

FILED
Court of Appeals
Division II
State of Washington
4/2/2018 8:00 AM

No. 50707-2-II
Cowlitz County No. 16-1-00867-1

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

STATE OF WASHINGTON,

Respondent,

v.

HOWARD B. GOODWIN, IV,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLARK COUNTY

The Honorable Judge Scott Collier

APPELLANT'S OPENING BRIEF

KATHRYN A. RUSSELL SELK, No. 23879
Appointed Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. QUESTIONS PRESENTED 1

C. STATEMENT OF THE CASE 1

 1. Procedural Facts 1

 2. Testimony at trial 2

D. ARGUMENT 12

 THE PROSECUTOR COMMITTED MISCONDUCT IN
 COMMENTING ON APPELLANT’S EXERCISE OF HIS
 CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL . . . 12

E. CONCLUSION 15

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Cross, 156 Wn.2d 580, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006) 14

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), overruled in part and on other grounds by, State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014) 13

State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), cert. denied sub nom Grier v. Washington, __ U.S. __, 135 S. Ct. 153, 190 L.Ed. 2d 112 (2014) 14

State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011). 13

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). 14

State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) 12

WASHINGTON COURT OF APPEALS

State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004). 13

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994) 13

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), reversed on other grounds, 175 Wn.2d 1022 (2012). 13, 14

FEDERAL AND OTHER STATE CASELAW

Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) 13

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

RULES, STATUTES, CONSTITUTIONAL PROVISIONS

RCW 9A.28.020(3)(b) 1
RCW 9.41.040 1
RCW 9A.36.021 1
RCW 9A.36.041 1
RCW 9A.44.050(1)(a) 1
RCW 9A.44.100 (1)(a) 1
RCW 10.99.020 1
RCW 26.50.110(4) 1

A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial misconduct in commenting on the appellant's exercise of his constitutional rights.
2. In the alternative, counsel was prejudicially ineffective in failing to object to the misconduct below.

B. QUESTIONS PRESENTED

1. Did the prosecutor commit misconduct which was so flagrant and prejudicial it could not have been cured by instruction in commenting on the presence of Mr. Goodwin, the appellant, at his own trial?
2. If the misconduct was not "flagrant and ill-intentioned," was counsel prejudicially ineffective in failing to object?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Howard Goodwin was charged by amended information with second-degree attempted rape, fourth-degree assault, felony violation of a domestic violence court order and indecent liberties with forcible compulsion, all charged as "domestic violence" offenses. CP 18-26. RCW 9A.28.020(3)(b), RCW 9.41.040, RCW 9A.36.021, RCW 9A.36.041, RCW 9A.44.050(1)(a), RCW 9A.44.100 (1)(a), RCW 10.99.020, RCW 26.50.110(4).

Pretrial proceedings were held before the Honorable Judges Daniel Stahnke on December 28, 2016, Gregory Gonzales on January 6, 2017, Robert Lewis on February 15, 2017, and Judge Gonzales again on February 23, 2017, after which a jury trial was held before Judge

Scott Collier on Feb 27-28, and March 1-2, 2017.¹

Mr. Goodwin was acquitted of the attempted second-degree rape and convicted of the other counts, with the jury making a finding that the violation of the court order was not an assault which did not amount to assault in the second degree. CP 32-44. After a continuance on April 27, on June 2, 2017, Judge Collier imposed a standard range sentence. CP 86-92. Mr. Goodwin appealed and this pleading follows. See CP 54.

2. Testimony at trial

On November 16, 2016, Patricia Meyer called police and said her boyfriend of 14 years, Howard Goodwin IV, had assaulted her. RP 352. Meyer was homeless, while Goodwin was living with his parents. RP 355. They met up at the home of some friend's of Goodwin's whose names she could not recall. RP 355-58. Those friends asked them to leave and Meyer said she and Goodwin left after midnight in order to go to a park, sleep and "be together." RP 358-59. They were going to the park to "be together" which included having sex. RP 469-70.

Shortly after they arrived, however, she was cold and hungry and asked him to go to his home and get something like a sleeping bag or something similar. RP 362. He said he did not want to leave her alone but, when she persisted in asking, left and came back with an extra blanket, plastic tarp and some food and they "got things

¹The verbatim report of proceedings consists of multiple volumes which are all chronologically paginated. They will be referred to herein as "RP."

situated” and ate. RP 362, 471.

