

91119-3

FILED
Dec 17, 2014
Court of Appeals
Division I
State of Washington

No.
Court of Appeals No. 70943-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
FRANCIS BATO,
Petitioner.

FILED
DEC 22 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. OPINION BELOW 1

C. ISSUE PRESENTED..... 2

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 8

The opinion of the Court of Appeals concluding that the prosecutor’s repeated and flagrant misconduct in her closing argument, to which Mr. Bato repeatedly objected does not merit a new trial is contrary to this Court’s decision and presents a significant constitutional question..... 8

1. The deputy prosecutor repeatedly and prejudicially referred to facts which were not supported by the evidence 8

2. Prosecutorial misconduct deprives a defendant his due process right to a fair trial..... 10

3. The Court of Appeals failed to follow this Court’s cases in addressing Mr. Bato’s claim 11

F. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court

<i>In re the Personal Restraint of Glasmann</i> , 175 Wash. 2d 696, 286 P.3d 673 (2012)	11, 14
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978)	10
<i>State v. Davenport</i> , 100 Wash. 2d 757, 675 P.2d 1213 (1984)	10
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012)	10, 14
<i>State v. Lindsay</i> , 180 Wn. 2d 423, 326 P.3d 125 (2014)	7, 11, 12
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011)	10

Washington Court of Appeals

<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008)	9
---	---

United States Supreme Court

<i>Berger v. United States</i> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1934)	10
---	----

Court Rules

ER 801	3
RAP 13.4	1, 14

A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Francis Bato asks this Court to accept review of the opinion of the Court of Appeals in *State v. Bato*, 70943-7-I.

B. OPINION BELOW

On appeal, Mr. Bato argued the deputy prosecutor's repeated references to facts outside the trial record during her closing argument deprived him a fair trial. The singular theme of the deputy prosecutor's closing argument was that the jury should convict Mr. Bato because of things he did but of which the jury had heard nothing. Mr. Bato objected and made a motion for mistrial.

The Court of Appeals concluded that because Mr. Bato made a motion for mistrial, the issue on review was not whether the prosecutor's flagrant misconduct warranted a new trial, but rather only whether the trial court abused its discretion in denying the motion for mistrial. Without analyzing whether the prosecutor's comments were misconduct, and without assessing the resulting prejudice, the Court of Appeal nonetheless concluded the trial court had not abused its discretion in denying a mistrial.

C. ISSUE PRESENTED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual a fair trial. Courts have long held that it is improper for a prosecutor in closing argument to refer to facts not in evidence. On appeal of a claim of misconduct, the Court's opinions require the reviewing court assess whether the prosecutor's statements were improper and if so whether they had a substantial likelihood of affecting the verdict. Where the Court of Appeals did not engage in this analysis is the opinion contrary to this Court's opinion and does it present a significant constitutional question?

D. STATEMENT OF THE CASE

Dinah Jimenez testified her former boyfriend, Mr. Bato, was at her apartment when she received a call from her new boyfriend. 8/8/13 RP 58. According to Ms. Jimenez Mr. Bato became angry. *Id.* Ms. Jimenez said Mr. Bato became angrier still when she told him he needed to leave. *Id.* at 61. Mr. Bato refused to leave and told Ms. Jimenez that she could not leave either. *Id.* at 62-63. Ms. Jimenez testified Mr. Bato stood in front of her at one point and held her by both arms. *Id.* at 63-64.

Eventually Ms. Jimenez sent a message to her new boyfriend via her laptop and he contacted police. *Id.* at 62-63, 69-70. Mr. Bato was arrested. 8/12/13 RP 54.

The State charged Mr. Bato with unlawful imprisonment, fourth degree assault, interfering with domestic violence reporting, and violation of a no-contact order. CP 13-14.

Police officers took a written statement from Ms. Jimenez following Mr. Bato's arrest. 8/12/13 RP 43. At trial, the court refused to admit Ms. Jimenez's written statement as substantive evidence. 8/12/13 RP 13.

A jury convicted Mr. Bato as charged. CP 45-50.

Mr. Bato appealed his conviction arguing the prosecutor's closing argument denied him a fair trial. Specifically, Mr. Bato argued that despite his repeated objections, the deputy prosecutor was permitted to argue his guilt based upon facts that were never presented to the jury.

