

FILED
Dec 20, 2016
Court of Appeals
Division III
State of Washington

NO. 34374-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANGELA MENDOZA,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has set forth six assignments of error, these as set out by Appellant as follows;

1. The prosecutor committed misconduct in closing argument misstating the law and violating Appellant's right to be presumed innocent.
2. Trial counsel was ineffective for not objecting to the misconduct in closing argument.
3. Appellate costs should not be imposed.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no misconduct.
2. Trial counsel was not ineffective.
3. Yakima County has no intention of asking for appellate costs.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

III. ARGUMENT

Response to allegations one. There was no error, there was no misconduct on the part of the State.

The totality of the alleged misconduct was:

We've talked about the presumption of innocence. The defendant is presumed to be innocent at this point. That presumption remains here until you go to the jury room and

deliberate on the case.

DELIBERATE - To weigh, ponder, discuss. To examine, to consult, in order to form an opinion. <http://thelawdictionary.org/deliberate/>

Mendoza would have this court parse these words into a sentence which would have no meaning. The State's attorney did not state that the presumption (of innocence) remains...until you go the jury room and just stop there. He goes on to state, and this is critical, "...and deliberate the case." Deliberate the case means come to a determination of guilt or innocence, the time when the presumption has either been overcome or held lacking and an acquittal has been declared.

He did not say you had to presume her guilty until the close of the case and then the presumption is over, it was after the jury had "deliberated the case" that the State meant the presumption ends. That is clear if this sentence is read in totality and in conjunction with the entirety of the closing argument.

The very first line of Appellant's argument section upholds that statement made by the State's attorney; "The presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during *deliberations*. State v. Evans, 163 Wn. App. 635, 644, 260 P.3d 934, 939 (2011)" State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (citing 11 *Washington Practice: Washington Pattern Jury*

Instructions: Criminal (3d ed. 2008).” (Appellant’s brief at 4) (Emphasis added.)

While the above cited portion of Evans supports the State’s attorneys statement, the ruling in Evans is distinguishable. The actions of the State in Evans were multiple in nature, were broad and addressed more areas of the law than the alleged misconduct in this case. In Evans the court stated, “...we are unwilling to speculate that a curative instruction could have overcome the prosecutor’s **multi-pronged and persistent attack on the presumption of innocence, the State’s burden of proof, and the jury’s role.**” (Emphasis added.) Id, at 647.

Venegas cited in Evans and Appellant is also distinguishable from this case. As the ruling in Evans makes clear, “Moreover, we have never hesitated to reverse where **several errors** combined to deny the defendant a fair trial. See State v. Hodges, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003). In Venegas, 155 Wn.App. at 525, 228 P.3d 813, **we found flagrant misconduct where the prosecutor repeatedly attacked Venegas’s presumption of innocence with improper argument.**” Id at 647 (Emphasis added.)

Here there was but one statement that when read in context does not take on the meaning ascribed by Mendoza.

Further, there was no objection to this statement. Mendoza did nothing, counsel did not object, did not ask for a motion to strike nor did her counsel move for the court to admonish the jury to disregard the alleged misconduct. Where there is a failure to object to alleged prosecutorial misconduct, request a curative instruction, or move for a mistrial, it constitutes a waiver of our review unless the misconduct is so flagrant and ill-intentioned that no instruction could erase the prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The court instructed the jury on the applicable law. The jury instructions were read to the jury and they physically take those instructions with them when they deliberate on a case. Those instructions are very clear and specific regarding this presumption. Instruction 3 at CP 15 leaves no doubt;

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.

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.

Generally, an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is truly constitutional, and manifest. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). This court should adhere to that general policy in this case. The alleged misconduct was not objected to because it was not objectionable. “Failure to object deprives the trial court of [its] opportunity to prevent or cure the error.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

The defendant must show both a constitutional error and actual prejudice to his rights. Id. at 926-27. To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id. at 935. The failure to raise this issue is in essence a default on the part of the defendant. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)).

Mendoza must therefore prove to this court that this alleged error

was a "manifest error affecting a constitutional right, " which she may raise for the first time on appeal. RAP 2.5(a). To fall within this exception, however, not only must the claimed error "implicate[] a constitutional interest as compared to another form of trial error, " but also it must be "manifest." The trial record must be sufficiently complete so that this court can determine whether the asserted error "actual[ly] prejudice[d]"

In this trial there was no "practical and identifiable consequences [at] trial." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009) from the statement; "That presumption remains here until you go to the jury room and deliberate on the case."