Meyer was not “in a real good mood” and said that she did not want to sleep outside. RP 362. She said he wanted to lay down, be together and go to sleep for a few hours, which she thought meant getting “intimate.” RP 362-63. She said he told her he wanted to have sex and admitted that she had wanted to have sex with him, too. RP 363, 366. Meyer said she wanted to spend time with him doing something “besides have sex all the time,” which meant she wanted to cuddle a little more or something first. RP474.

Meyer said that “we got high together and ate food, and you know, tried to keep eachother warm” but it was”just strained” because of her mood. RP 363-64. She also said they were both frustrated that “for the hundredth time” she did not have anywhere to go and they were cold. RP 364. She said it was hard for him to see her like that and not know what to do. RP 364. Meyer and Goodwin had lived together at his dad’s home from about 2007 to 2012, when Goodwin’s father asked her to leave. RP 461.

At trial, Meyer said Goodwin left several times because he did not want to fight. RP 366. She said “I was mad and, you know, it’s just we’re high and it’s not a very good situation, you know[.]” RP 367. But she also testified that he left only twice - once to get the tarp and items and another because he was angry and “going to blow.” RP 369. She then testified that he came back three times and the third time was when it got into a fight. RP 369-70.

Meyer said they had started down the road to have sex when

things started going wrong. RP 379. But she also said her pants were half off and her shirt was off, too, after the fight began. RP 379. The prosecutor tried to clarify, asking, “prior to that physical fight starting, your clothes were off?” RP 379. Meyer responded, “[a]s best I can remember.” RP 380. A moment later, the prosecutor said, “whatever clothes came off, came off after the physical” fight and Meyer said, “[t]o the best of my knowledge, yes.” RP 381. She was clear that none of his clothes came off. RP 381.

Earlier in the evening, they had kissed and touched in a sexual way. RP 383. He had rubbed her shoulders, arms and butt and probably her thighs and legs. RP 383.

When he came back the third time, she was lying down in the covered picnic area. RP 384. He came over and lay down next to her, asking her if she wanted him to stay or if she wanted to keep fighting. RP 384-85. She said she wanted him to stay and did not want to keep fighting. RP 385. They started arguing almost immediately, however, and they both got angry. RP 384.

Meyer later admitted that, at some point, she threw a basket which had previously held chicken and had soda cans, throwing it at him and hitting him in the head. RP 478. She did not think it was heavy, however. RP 478. She had thrown it before the second time he left, and afterwards he said, “knock it off,” and that he was going home. RP 479. In fact, she conceded, her assault with the basket was why he left. RP 479. When he came back, she said, it was to make sure she was okay. RP 479.

When asked to describe how the argument “started to get physical,” Meyer could not say. RP 385. She said she became afraid and wanted to leave but admitted he did not hit her. RP 385. She said he restrained her from leaving but was “not really sure” how he did that. RP 385, She said they were just “wrestling around” and she thought it was going to “get more physical” and was getting more scared, so she ran away at some point. RP 386. She was “not really sure” how her pants got half off but said they were half off when she started running around the picnic area. RP 386-87. Later, in cross-examination, she remembered that he had helped her get her pants half off because she only wanted one leg out to keep warm while they had sex. RP 481.

Meyer said it was “kind of hard” for her to remember if he ran after her. RP 387. She could not remember what he said to her. RP 388. She thought, however, it was something like, “[w]e’re not going to do this again,” that she needed to “calm down” and he was not going to hurt her. RP 388. When he caught up with her she threatened that if he did not “knock it off,” she would call police on him. RP 387-88. He started getting mad about her threatening to call police and she said “get off me,” and “don’t do any of this again” and “I’m not messing around this time, so you need to leave.” RP 388.

According to Meyer, she hit her head and became “dazed and blurred” when her head hit the ground at some point. RP 388. She thought he had thrown her to the ground. RP 388-89. She said she

was trying to get her phone in her stuff but he did not know that was what she was doing. RP 389. They were wrestling, he said, and he was holding her down. RP 389. She got away, threatened to call the cops and, when he started towards her, she dialed the police-emergency telephone number, 9-1-1. RP 389-90. He cursed her out and ran away. RP 390. Meyer testified at trial that he yelled that if she called police it was not “going to be good,” while he was running away, and she shouted after him, “don’t come back.” RP 390.

