72538-6

No. 72538-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
Jul 02, 2015
Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER ZANDER, Appellant.

BRIEF OF RESPONDENT

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Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Zander can demonstrate from this record his trial was constitutionally unfair where the prosecutor did not make repeated impermissible arguments or misstate the law and error if any, was isolated and could not have resulted in any prejudice in light of the overwhelming evidence presented below.

C. FACTS

1. Procedural facts.

Christopher Zander was charged with five counts of domestic violence felony violation of a no contact order for repeatedly violating a no contact order prohibiting contact with Deborah Condon, with whom Zander previously had a romantic relationship with. CP 68-71. Following a jury trial, Zander was convicted as charged. CP 111-222. The sentencing court calculated an offender score of 15 months and imposed a 120 month sentence. Id. Zander timely appeals. CP 123-135.

2. Substantive facts.

Christopher Zander repeatedly and knowingly violated a no contact order prohibiting him from any contact with Deborah Condon, with whom he previously had a relationship. RP 150. On one occasion Zander drove

to Ms. Condon's home, stopped at the gate at the end of her driveway and tossed a purse enclosed in a freezer bag onto her property. RP 167. Inside the purse Zander had written several notes and other miscellaneous items. RP 173. On another occasion, Zander left a work light, some alcohol, Twinkies and Zingers outside a gate at Condon's home. Then again on another occasion, Zander drove over to her home at 4:45 a.m., pulled up to the gate, put his bright lights of his vehicle directly into her home, got out of his vehicle and threw four large rolls of carpet over her gate. RP 174. Finally, on another occasion Condon returned home in her vehicle at approximately 10:30 p.m. to find Zander was standing a few feet from Condon's property. Zander stood outside his vehicle staring at Condon whilst holding a flashlight. RP 178. Eventually, after Condon drove to her neighbor's home to summon help, Zander fled into the woods with his flashlight. RP 181. After several hours, Zander returned to his vehicle and left the area. RP 182. On another occasion Condon found Zander standing on foot outside a gate that led to Condon's mail box early in the morning. RP 186. At trial, the state presented security video provided by Ms. Condon of most all of these incidents –wherein Zander could be seen violating the terms of the no contact order. While testifying, Zander acknowledged he was aware of the no contact order, its provisions prohibiting contact and that he had repeatedly violated the order. RP 465.

D. ARGUMENT

1. Zander cannot demonstrate from this record his trial was constitutionally unfair where the prosecutor did not make repeated misstatements of the law and error if any with alleged impermissible argument was isolated. Moreover, the alleged errors had no prejudicial effect in light of the overwhelming evidence of guilt.

Where prosecutorial error is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wash. 2d 529, 561, 940 P.2d 546 (1997), as amended (Aug. 13, 1997), . Prejudicial effect is established only if there is a substantial likelihood that the error affected the jury's verdict. State v. Roberts, 142 Wash. 2d 471, 533, 14 P.3d 713 (2000), as amended on denial of reconsideration (Mar. 2, 2001), . Absent an objection, a claim of prosecutorial error is waived unless it is so flagrant or ill-intentioned that it creates an incurable prejudice. State v. Russell, 125 Wash. 2d 24, 86, 882 P.2d 747 (1994); State v. Echevarria, 71 Wash. App. 595, 597, 860 P.2d 420 (1993), as amended on reconsideration (Nov. 23, 1993), . Prosecutorial error does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wash. 2d 136, 175-76, 892 P.2d 29 (1995).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wash. 2d at 85-86. Defense counsel's decision not to object or move for a mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wash. 2d 613, 661, 790 P.2d 610 (1990), as clarified on denial of reconsideration (June 22, 1990), . Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wash. 2d 668, 719, 940 P.2d 1239 (1997); *see also*, State v. Gregory, 158 Wash. 2d 759, 841, 147 P.3d 1201 (2006), as corrected (Dec. 22, 2006), (court gives deference to the trial court's ruling on motion for mistrial "because the trial court is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant").

Zander contends the prosecutor improperly disparaged defense counsel, misstated the law and urged the jury to consider matters beyond "their role." Br. of App. at 3. Relying on State v. Thorgerson, 172 Wash. 2d 438, 258 P.3d 43 (2011). Zander contends these alleged errors require reversal.

Disparaging defense counsel.

