appellant’s Opening Brief at 32. Defendant can show neither deficient performance nor prejudice.

As argued above, the prosecutor argued reasonable inferences based on the evidence presented at trial and did not minimize the State’s burden of proof. Counsel argued that defendant’s theory was credible when she mimicked the prosecutor’s “reasonableness” argument and encouraged the jury to find defendant’s theory of an accidental burning to be a reasonable explanation of the event. RP 361, 367. Counsel pointed out to the jury that if there were two “reasonable” interpretations of the event, then the State had not proven its case beyond a reasonable doubt. RP 371. Counsel’s failure to object to proper argument was not deficient performance.

In addition, defendant's focus on counsel's performance during the State's rebuttal closing argument leads the court away from the proper standard of review under *Strickland* and its progeny. The standard of review for effective assistance of counsel is whether, *after examining the whole record*, the court can conclude that defendant received effective representation and a fair trial. *Ciskie*, 110 Wn.2d at 263. The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Gentry*, 540 U.S. at 8.

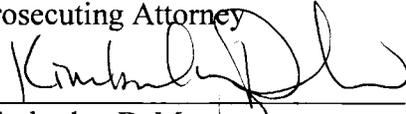
The entirety of the record reveals that defendant received her Sixth Amendment right to counsel. She had an attorney who argued for the suppression of her statements, the 911 tape, and prior criminal history. RP 35-76. Counsel gave an opening statement. RP 82. She made relevant objections and cross-examined the State's witnesses. RP 39, 50, 62, 136, 141, 179, 201, 218, 238, 243, 281, 332, 374. Counsel proposed jury instructions and considered whether lesser-included instructions were appropriate. RP 257, 262, 336-38. She made a coherent closing argument. RP 361-73. It is clear that defendant had counsel and that her attorney tested the State's case. Looking at the entirety of the record, defendant cannot meet her burden on either prong of the *Strickland* test.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction for assault in the second degree.

DATED: August 5, 2011.

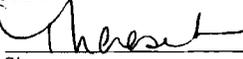
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.5.11 
Date Signature