When police arrived, she was sitting on a bench in the picnic area. RP 392. They walked her over to an ambulance and she was taken to the emergency room. RP 393. Dr. Brett Jensen examined Meyer there and said Meyer told her that she had been “assaulted through various means,” by getting picked up, thrown, hit and kicked, and that there had been attempted sexual contact. RP 290. Meyer told the doctor that there was no penetration of any kind. RP 290-92. She said there was attempted forced oral sex. RP 292. Meyer reported a significant headache and having neck, arm and back pain. RP 293. There was no bruising, contusions or swelling on her back and the doctor admitted that the diagnosis of back injury was based on “self-reporting” of pain. RP 306.

The doctor said there were areas that were “tender” and that Meyer had an abrasion on her right forehead, some swelling of her scalp and on the right side of her head, tenderness in her neck, left leg, left hand and wrist. RP 294-95. The injuries were consistent with blunt force trauma. RP 296. Radiology and other tests showed

no injuries that were life-threatening. RP 296. She declined narcotics pain relief but was given ibuprofen. RP 296-98.

Although she was offered counseling, Meyer declined. RP 299. She also declined a sexual assault exam. RP 302.

The doctor acknowledged that Meyer had “known psychiatric illness” but said Meyer seemed “very capable” of answering questions and interacting. RP 292.93. Meyer told the doctor she did not lose consciousness during the incident. RP 294. The doctor said the headache Meyer said she had and what Meyer said had occurred led the doctor to think she had a “mild concussion.” RP 304.

The doctor saw no bootmarks to support the claim of kicking. RP 300. X-rays of the tibia, fibula, left arm, left hand, lumbar spine, chest, left forearm showed no injuries, nor did a head CAT scan or a cervical spine scan/test. RP 307. There was nothing the doctor saw indicating any recent injuries. RP 310. Meyer, however, asked for an arm sling and put it on. RP 310-11.

A nurse in the emergency room said Meyer reported being shoved, pushed around and “kicked all over,” and that he “grabbed [her] face really hard.” RP 332-34. But Meyer denied being sexually assaulted. RP 334, 342. The nurse saw nothing that indicated any injuries except Meyer’ self-reported claims of pain. RP 342-43.

Meyer testified at trial that he never told her he was going to make her have sex or try to make her suck his penis. RP 397-98. When the prosecutor asked if she felt he just wanted to have sex with her and did not respect her, Meyer responded, “[n]o.” RP 399-40.

She said he never hit her for not wanting to have sex. RP 405-406.

She was not sure if he hit her on the head with his hands and said he never told her to suck him off and get him hard. RP 406. She denied he threatened to kill her if she called police. RP 406-407.

Meyer's call to police was played for the jury, after some pretrial redactions. RP 408. In it, Meyer said she was in the park under the covered park table area and that he had "attacked me and beat me and beat me. RP 409. She told the operator he could hear her calling and he was "going to run." RP 409-410. She told police he lived right across the street and could see her but also that she did not know if she needed medical help. RP 411-12. She also said:

He wouldn't - - he wouldn't - - he wanted to have sex and I said "no," and he just started hitting me and beating me and telling me how he was going to (inaudible) make me, make me. And then he stopped, calmed down, and then he hit me again (inaudible) and he stopped.

RP 411. On the call, unlike when she spoke to the doctors and medical staff and in contrast with her testimony at trial, when asked by the operator if he sexually assaulted her, Meyer said, "[y]es." RP 411. She said on the call that he beat her, hit her in the head, kicked her, picked her up and "body slammed" her on the cement, "[s]everal times." RP 412. Meyer also repeatedly stated that officer were "going to let him go" and declared he needed to go to jail. RP 418-29. She also told the officer she "fought to keep the phone," that it "wasn't going to happen anymore," that after 14 years she deserved better and that she should have called sooner. RP 419-420. The operator commiserated, telling Meyer she was "[v]ery brave" to call, that the

officer was “very proud” of her for calling and “[y]ou called today, and that’s all that matters.” RP 420.

After the recording was played, Meyer said she did not say he had sexually assaulted her and did not remember saying anything about him trying to make her suck his “dick.” RP 421. She explained that, when she told police she did not want “this to go on anymore,” she meant the physical fighting. RP 421. She said that he did not “repeatedly” kick her in the head but that it was once. RP 492.