The State had offered Ms. Jimenez's statement from the night of the incident. However, the court refused to admit the exhibit as prior testimony under ER 801(d)(1). 8/12/13 RP 13. Moreover, the court concluded the statement did not meet the foundational requirements of

an excited utterance and police witnesses were not permitted to testify to the substance of the statement. 8/12/13 RP 54. Thus, all the jury heard was that Ms. Jimenez had made a statement to police. 8/12/13 RP 43-45.

Undeterred by the evidence actually admitted at trial, early in her closing argument the deputy prosecutor, Mari Isaacson, said, “now you’ve heard two versions [of] what happened that night.” 8/13/13 RP 38. Ms. Isaacson continued, “[u]nderstandably, you may want to know about everything that happened, such as knives, the threats, the dragging. And I submit to you that is what happened.” *Id.* Defense counsel immediately objected to Ms. Isaacson’s reference to facts outside the record, saying “No one testified to the majority of those things” *Id.* The court overruled the objection and told the jury that closing arguments are not themselves evidence.” *Id.* at 38-39.

Ms. Isaacson quickly returned to her theme that Ms. Jimenez had offered two versions of events. *Id.* at 40. The deputy prosecutor claimed that Ms. Jimenez was minimizing events saying, “you bet that [Ms. Jimenez] is getting pressure from [her sister-in-law] about this case.” *Id.* a 45. Again, Mr. Bato objected to Ms. Isaacson reference to

facts outside the testimony. *Id.* Again, the court overruled the objection and told the jury that arguments are not evidence. *Id.*

The deputy prosecutor continued, telling the jury that Ms. Jimenez gave two versions of events “what she told the police that night and what she said here in court. And you know she told you a different story than what she told them.” *Id.* at 46. Ms. Isaacson asserted the account had changed because in court Ms. Jimenez said Mr. Bato “didn’t cause her any pain that night. She said that he didn’t drag her to the bedroom, that he didn’t grab those knives, he didn’t threaten to kill the police, he didn’t threaten to kill her.” *Id.* at 47. Again, Mr. Bato objected that there was no evidence Ms. Jimenez had ever said any of those things prior to trial. *Id.* Again the court overruled his objection. *Id.*

The prosecutor continued, saying “in front of you, what she’s trying to do is take back what she perceives to be the worst for him: the knives, the dragging throwing her on the bed, threatening to kill.” *Id.* at 48. Yet again the court overruled Mr. Bato’s objection. *Id.* And so, Ms. Isaacson continued.

After he kept her in the room, after he had the knives, after he had threatened her life . . . all the while her young children were at home with her. That’s what she said then. That was after that happened, but before she

had the opportunity to think it over, before she succumbed to pressure from her family and from the Defendant himself. So that version is what really happened.

Id. at 49. When Mr. Bato interposed an objection, the court again overruled the objection.

The sum of the closing argument was based upon evidence that was never presented to the jury. The deputy prosecutor invited the jury to imagine a set of facts far more serious than the evidence presented to them. That imaginary set of facts involved threats with knives and threats to kill police officers, rather than the simple assault the jury heard described. Those imaginary facts involved pressure from unidentified person on Ms. Jimenez to change her testimony. No matter how much Ms. Isaacson wished it were otherwise, there was no evidence to support any of her claims.

Having painted a picture of events far more severe than established by the evidence, the prosecutor concluded her argument saying Ms. Jimenez “deserves justice in this case, even if she doesn’t want it. And justice here means the Defendant is convicted of these crimes He needs to be held accountable.” *Id.* at 53. Mr. Bato objected saying the jury’s task was to determine if the State proved its

case not to hold Mr. Bato accountable. Again, the court overruled the objection.

Following closing arguments, Mr. Bato made a motion for mistrial based upon the State's improper argument. 8/13/13 RP 85. The court acknowledged it had refused to admit Ms. Jimenez's prior statement. *Id.* at 86. Nonetheless, the court reasoned it properly overruled the objections and "took the opportunity to inoculate and remind the jurors that what the attorneys says [sic] is not in and of itself evidence." *Id.* The judge added that he did not believe the prosecutor acted in bad faith. *Id.*

The Court of Appeals affirmed the conviction. Although it never undertook the analysis of whether the deputy prosecutor's statements were (a) proper or (b) not prejudicial, the Court of Appeals concluded the trial court had not abused its discretion in denying a mistrial. Mr. Bato had never challenged the propriety of the ruling on the motion for mistrial only the prejudicial misconduct.

