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

STATE OF WASHINGTON, Respondent

v.

HOWARD BRUCE GOODWIN IV, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02761-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The prosecutor did not commit misconduct during his closing argument because he did not impermissibly comment on, or draw an impermissible inference from, Goodwin's right to be present.**
- II. **Goodwin received the effective assistance of counsel.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Howard B. Goodwin was charged by second amended information with Attempted Rape in the Second Degree, Indecent Liberties with Forcible Compulsion, Felony Domestic Violence Court Order Violation, Assault in the Fourth Degree, and Assault in the Second Degree with Sexual Motivation for an incident occurring on or about November 16, 2016. CP 44-46. Each charged count listed Patricia Meyer as the victim and contained a special allegation of domestic violence. CP 44-46.

The case proceeded to a jury trial on February 27, 2017 before the Honorable Scott Collier and concluded on March 2, 2017 with the jury's verdict. RP 16, 716-720; CP 120, 138. The jury acquitted Goodwin of Attempted Rape in the Second Degree and made a finding that reduced the Domestic Violence Court Order Violation to a misdemeanor, but otherwise found him guilty as charged. RP 716-20; CP 93-100. Judge

Collier imposed a minimum term, standard range sentence of 132 months confinement. CP 123, 139. Goodwin filed a timely notice of appeal. CP 148.

B. STATEMENT OF FACTS

By November 16, 2016, Howard Goodwin IV and Patricia Meyer had been a couple for about 14 years. RP 341, 351-52, 465. Meyer was transient at the time, while Goodwin lived with his parents. RP 353, 355-57, 341, 584. Meyer was the protected party in a domestic violence no-contact order that prohibited Goodwin from having contact with her.¹ Nonetheless, that night Goodwin and Meyer decided to go to Orchards Park, which was located just a block from Goodwin's home, to sleep and be together. RP 359-360, 469. Meyer often went to Orchards Park and utilized a covered picnic area that had a concrete floor. RP 355-57, 516-17, 554. The couple setup their sleeping quarters in that picnic area. RP 359-360, 554. The pair expected to have sex though Meyer was not in the same hurry that Goodwin was, as she wanted to first spend more time together communicating and cuddling. RP 365-66, 474-75.

¹ Goodwin also had a pending misdemeanor domestic violence case for assaulting Meyer. *See* RP 424-451, 458-49. This prior assault was admitted into evidence under ER 404(b). RP 458-59.

This difference in priorities led to an argument. RP 365-66, 474-75, 483. The argument varied in intensity as Goodwin left and returned to the area multiple times. RP 365-69, 469-472. Eventually, the argument turned physical and Meyer called 911. RP 367-69, 480. The 911 call was played for the jury. RP 408-420. On the 911 call Meyer states, “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.” RP 411. When the 911 operator asks Meyer if she was sexually assaulted she responds “yes.” RP 411. Meyer also describes Goodwin hitting her on the head, kicking her, “pick[ing] [her] up and body slamm[ing] [her] on the cement,” and trying to make her perform oral sex on him “several times.” RP 412, 420-21, 424, 493, 666; Ex. 1A.

Police arrived at Orchards Park in response to the 911 call and found Meyer upset, crying, and disheveled. RP 391-93, 503. Meyer was transported to the hospital via ambulance. RP 391-93; 513-14. While at the hospital, Meyer was examined for injuries, gave oral statements about the incident to Dr. Brett Jensen, a nurse, and a responding deputy, and also provided a written statement. RP 287-292, 294-95, 299-300, 302-03, 331-33, 340-41, 457, 514, 534-35, 537-546, 553; Ex. 9A. These statements were generally consistent with each other and with the information she

imparted during the 911 call.² For example, Meyer wrote that Goodwin “physically assaulted and sexually assaulted” her, “made several attempts to have sex” against her will, and that on the “last attempt to rape, he body slammed [her] to the pavement.” RP 457; Ex. 9A. Similarly, she told Dr. Jensen that “she’d been picked up and thrown, hit and kicked,” and that Goodwin had “attempted forced sexual intercourse.” RP 290. More specifically, she told Dr. Jensen that she was “body slammed” and that “there was attempted forced oral sex.” RP 292. Likewise, Meyer told the responding deputy that after she had denied Goodwin sex that he got angry and slapped her multiple times, that she refused Goodwin’s attempts to make her suck on his penis, and that he “slammed [her]” on the floor. RP 538-543, 553.