Meyer admitted she had been using methamphetamine that night but was not sure it had affected her memory. RP 423.

Meyer’s written statement to police said he had “physically assaulted and sexually assaulted” her “three separate times,” hitting her, making several attempts “to have sex against my will” and on his “last attempt to rape” he “body slammed” her to the pavement and threatened to kill her if she called police. RP457. Meyer said she thought that he had made that threat but that now she was pretty sure he had not and she had misheard. RP 493-94.

A deputy who interviewed Meyer at the hospital said she told him they had arrived at the part about 5:30 in the morning, not closer to midnight as she had said. RP 537. He said she was “clear” to him she did not want to have sex with Goodwin that morning and just wanted to sleep. RP 537-38. She also told him she had asked him a couple of times to stop touching her and removed his hands from her body. RP 538-39. She also said that, after the first time he left and came back, he got angry when she said “no,” slapped her in

the face and then climbed on top of her and would not get off. RP 539. She said he “tried to put it in me, but he couldn’t get it up.” RP 541. She also said he yelled at her to touch his penis. RP 541-42. The deputy also reported she said he had “slammed me” and that meant onto the ground. RP 553.

A prosecutor was called to testify that, on August 11, 2016, she had asked a court to issue a restraining order against Goodwin with the “protected party” as Meyer, and that the order was issued. RP 559.

Meyer was also asked about an alleged incident six months before this one which involved a physical altercation between them and after which she went to the hospital, but not in significant detail. RP 459.

Mr. Goodwin testified on his own behalf. RP 576-79. He admitted being frustrated about being out in the cold and said when he went to get the stuff, he brought the chicken and his pipe and pot, too. RP 579. At some point she said she did not know if she wanted to “do it” out in the cold but he asked if that meant she did not want to have sex and she said no, that she was just cold, so he went to get more blanket. RP 579-80. Unfortunately, during the foreplay, he fell asleep for a second, because he was exhausted and had been awake for probably 24 hours, because of the methamphetamine. RP 582-83.

This made her very mad. RP 583-84. She woke him up by yelling at him. RP 584. He got frustrated and thought, “I can go home right now and go to sleep” and did not have to be in the cold

arguing in the park. RP 583-84. He got up, put his pant leg back on and started walking away. RP 584. At that point, she threw the chicken bucket and items at him and hit him in the head. RP 584.

Goodwin knew that he was the one who usually loses his “cool the soonest” and admitted that, after she assaulted him with the bucket, he grabbed her by her hair and “smacked her upside the head.” RP 586.

Goodwin agreed that he did assault her and that he had violated the no-contact order. RP 585-86. He then walked away and she was yelling at him from the park so he returned and told her, “we need to stop this,” it “has got to stop,” and “[w]e need to talk about this.” RP 588. She agreed and they sat down to talk, eventually ending up engaging in foreplay again. RP 589. She kept wanting to talk and he was frustrated that she kept stopping in the middle, and they started arguing again. RP 589-90. He got up and walked away and he said, “I don’t have to sit here and put up with this,” and “I can go and crash out on the couch in a nice warm spot.” RP 590. He left. RP 591.

Goodwin testified that he never tried to force Meyer into sex. RP 594. He did think he had his penis out at one point when he walked towards her when they were arguing but did not tell her to “suck” him or anything similar. RP 594-95. He may have told her not to call the police but he did not mean he would hurt her, just that calling police never made things better. RP 600-602. Goodwin said that, when Meyer tried to call police, he tried to get the phone

from her first. RP 605.

Goodwin said that, when he was arrested and asked about what happened, he had said he did not remember because he was still messed up from drugs and the incident. RP 610-11.

Meyer also testified as a witness for Goodwin. RP 618. She admitted sending Goodwin a bunch of letters through a third party, saying she did so because “he needed to know” how she felt. RP 620-21. She put someone else’s name on the outside because she was not supposed to contact him, and said he did not respond. RP 621-22.

D. ARGUMENT

THE PROSECUTOR COMMITTED MISCONDUCT IN COMMENTING ON APPELLANT’S EXERCISE OF HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL

In initial closing argument, the prosecutor told the jurors that defense counsel “wants you to disbelieve” the 9-1-1 call and statements Meyer made to the doctor and in her statement and instead wanted to have them believe her testimony. RP 672. The prosecutor went on:

So, what do we make of her testimony in the last two days? **Well, first off, remember, that testimony, those statements were made in front of Mr. Goodwin.** This 911 call was not, the statements to the doctor were not. She has admittedly said, she wants to see him again.