Noting that the opinion's analysis was contrary to this Court's opinion in *State v. Lindsay*, 180 Wn. 2d 423, 431, 326 P.3d 125 (2014), Mr. Bato filed a motion to reconsider. The Court of Appeals denied the motion to reconsider, but issued an amended opinion adding a footnote

concluding it must defer to the trial court's ruling on the motion for mistrial. Opinion at 8, n9.

E. ARGUMENT

The opinion of the Court of Appeals concluding that the prosecutor's repeated and flagrant misconduct in her closing argument, to which Mr. Bato repeatedly objected does not merit a new trial is contrary to this Court's decision and presents a significant constitutional question.

1. The deputy prosecutor repeatedly and prejudicially referred to facts which were not supported by the evidence.

In reviewing the prosecutor's arguments in this case it is necessary to first understand that there was no evidence presented to the jury that Mr. Bato ever had a knife. There was no evidence presented to the jury that he dragged Ms. Jimenez. There was no evidence that he threatened to kill her or any other person. There was no evidence presented to the jury, that Ms. Jimenez had ever described the events differently than the manner in which she testified.

It cannot seriously be contended that claims that Mr. Bato was armed with a knife or referring to threats to kill Ms. Jimenez and/or police officers was proper where there was no evidence of those facts. It cannot be claimed that it was proper argument to accuse Ms. Jimenez

of changing her story where there was no evidence that she had done so and had only testified to one version of events at trial.

“Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (citations omitted). The version of events presented to the jury in the prosecutor’s closing argument, is wholly unsupported by the record. That is what makes it improper. It did not “inoculate” the jury to tell them the prosecutor’s argument is not itself evidence, but then permit the prosecutor to continue along the same path. By permitting the prosecutor to repeatedly refer to facts outside the record, and overruling defense objections to her doing so, the jury could properly believe there was nothing wrong with what Ms. Isaacson was doing or saying. The court permitted Ms. Isaacson to leave the very clear impression in juror’s minds that information was withheld from them, and that information established a far more serious crime. The state’s arguments were improper and prejudicial.

2. *Prosecutorial misconduct deprives a defendant his due process right to a fair trial.*

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Here, the State's closing argument was predicated on a version of facts which was unsupported by the evidence. Because Mr. Bato repeatedly objected at trial and because the nature and repetition of misconduct created a substantial likelihood of affecting the jury's verdict, the court should have reverse Mr. Bato's convictions. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Where a trial court overrules timely and specific objections to improper closing argument, such rulings "[lend] an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wash. 2d 757, 764, 675 P.2d 1213 (1984). By permitting the prosecutor

to repeatedly refer to facts outside the record, and then overruling defense objections to her doing so, the court allowed the jury to believe there was nothing wrong with what Ms. Isaacson was doing or saying. The court permitted Ms. Isaacson to leave the very clear impression in juror's minds that information was withheld from them, and that information established a far more serious crime. The state's arguments were improper and prejudicial.

3. The Court of Appeals failed to follow this Court's cases in addressing Mr. Bato's claim.

To prevail on a claim of misconduct, an appellant need only show the "the prosecutor's conduct was both improper and prejudicial." *In re the Personal Restraint of Glasmann*, 175 Wash. 2d 696, 704, 286 P.3d 673 (2012); *Lindsay*, 180 Wn. 2d at 431.

As set forth above, there can be no dispute that telling a jury that Mr. Bato threatened to kill police officers was improper where there was no evidence before the jury of such statements. There can be no dispute that telling jurors that Mr. Bato wielded a knife was improper where there was no evidence before the jury that he had done so. The Court of Appeals acknowledges there was no evidence that Mr. Bato threatened to kill Ms. Jimenez but never answers whether referring to such facts was improper. Opinion at 7. It indisputably was.