As a result of Goodwin’s assault, Meyer complained of a significant headache and pain to her back, neck, face, hand, wrist, left arm, and leg. RP 292, 294-95, 303, 334, 340. Dr. Jensen’s examination of Meyer’s body noted multiple tender areas, abrasions, and swelling of Meyer’s scalp, the right side of her head, and of her left leg. RP 249-95. He considered her injuries consistent with blunt force trauma and also

² One exception is that Meyer denied to her nurse that Goodwin sexually assaulted her. RP 334.

diagnosed her with a mild concussion (closed head injury). RP 296-97, 304. Meyer's head hurt for about a week. RP 496.

Meyer's trial testimony regarding the altercation differed from the other statements she provided in one key aspect; at trial she denied any type of sexual assault or attempted sexual assault. *See generally* 362-369, 378-407, 420-21, 465-496. Nevertheless, Meyer did testify that Goodwin "got physical" with her, which she initially described as restraining, wrestling, and manhandling, before more specifically admitting that he body slammed her several times on the concrete and kicked her in the head. RP 367-69, 385, 388-89, 491-92.

Goodwin also testified.³ He agreed that he and Meyer initially got into a verbal argument though he described Meyer as the instigator. RP 583-84. He also claimed that Meyer was the one who turned the verbal argument into a physical one when she threw a bucket of chicken⁴ at him, which hit his head. RP 584. In response, Goodwin admitted that he grabbed Meyer by the hair and "smacked her upside the head." RP 584-85. Goodwin also admitted that he knew of the no-contact order and was knowingly violating it on the night in question, and that he did wrestle with Meyer in an attempt to keep her from her phone to prevent her from

³ Goodwin explained that he originally told the police and his family that he did not remember the incident because he did not want to "self-incriminate." RP 607-613.

⁴ Meyer agreed that she threw a bucket of chicken at Goodwin. RP 477-78.

calling 911. RP 597, 605. Goodwin denied all other allegations. RP 585-86, 590, 593-95, 598-99.

ARGUMENT

I. The prosecutor did not commit misconduct during his closing argument because he did not impermissibly comment on, or draw an impermissible inference from, Goodwin’s right to be present.

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984)).

If the defendant can establish that prosecutorial misconduct occurred during closing argument, the determination of whether the defendant was prejudiced is subject to one of two standards of review: “[i]f the defendant objected at trial, the defendant must show that the

prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 760-61 (citation omitted); *State v. Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). Under the heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) (holding that "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request"). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial

to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990) (citations omitted).

Here, Goodwin argues that State engaged in prosecutorial misconduct in closing argument when it asked the jury to remember that Meyer’s trial testimony was made in front of Goodwin. RP 672; Brief of Appellant at 12-13. That portion of the closing argument, with some additional context, is as follows:

Now, defense counsel may want you to disbelieve Patricia, disbelieve what she says to 911, what she said to the doctor, what she wrote in her statement. He, defense [], he wants you to believe what Patricia has testified to the last two days.

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, and her statements to [the deputy] were not. She has admittedly said, she wants to see him again. She told you that at one point back in November she felt that Mr. Goodwin was all that she had.

Second, she does not want to talk about the aspect of sex in this case. That is very clear. And there could be many, many reasons. There could be issues over privacy, concerns about privacy, doesn’t want to talk about something that private in front of people. It could be embarrassment. It could be a sense of potentially shame, that she doesn't want to have to relive or accept what happened to her, that the man she had been with for 14 years had done to her. There can be all types of reasons why she doesn’t want to talk about sex, but it’s to the point where she will deny having said what she clearly said on this 911 call.

RP 672-73.

Goodwin offers no instructive cases or authority for the proposition that the mere mention of a defendant's presence at trial is violative of his right to be present. Br. of App. at 12-15. More importantly, however, is that the context of the State's argument shows that the State was not seeking to draw a negative inference against Goodwin based on his presence. Instead, the State was providing one persuasive reason why Meyer's testimony differed from her other statements, especially in regard to the sexual aspects of the assault. This commonsense proposition—that testifying in front of and against a loved one may result in minimizing their bad acts or recanting certain accusations—is not misconduct.