It is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. State v. Warren, 165 Wash. 2d 17, 29-30, 195 P.3d 940 (2008). In Thorgeson, the prosecutor committed error in opening and closing statements by ***repeatedly*** referring to the defense as 'bogus' and engaging in 'sleight of hand' in defending Thorgeson. The court determined that the phrase 'sleight of hand' implied a deception or dishonesty by defense counsel and constituted improper argument. Warren, 165 Wash. 2d 17 The Court determined nonetheless, it was unlikely the prosecutor's disparaging remarks would have altered the result or that a curative instruction could not have alleviated any potential prejudice and therefore affirmed Thorgeson's conviction.

Here, at the beginning of closing argument, the prosecutor stated:

> I'm going to summarize the evidence that we heard in the trial and I'm going to talk at length about the instructions that you heard from judge Garrett just a moment ago because your job as a jury as a whole will be to carefully go through all of these things, to remember what you heard in court, and to compare them to the law you've been instructed on. And that is your duty to do that.

> Okay. Now there will be other things argued in the next hour or so to you that encourage you to go beyond what your duty is as a juror.
>
> RP 549.

While the prosecutor did not identify who or what other things he was referring to, Zander contends this argument implied his trial attorney would ask jurors to go outside their duty. Appropriately, Zander's attorney immediately objected and advised the court and the jury that this argument was improperly commenting on counsel. Id. The prosecutor then clarified to the court in front of the jury he was merely arguing the jury's duty was to abide by the law as given by the court and not anything else. RP 549. The prosecutor appeared concerned, likely in context to trial testimony, that Zander's attorney would argue Zander didn't intentionally violate the protection order based on a mental health condition even though Zander did not seek to introduce medical testimony regarding Zander's ability to from the requisite intent to commit the charged crimes. See RP 564.

In response, the trial court then cautioned the jury, without ruling specifically on the objection, "that they should consider the lawyers arguments and statements as intended to help you understand the evidence and applied the law to the evidence. The Court's instructions are these instructions the definitive instructions on the

law and you've received those instructions and you'll have them to refer to." RP 550.

This cautionary instruction, while not ideal, did reaffirm to the jury that the attorney's arguments were merely to assist them in digesting the evidence and ultimately the jury would decide the case based on the law as instructed by the trial court. RP 549-50. This instruction did not magnify the alleged error but instead neutralized it –by not characterizing the argument one way or another but instead reminding the jury the arguments were not evidence and they were to focus on the law as given by the court. Moreover, the prosecutor immediately clarified he was asking the jury to apply the facts to the law-as given by the Court. This clarification further ameliorated any potential prejudice that could have been caused by the prosecutor's isolated statement.

In light of the trial court's neutralizing instruction, the prosecutor's clarification of his argument and the overwhelming evidence otherwise presented below, Zander cannot demonstrate this isolated statement during closing argument could have substantially affected the verdict. Reversal for this alleged isolated error is not warranted.

Alleged prejudicial comments

Next, Zander contends the prosecutor impermissibly made flagrant and prejudicial comments during closing meant to appeal to the prejudices and passions of the jury. Br. of App. at 5.

Specifically, Zander contends the prosecutor's comments during closing stating that "an effort has been made to make this about Mr. Zander in the last, Wednesday last week and again this morning. This case is not about Mr. Zander, this case is about Ms. Condon and the efforts we go through to protect ourselves. That's what you heard about. So I ask you to find Mr. Zander guilty of five different charges, five different crimes he's committed in this case," was impermissible. RP 565. Zander did not object initially but prior to the state's rebuttal argument Zander's attorney did note he was objecting to any argument meant to direct the jury to protect the victim. RP 577.

Absent an objection, a claim of prosecutorial error is waived unless it is so flagrant or ill-intentioned that it creates an incurable prejudice. Had Zander objected initially, the trial court could have given an effective curative instruction had it determined the prosecutor's statement was improper by simply reminding the jury, as the prosecutor subsequently did, that the state had the burden of proving Zander's guilt based on the evidence presented beyond a reasonable doubt and such decision is

predicated on the facts presented applied to the law as instructed by the jury. Since a curative instruction would have cured any potential for prejudice, Zander waived his right to now complain of this alleged error.

When the prosecutor subsequently asked the jury to consider Ms. Condon's wishes during rebuttal, Zander did object and the Court appropriately asked the prosecutor to move on. RP 578. The prosecutor then drew another objection by asserting the case was about "doing what you can to protect yourself" at which point, the trial court advised the prosecutor to focus on responding to the factual issues raised in Zander's defense counsel's closing. RP 578. The prosecutor did, asking the jury to review the 'to convict' jury instructions that set forth the elements for each charged offense and to follow the jury instructions as given by the Court. The court's intervention and the prosecutor's appropriate response alleviate any potential for prejudice stemming from the prosecutor's statements. Thus, Zander cannot demonstrate this alleged error could have any substantial prejudicial effect on the jury determination. Particularly, in light of the overwhelming evidence presented against Zander, including his own admissions and video surveillance of the charged crimes.