Further, the Court of Appeals, relegates to footnote its entire analysis of prejudice. With no analysis of the facts of this case, the court opines “for the reasons above, [Mr. Bato] cannot meet his burden of demonstrating a substantial likelihood that any misconduct affected the jury’s verdict.” Opinion at 8, n.7. But there were no “reasons above” as the sum of the court’s opinion focuses only on whether the erroneously denied a mistrial. Opinion at 6-7.

The fact that Mr. Bato made motion for a mistrial does not in any way alter the analysis of the prosecutor’s misconduct on appeal, beyond the conclusion that a motion for mistrial premised upon prosecutorial misconduct preserves the issue for appeal. *Lindsay*, 180 Wn. 2d at 430-31. Upon concluding that the motion for mistrial preserved the issue, this Court returned to the familiar analysis stating

[t]he prosecutorial misconduct inquiry therefore consists of two prongs: (1) whether the prosecutor's comments were improper; and (2) if so, whether the improper comments caused prejudice. We thus begin by analyzing the propriety of the prosecutor's comments.

Id., at 431 (Internal citations omitted). *Lindsay* makes clear the question is not the propriety of the ruling on the motion for mistrial, but rather upon the propriety and effect of the prosecutor’s actions. Here, the Court of Appeals never undertakes this analysis. It seems impossible to

conclude repeated misconduct did not warrant a mistrial without first independently assessing whether the comments were improper and prejudicial. But that is what the court did.

This opinion creates a disincentive for litigants to attempt to correct the error in the trial court by way of a motions for a mistrial or for a new trial. Where defendants have contemporaneously objected to the misconduct, as Mr. Bato did, the issue is fully preserved for appeal and they will prevail on appeal merely by showing the comments were improper and prejudicial. But, if they choose to afford the trial court one last opportunity to correct the error the Court of Appeals will not independently assess the propriety and prejudice of the prosecutor's conduct, and instead defer to the trial court's resolution of the question.

The fact that that the jury was instructed that argument was not evidence cannot and did not cure the misconduct. Such a simplistic rule would give prosecutor's *carte blanche* to argue a wide array of unproven facts established a defendant's guilt. The error is not the failure to instruct the jury. Instead, the prejudice results from the prosecutor's repeated refusal to limit her argument consistent with those instructions and the law. The prejudice results from the trial court's repeated rulings overruling timely objections. The prejudice

results from the fact that prosecutor argued Mr. Bato was guilty based upon a far-more serious version of events that was not supported by the evidence.

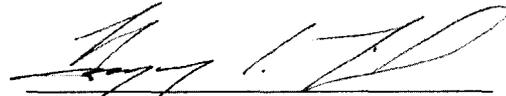
This Court has recognized the flagrancy of misconduct is illustrated by repeated misstatements. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704. Both prongs are satisfied here. Contrary to *Glasmann*, by failing to reverse a case such as this where misconduct permeated the State's argument and became its theme, the opinion reduces to "empty words" the warning that such tactics will not be tolerated. *Glasmann*, 175 Wn.2d at 712-13

Given the repetition of the misconduct, there is no way to unring the bell. Whether it was a result of bad faith, inadvertence, or ineptness does not alter the fact that the arguments were substantially likely to affect the verdict. This Court should accept review pursuant to RAP 13.4 and reverse Mr. Bato's convictions. *Emery*, 174 Wn.2d at 760.

F. CONCLUSION

For the reasons above this Court should accept review and reverse Mr. Bato's convictions.

Respectfully submitted this 17^h day of December, 2014.

A handwritten signature in black ink, appearing to read "Gregory C. Link", written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Petitioner

2014 NOV 24 AM 9:27

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANCIS G. BATO,

Appellant.

No. 70943-7-1

UNPUBLISHED OPINION

FILED: November 24, 2014

PER CURIAM — Francis Bato appeals his convictions for unlawful imprisonment, assault, and violating a no-contact order. He contends the prosecutor's repeated references in closing argument to facts outside the record amounted to misconduct and denied him a fair trial. Because the alleged misconduct was the subject of a mistrial motion and the court was within its discretion in denying that motion, we affirm.