RP 672-73 (emphasis added). Counsel did not object.

The prosecutor committed flagrant, prejudicial misconduct in making this comment. The state is constitutionally prohibited from commenting on the defendant’s exercise of a constitutional right as a support for convicting. See State v. Rupe, 101 Wn.2d 664, 705, 683

P.2d 571 (1984); State v. Gregory, 158 Wn.2d 759, 807, 147 P.3d 1201 (2006), overruled in part and on other grounds by, State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014). Drawing a negative inference from the exercise of a constitutional right chills that right and is constitutional error. Gregory, 158 Wn.2d at 806; see State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). Further, it is constitutional error. See State v. Jones, 71 Wn. App. 798, 809-10, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

The accused, like Mr. Goodwin, have a constitutional right to be present at their own trial. See Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Martin, 171 Wn.2d 521, 536-37, 252 P.3d 872 (2011). The prosecutor's "wide latitude" to discuss the facts and raise reasonable inferences does not extend to commenting on the defendant's exercise of his rights. Jones, 71 Wn. App. at 805-806. By commenting on the fact that the victim in this domestic violence case had changed her testimony due to having to be in front of Goodwin and testifying at trial, the prosecutor suggested a negative inference from Goodwin's exercise of his right to be present at his own trial.

Where defense counsel fails to object below, prosecutorial misconduct is often deemed "waived." See State v. Walker, 164 Wn. App. 724, 730, 265 P.3d 191 (2011), reversed on other grounds, 175 Wn.2d 1022 (2012). Where, however, the misconduct is so flagrant and ill-intentioned that it would be incurable even with corrective instruction, this Court may reverse for misconduct even absent an

objection below. Id. Notably, the question this Court asks is not whether there was sufficient evidence to support the conviction. Walker, 164 Wn. App. at 736. Instead, the issue is whether there is a substantial likelihood the misconduct had an effect on the verdict. Id.

In the alternative, reversal and remand for a new trial with new counsel should be ordered based on counsel's ineffectiveness in failing to object to the prosecutor's comment. This Court reviews de novo whether a defendant has been denied effective assistance of counsel. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). The right to effective assistance is a cornerstone of our entire system. See State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), cert. denied sub nom Grier v. Washington, ___ U.S. ___, 135 S. Ct. 153, 190 L.Ed. 2d 112 (2014); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sixth Amend.; Art. 1, § 22.

Even if the misconduct here is not deemed so flagrant, ill-intentioned and prejudicial that it could not be cured without instruction, this Court should find counsel was ineffective in failing to object below. Counsel is ineffective despite a presumption of effectiveness when counsel's representation was "deficient" (i.e., fell below an objective standard of reasonableness) and that the deficiency prejudiced the defendant. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This Court should hold that it falls below objective standards of reasonableness to fail to object

when a negative inference is drawn based on your client's exercise of his constitutional right to be present at his own trial and should reverse based on ineffectiveness even if the misconduct is deemed not so flagrant and ill-intentioned it could not have been cured by instruction.

E. CONCLUSION

For the reasons stated herein, this Court should grant appellant relief.

DATED this 30th day of March, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box 176
Seattle, Washington 98115
(206) 782-3353

DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, and to appellant Howard B. Goodwin IV, DOC 733205, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 30th day of March, 2018,

/S/Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, No. 23879
1037 Northeast 65th St., Box 176
Seattle, WA. 98115
(206) 782-3353

RUSSELL SELK LAW OFFICE

March 30, 2018 - 10:54 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50707-2
Appellate Court Case Title: State of Washington, Respondent v. Howard B. Goodwin, Appellant
Superior Court Case Number: 16-1-02761-0

The following documents have been uploaded:

- 507072_Briefs_20180330225328D2935411_2662.pdf
This File Contains:
Briefs - Appellants
The Original File Name was goodwinfin.pdf
- 507072_Motion_20180330225328D2935411_2813.pdf
This File Contains:
Motion 1 - Other
The Original File Name was goodwinmtn.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- rachael.rogers@clark.wa.gov

Comments:

Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
Address:
1037 NE 65TH ST
SEATTLE, WA, 98115-6655
Phone: 206-782-3353

Note: The Filing Id is 20180330225328D2935411