Alleged misstatement of the law during closing

Finally Zander argues, relying on State v. Allen, 182 Wash. 2d 364, 341 P.3d 268 (2015), that he was prejudiced by the prosecutor's alleged misstatements of the law regarding the 'knowing' element of the charged offense during closing arguments. Br. of App. at 7. Zander contends the prosecutor impermissibly told the jury in closing it could find Zander had knowledge of the no contact order so long as the jury concluded a reasonable person would have knowledge. Br. of App. at 7. Zander contends that as in Allen, 182 Wash. 2d 364, this reasonable person "should have known" of a particular outcome argument was impermissible. Br. of App. at 7.

In Allen, the prosecutor's argument was determined impermissible because Allen was charged as an accomplice and under accomplice liability, the jury was required to find Allen had actual knowledge that the principle was engaging or going to commit the crime charged. Thus, the court determined it was improper for the prosecutor to argue Allen acted knowingly predicated on constructive knowledge.

Zander was not charged as an accomplice. Moreover, the evidence overwhelmingly demonstrated Zander had actual knowledge of the protection order, its terms and knowingly, repeatedly violated those provisions. And in context, the record reflects the prosecutor merely was

reviewing the jury instructions as given to the jury pertaining to the "knowingly" mens rea element arguing:

> to act knowingly means if a person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result, then he or she is aware of that fact, circumstance or result.
>
> So we know Mr. Zander was aware of two things; we know he was aware that the protection order was in place that protected Deborah Condon, he was well aware of that. Ms. Holmes had gone over with him specifically just a week before these events started really gaining speed in January of 2014. We know he signed the bottom of each of the protection orders you'll see in Exhibits 1-A and Exhibit 2. We know that was him that signed those, we had fingerprint experts, we had Ms. Condon recognizing his signature on all the documents, we know Mr. Zander knew, and Mr. Zander admitted that he knew these, that the protection orders were in place. Okay. This is the first part of the knowing instruction when he is aware of the facts.
>
> Mr. Zander was fully aware of the fact that the protection orders were in place, okay. It's not necessary that the person know the facts or circumstances or result defined by law as being a crime so we don't have to show, it's not a necessary part of what needs to be shown that Mr. Zander knew then that violating a protection order was criminal, we don't have to show that. We have to show that there was a protection order in place and Mr. Zander knew of that protection order.
> And importantly the last part of this instruction on knowledge is if the person has information that would lead a reasonable person in the same situation to believe that the facts exists, the jury, you, is permitted to find that he acted with knowledge of that fact. Okay, so it's even further than you believing Mr. Zander knew that these protection orders were in place and that he was violating them. If a reasonable person would have had the information to know that, that's like also a permitted showing of knowledge for this case, okay. And we know a reasonable person in the shoes of Mr. Zanders would know that these orders were in place because he sat in court, was told the orders were in place by a judge, signed his name on them, put his finger prints on them, was reminded of them

> on numerous occasions by Ms. Holmes, a reasonable person in the mind of Mr. Zander' would know those orders are in place.

RP 562. Taken in context, these statements demonstrate the prosecutor did not misstate the law but was merely repeating the law as defined by the Court and approved by the parties and, was explaining the applicability of the law to the facts. The prosecutor argued the evidence demonstrated Zander had actual knowledge of the protective order and knowingly violated its terms. The prosecutor also pointed out the jury could also find Zander had actual 'knowledge' if the jury determined "the person has information that would lead a reasonable person *in the same situation* to believe that the facts exists, the jury, you, is ***permitted*** to find that he acted with knowledge of that fact." RP 561(*emphasis added*). This argument was entirely consistent with the instructions and appropriate given that Zander was not charged as an accomplice. Jury instruction 13 read:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstances or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know the fact, circumstances or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of the crime, the element is also established if a person acts intentionally as to that fact.

CP 80-100 (instruction 13).

Zander cannot therefore show based on this record, that the prosecutor misstated or impermissibly argued the law. Particularly when the facts establish Zander knew of the protective orders, signed the Orders and acted in a manner that reflected he knew his violations were intentional. Zander's argument should be rejected.

E. CONCLUSION

For the foregoing reasons, the State requests that Zander's appeal be denied and his five felony domestic violence no contact order convictions and sentences be affirmed.

Respectfully submitted this 2nd day of July 2015.

Kimberly Thulin

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Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Gregory Link, addressed as follows:

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TDAStavik — 7/2/15

NAME **DATE**