Based on allegations that Bato committed domestic violence against his girlfriend, Dinah Jimenez, the State charged him with unlawful imprisonment, fourth degree assault, interfering with domestic violence reporting, and violation of a court order. At trial, the State's evidence established that on the evening of December 13, 2012, a friend drove Bato and Jimenez to Jimenez's apartment. All three entered the apartment. Jimenez eventually asked Bato and his friend to leave, but Bato refused and spent the night at Jimenez's apartment.

No. 70943-7-1/2

The next morning, Bato drove Jimenez to work. After dropping her off, Bato found Jimenez's iPad in his car and read some Facebook messages she had received from a male co-worker, Ronel Bunger.

Later that day, Bato and Jimenez were at her apartment when she received a phone call from Bunger. Bato became angry when he realized the call was from Bunger. Jimenez asked him to leave, but Bato refused to go and told Jimenez not to answer the phone. He then took Jimenez's phone from her, removed the battery, and put it in his bag.

Jimenez testified that she tried to leave the room three times, but Bato blocked the doorway and held her by her forearms. Roughly 30 minutes passed before Bato left and went outside. While he was gone, Jimenez sent a Facebook message to Bunger, stating, "I need help." Shortly thereafter, Jimenez heard her phone ringing in the bedroom and answered it. Bato came into the bedroom and grabbed the phone from Jimenez, causing her hand to bleed. Bato asked Jimenez, "Who are you calling?" She said Bunger had called to tell her the police were on their way.

King County Sheriff's Deputies Julian Chivington and Steven Perry investigated the incident. Deputy Chivington testified that Bato initially said he had not touched Jimenez. He later admitted that he was upset that Jimenez had another boyfriend and "grabbed her hand off of the doorknob and wouldn't let her leave." Jimenez was "distraught" and complained of pain in her arm. Deputy Chivington noticed injuries on her arms and photographed them. The photographs, which were

No. 70943-7-I/3

admitted as exhibits, showed red marks and bruising on Jimenez's bicep and forearm. Deputy Chivington testified that three or four of the red marks were grouped in a manner consistent with someone's fingertips. Jimenez testified that the marks "came from the time that [Bato] was stopping me to leave the room."

Deputy Perry testified that Bato led him and Deputy Chivington into the apartment where they found Jimenez "seated on the floor with her knees pulled up to her chest, arms wrapped around her legs." Deputy Perry spoke privately with Jimenez and determined there was probable cause to arrest Bato.

Jimenez's written statement to police was not admitted at trial. Jimenez admitted during her testimony, however, that she told police that Bato dragged her and threw her on the bed. She explained that she made the statement to police because "I was not in my right mind and I was just afraid." When asked generally about the statement, she said, "I don't really recall anymore what I have said." When asked specifically if she told police that Bato had knives or threatened to kill her, the police, and Bunger, she stated, "I don't really remember."

Bato testified and denied striking or pushing Jimenez or doing anything to stop her from leaving. He also denied grabbing any knives, leaving the apartment, or making any threats to kill Jimenez, the police, or Bunger. He admitted touching Jimenez because she was "hysterical" and he wanted to "calm her down." He claimed he "held her two hands, and then . . . sat her on the bed" and "laid her

No. 70943-7-1/4

down.” He said he “was just preventing her from being hysterical.” He admitted taking Jimenez’s phone and removing the battery.

During the prosecutor’s closing argument, the following remarks, objections, and rulings occurred:¹

Prosecutor: Understandably, you may want to know about everything that happened, such as the knives, the threats, the dragging. And I submit to you that that is what happened that night.

Defense: Objection, Your Honor; facts not in evidence. No one testified to the majority of those things. She asked about them.

Court: The objection is overruled. The jurors are reminded that the statements by the attorneys during closing argument are not in and of themselves evidence.

....

Prosecutor: So how did [Jimenez’s] account change? She said that [Bato] didn’t cause her any pain that night. She said that he didn’t drag her to the bedroom, that he didn’t grab

¹ Bato mentions two additional instances of alleged misconduct, one involving possible pressure on Jimenez to testify favorably to Bato and another involving the nature of the jury’s task. Because he does not support his challenge to these remarks with meaningful analysis or argument, they need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument not supported by authority); State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficient argument); Saunders v. Lloyd’s of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (insufficient argument and authority). We note, however, that the remarks regarding possible pressure on Jimenez appear to have been reasonable inferences from the evidence and that asking the jury to hold Bato “accountable” was not improper. State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992) (not improper to tell jury that their verdict will determine whether “the defendant will be set free or held to account”); State v. Finch, 137 Wn.2d 792, 841-42, 975 P.2d 967 (1999) (asking the jury to act as the conscience of the community is not improper unless the intent is to inflame the jury).