Mendoza claims this is an issue this court should considered for the first time on appeal, but once again as the court ruled in State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) "As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." See also State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) "An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case."(Citations

omitted.)

In order to establish that she is entitled to a new trial due to prosecutorial misconduct, Mendoza must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Once again, because Mendoza never objected to the States argument she falls into the area of the law were when a defendant fails to object to an improper remark she waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. Boehning, supra, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)). A prosecutor's closing argument is reviewed in the context of the total argument, the issues in the case, the evidence, and the jury instructions. Id. at 519. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Id.* See also, State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the

jury.” In fact, the absence of an objection by defense counsel “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. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

“[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” Russell, 125 Wn.2d at 87 (citing United States v. Hiatt, 581 F.2d 1199, 1204 (5th Cir. 1978)). It is not misconduct for a prosecutor to merely argue that the evidence supports the State’s theory or that the evidence does not support the defense theory. Id. The court also instructed the jury that the attorneys’ remarks were not evidence and that they must disregard any remark, statement, or argument that was not supported by the law or the evidence. CP 12.

Response to allegation two. Alleged ineffective assistance of counsel, failure to object to alleged prosecutorial misconduct in closing.

In order to establish that counsel was ineffective, Appellant must show that counsel’s conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Mendoza must show that counsel's performance fell below an objective standard of reasonableness based on all of the circumstances.

Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)), that in this case, based solely on the facts and circumstances present, that this one statement, made in closing such that "Prejudice (was) established if there (was) a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

The claimed deficiency here is the failure to challenge an allegedly prejudicial statement made by trial counsel for the state. A statement that was not a misstatement of the law no matter how you parse the words. As this court is well aware, a claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. Nichols, 161 Wn.2d at 9. However, Mendoza must first establish that the claimed error is a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). In order to be "manifest," an alleged error must have "practical and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

There is no record here for this court to review, Mendoza did not preserve this issue in the trial court because there was nothing to preserve and the actions of her trial counsel was not deficient nor ineffective for not objecting to something which was not objectionable.

Trial counsel was not ineffective in his performance when he “failed” to object, there was nothing to object too.

Response to allegation three - Appellate costs.

Yakima county has not traditionally requested reimbursement for cost assessed after having primarily prevailed on appeal. However, cases such as this where an appeal is filed when there is no claim of error that is supportable by the record suggests to the State that perhaps costs should be requested.

State v. Sinclair, 192 Wn.App. 380, 385-86, 388-90, 367 P.3d 612 (quoting RAP 14.2), review denied 185 Wn.2d 1034 (2016) very recently ruled, "The commissioner or clerk “will' award costs to the State if the State is the substantially prevailing party on review, 'unless the appellate court directs otherwise in its decision terminating review. "... When a party raises the issue in its brief, we will exercise our discretion to decide if costs are appropriate.... We base our decision on factors the parties set forth in their briefs rather than remanding to the trial court.”

This is a 43-year-old citizen of this state who from the record

before this court is able bodied. She has apparently amassed a significant criminal history but was also apparently capable of obtaining sufficient monies to support herself while committing this ever lengthening list of crimes. She had apparently been on a DOSA¹ at the time this crime was committed, (RP 143, 147) that sentence is one that was “imposed” so that the defendant could receive treatment an alternative a result that she admitted at sentencing had been beneficial to her and yet here again (RP 149) another person was harmed and the State has incurred significant costs.

It defies logic that a person who has now amassed so many convictions, and so many costs associated with those convictions, could now use those very convictions as a basis to request exemption from payment. This is literally indicating to the offender that if they commit more crimes they, the person who has caused this damage and incurred these costs, will not be held to account for those costs. That instead the cost of their actions should be borne by those against whom the very crimes are committed and the society they live in.

This court should not waive the imposition of these costs. There are means by which Ms. Mendoza can address these costs, if incurred, at

¹ Drug offender sentencing alternative (DOSA) under RCW 9.94A.660

the time she begins to pay for her actions.

Accordingly, this court should decline at this time to deny the State costs if the State is the prevailing party on appeal. RAP 14.2.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal.

Respectfully submitted this 20th day of December 2016,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on December 19, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Jennifer J Sweigert at Sloanej@nwattorney.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of December, 2016 at Spokane, Washington.

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