This Court's decision in *State v. Lawler* is instructive.⁵ 194 Wn.App. 275, 374 P.3d 278 (2016). In *Lawler*, a case involving a sexual assault amongst other crimes, the prosecutor during closing argument "reminded the jury of the 'uncomfortable situation' of [the victim] testifying about a nonconsensual experience. The prosecutor stated that Lawler could 'eye' [the victim] and 'stare her down' while she testified." (citations omitted). On appeal, the defendant argued that the prosecutor violated article I, section 22 "by asking the jury to draw a negative

⁵ The section in *Lawler* discussing prosecutorial misconduct is unpublished. Pursuant to GR 14.1 "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

commented on his (the defendant's) demeanor. *Id.* This Court rejected said arguments noting that the:

context shows that the prosecutor was not commenting on Lawler's demeanor or arguing that Lawler's demeanor was evidence of his guilt. The prosecutor did not suggest that it was significant that Lawler was staring down [the victim] or even that Lawler was in fact staring her down. Instead, the point was that he *could* eye [the victim] and stare her down as she was testifying, which made it more difficult for her to testify. The prosecutor did not argue or even imply that the jury should consider Lawler's demeanor in deciding the case.

Id. (emphasis in original). Here, the prosecutor was making the same point using more anodyne language as there was not even a suggestion that Goodwin did, or could, stare down Meyer as she testified. The focus of the prosecutor's argument was on why Meyer's testimony diverged from her previous statements.

Furthermore, because Goodwin did not object to this portion of the closing argument he must show that "the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760 (citations omitted). Notably, he does not make an attempt to meet the above standard. Br. of App. at 13-14; RAP 10.3(a)(6). This choice is likely due to the overwhelming evidence of Goodwin's guilt based on the harrowing 911 call combined with Meyer's other out-of-court statements, her injuries,

and Goodwin's admissions. Accordingly, and for the reasons previously argued, this Court should find that the prosecutor did not engage in misconduct and that even if he did such misconduct was not so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.

II. Goodwin received the effective assistance of counsel.

As an alternative argument, Goodwin claims that he received the ineffective assistance of counsel when his trial counsel did not object to the prosecutor's closing argument. This argument fails because (1) the prosecutor did not engage in misconduct; (2) there are valid tactical reasons for not objecting to fleeting instances of misconduct in a closing argument; and (3) Goodwin cannot establish prejudice.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 211 P.3d 441 (2009) (stating that "[j]udicial scrutiny of counsel's performance must be highly deferential") (quotation and citation omitted). When counsel's actions or decisions can be characterized as "legitimate trial strategy or tactics, performance is not deficient." *Grier*, 171 Wn.2d at 33 (citing *Kyлло*, 166 Wn.2d at 863). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Id.* In order to prove that deficient performance prejudiced the defense, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyлло*, 166 Wn.2d at 862).

Here, as argued above, the prosecutor did not engage in misconduct during his closing argument when he mentioned that Meyer's

testimony occurred in front of Goodwin in order explain why she minimized his conduct. Thus, Goodwin's trial counsel did not perform deficiently when he chose not to object.

Second, assuming misconduct, Goodwin's trial counsel had a valid tactical reason for not objecting to the prosecutor's fleeting remark. The valid tactical reason is to not draw "undue attention" or "emphasize" the purported prejudicial information. *State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014). Accordingly, Goodwin's trial counsel's performance was not deficient.

Third, assuming misconduct and deficient performance, Goodwin cannot establish prejudice, i.e., a reasonable probability that the outcome of the proceedings would have been different. Once again, however, Goodwin does not attempt to argue prejudice. Br. of App. at 14-15; RAP 10.3(a)(6). The evidence that Goodwin was guilty of the crimes for which the jury convicted him was overwhelming based on the harrowing 911 call combined with Meyer's other out-of-court statements, her injuries, and Goodwin's admissions. There is not a reasonable probability that Goodwin would have been acquitted of one of the crimes had his counsel objected to the prosecutor's fleeting remark and received a curative instruction. Consequently, Goodwin cannot establish that he received the ineffective assistance of counsel.

CONCLUSION

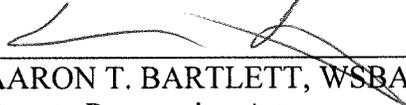
For the reasons argued above, this Court should affirm Goodwin's conviction.

DATED this 25 day of May, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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