No. 70943-7-1/5

those knives, he didn't threaten to kill the police, he didn't threaten to kill her.

Defense: Your Honor, I'm going to object to the extent that she's implying that there's evidence that he—she ever said those things. That's not in evidence and this is improper.

Court: The objection is overruled.

....

Prosecutor: [Jimenez] said that she wasn't thinking clearly and she wasn't in her right mind when she gave her statement

Now in front of you, what she's trying to do is take back what she perceives to be the worst for him: the knives, the dragging, throwing on the bed, threatening to kill. She's smart.

Defense: Your Honor, again I'm going to object. This is misconduct at this point.

Court: The objection is overruled. The jurors are once again reminded that the lawyer's remarks during closing argument are not themselves evidence.

....

Prosecutor: When she had just been through a terrifying experience, when she was crying that night and she needed help, she talked about what happened. After he kept her in the room, after he had taken the knives, after he threatened her life—

Defense: Objection, Your Honor. Again, facts not in evidence.

Court: The objection is overruled. The jurors are reminded that closing arguments and the statements made during closing argument are not themselves evidence.

Prior to the jury receiving the case, defense counsel moved for a mistrial based on "my objections during the State's closing with respect to statements about

No. 70943-7-1/6

the evidence, burdens of proof, and elements of the offense I believe that were misstated.” In denying the motion, the court stated in part,

[W]ith regard to the actual presentations about what the victim said or did not say, I would incorporate my recitations . . . where I wanted the record to [show] that the alleged victim Jimenez’s testimony was ambiguous. And she . . . didn’t remember what she had previously said regarding knives, threats to kill, that type of thing, which makes this subject to argument. And it was argued. The Court therefore overruled most of the objections, but also took the opportunity to inoculate and remind the jurors that what the attorneys say[] is not in and of itself evidence. Moreover, this Court would make a finding that from where I sat, I did not infer any bad faith on behalf of the Prosecuting attorney during closing arguments. . . .

. . . . The motion is therefore denied.

The court’s written instructions to the jury stated that “the lawyers’ statements are not evidence,” that they “must disregard any remark, statement, or argument that is not supported by the evidence,” that the only evidence before them was the testimony, stipulations, and exhibits, and that “[i]f evidence was not admitted . . . , then you are not to consider it in reaching your verdict.”

The jury acquitted Bato of interfering with domestic violence reporting but found him guilty of fourth degree assault, violation of a court order, and unlawful imprisonment, with a special verdict finding of domestic violence. He appeals.

DECISION

It is improper for a prosecutor to make arguments based on facts not in evidence.² Citing this rule, Bato contends the trial court denied him a fair trial “[b]y

² State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

No. 70943-7-1/7

permitting the prosecutor to repeatedly refer to facts outside the record, and overruling defense objections to her doing so." We disagree.

When, as in this case, alleged prosecutorial misconduct has been the subject of a mistrial motion, we review the court's ruling for abuse of discretion.³ "[W]e give deference to the trial court's ruling because it is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant."⁴ A trial court should grant a mistrial only if a defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.⁵ Considering the court's verbal and written instructions, the evidence, and the deference afforded the trial court's decision, we conclude the court did not abuse its discretion.

Each of the prosecutor's challenged remarks included some facts that were in evidence, such as Bato's dragging Jimenez, throwing her on the bed, and preventing her from leaving, and some facts that were not, such as Bato's alleged threats to kill. Rather than parse out the proper and improper portions of the remarks -- something defense counsel failed to do in his objections -- the court chose instead to immediately and repeatedly remind the jurors that the lawyers' remarks were not evidence. The court's written instructions further emphasized that point, telling the

³ State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Defense counsel expressly moved for a mistrial based on the prosecutor's "statements about the evidence," and the court's ruling referenced the prosecutor's remarks regarding the knives, threat to kill, and "that type of thing."

⁴ State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

⁵ State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

No. 70943-7-1/8

jury exactly what was and was not evidence. We presume that juries follow their instructions.⁶

In addition, the evidence strongly supports the court's conclusion that a mistrial was not warranted. Bato admitted that he pulled Jimenez's hands off the doorknob, held her hands, and did not let her leave. He conceded that he violated the no-contact order. Jimenez admitted telling police that Bato dragged her, threw her on the bed, and prevented her from leaving. Testimony and photographs showed Jimenez's injuries, and other testimony established that she sent her friend a message during the incident asking for help.

Taken together, the instructions, evidence, and deference we afford a mistrial decision convince us that the court did not abuse its discretion in concluding that the alleged misconduct did not warrant a mistrial.⁷

Affirmed.^{8 9}

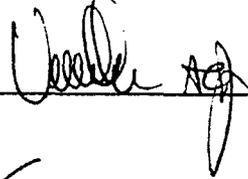
⁶ State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000) (citing State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)).

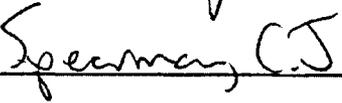
⁷ We note that even if some of Bato's prosecutorial misconduct claims were not decided in the mistrial ruling, for the reasons stated above, he cannot meet his burden of demonstrating a substantial likelihood that any misconduct affected the jury's verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

⁸ Bato's motion for oral argument is denied.

⁹ Following filing of this opinion, Bato moved for reconsideration, arguing that the standard of review is not abuse of discretion. Citing State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014), he claimed that Lindsay "made clear that a motion for mistrial premised upon prosecutorial misconduct preserves the issue for appeal *but does not alter the standard of review.*" Motion to Reconsider at 2 (emphasis added). According to Bato, the standard of review for prosecutorial misconduct is whether the prosecutor's conduct was improper and prejudicial, not abuse of discretion. His motion fails for two reasons.

FOR THE COURT:





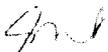


First, Lindsay did not address any alleged difference between the standards of review for mistrial rulings and rulings on objections to alleged misconduct. Rather, it merely held that when prosecutorial misconduct is not objected to but is raised in a mistrial motion, the alleged error has been preserved and the stringent flagrant and ill-intentioned standard applicable to unpreserved claims does not apply. Lindsay, 180 Wn.2d at 430-31, 440-42. Second, Bato overlooks the fact that numerous decisions, including Lindsay, state that the standard of review for rulings on objections to prosecutorial misconduct is abuse of discretion—the same standard applied to rulings on motions for a mistrial. Id. at 430 (allegations of prosecutorial misconduct are reviewed for abuse of discretion); State v. Ish, 170 Wn.2d 189, 195-96, 241 P.3d 389 (2010) (accord); compare State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (abuse of discretion standard applies on review of ruling denying mistrial). And whether the challenged ruling addresses an objection to alleged misconduct or a motion for a mistrial, we give deference to the ruling and will not reverse it absent a substantial likelihood that the alleged misconduct affected the verdict. Rodriguez, 146 Wn.2d at 269-70 (mistrial ruling will be overturned only if there is a substantial likelihood the error prompting the mistrial request affected the verdict); Ish, 170 Wn.2d at 195-200 (to demonstrate prosecutorial misconduct, a defendant must show both improper conduct and a substantial likelihood that such conduct affected the verdict; reviewing court defers to trial judge who “is generally in the best position to determine whether the prosecutor’s actions were improper and . . . prejudicial.”); State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (where defendant objects or moves for a mistrial on the basis of prosecutorial misconduct, reviewing court gives deference to the trial court because of its superior position in assessing prejudice). Thus, contrary to Bato’s assertions, the standard of review is abuse of discretion. His motion for reconsideration is denied.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70943-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Joseph Marchesano, DPA
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 17, 2014

WASHINGTON APPELLATE PROJECT

December 17, 2014 - 4:36 PM

Transmittal Letter

Document Uploaded: 709437-Petition for Review.pdf

Case Name: STATE V. FRANCIS BATO

Court of Appeals Case Number: 70943-7

Party Represented: PETITIONER

Is this a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PAOAppellateUnitMail@kingcounty.gov