72564-5

NO. 72564-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

AL-PENYO BROOKS,

Appellant.

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

The Honorable John H. Chun, Judge

BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to confront his accuser when the trial court erroneously ruled he had forfeited this right.

2. Appellant was denied his constitutional right to a fair trial when the prosecutor appealed to the jury's emotions and argued facts not in evidence, thus diverting the jury's attention away from its duty to render a fair and impartial verdict.

3. The trial court erred when it found the no-contact order defendant was accused of violating was valid.

Issues Pertaining to Assignments of Error

1. Appellant was charged with fourth degree assault after he and his girlfriend got into an argument. His girlfriend told police that appellant hit her, but she was unavailable to testify to this at trial. The State argued her statement was still admissible because appellant had forfeited his right to confrontation by sending numerous messages to his girlfriend (despite the existence of a no-contact order), urging her not to show up at trial. The record also establishes, however, that even before these messages were sent, appellant's girlfriend independently refused to assist police and would not provide a written statement because she loved appellant and wanted him

released. Given this record, did the trial court err when it found there was clear, cogent and convincing evidence that appellant caused the witness to become unavailable?

2. During closing argument, the prosecutor appealed to the passions and sympathy of the jury by focusing on the fact that the complainant was pregnant with appellant's baby and by conjuring up notions that she was unhappy and missing out on the happy-go-lucky life of a teenager because of appellant's contact with her. There was no evidence to support this. The prosecutor also suggested that appellant knew his girlfriend was pregnant at the time of the alleged assault, even though there was no evidence to support this. Finally, the prosecutor invited the jury to speculate that appellant was continuing to violate a no-contact order by contacting his girlfriend up to and during the trial. Again, there was no evidence to support such prejudicial speculation. Was appellant denied a fair trial due flagrant prosecutorial misconduct?

3. The pre-trial no-contact order at issue here, which served as a basis for five charges of its violation, had an expiration date of 2063 (nearly 50 years in duration). The issuing court and the prosecutor provided no explanation as to why such a lengthy duration was reasonably necessary. The statute only permits a duration up to

conviction or dismissal of the charges, which would have happened well before 50 years, given appellant's constitutional right to a speedy trial. As such, was the order invalid as a matter of law?

B. STATEMENT OF THE CASE

1. Procedural History

On March 11, 2013, the King County prosecutor charged appellant Al-Penyo Kniar-James Brooks with one count of witness tampering, one count of fourth degree assault, and two counts of a misdemeanor violation of a no-contact order. CP 1-8. On October 12, 2014, the information was amended and the State added three more counts of violating the no-contact order. RP 10-12. Additionally, the State charged a domestic violence enhancement for each count. CP 10-12. After a trial, a jury found Brooks guilty as charged. CP 52-61. He appeals. CP 105.

2. Substantive Facts

On January 20, 2014, Brooks returned to Seattle after a trip to Portland. RP 633.[1] He immediately went to see his girlfriend, Alexis Wilturner. RP 633. Wilturner was living with her grandmother. RP 633-34.

---

[1] Unless otherwise noted, "RP" refers to the primary trial transcript, which is multi-volume and consecutively paginated up to page746.

After arriving at Wilturner's home, Brooks looked at Wilturner's phone and discovered some flirtatious texts between her and another man. RP 633, 638. Brooks was heartbroken. RP 639. He wanted to leave but Wilturner attempted to prevent him, grabbing at his shirt and directing him to stay. RP 641-43. Eventually, Brooks left. RP 648. However, he soon realized he had left his cellphone in Wilturner's apartment and became worried Wilturner might do something to it. RP 650-52. He went back, knocked on the door, and demanded that Wilturner return his phone, but she did not. RP 651-52. Wilturner's grandmother called 911. RP 403, 652.

Police arrived, found Brooks kicking the door, and ordered him to the ground. RP 377, 398. One officer took Brooks to the police car, while another spoke with Wilturner. RP 378, 398. The officer observed Wilturner had an injured lip. RP 380. Wilturner claimed Brooks hit her. RP 381. However, she refused to let police take pictures and refused to give a written statement. RP 380, 383. She loved Brooks and told police she wanted him released before she would cooperate. RP 383.

Brooks was arrested. RP 404, 455. On January 21, 2014, the Federal Way court issued a pretrial no-contact order, restraining

Brooks form contacting Wilturner. Ex. 12. Afterward, Brooks made many phone calls and sent numerous emails to Wilturner. RP 662-63. In some, he urged Wilturner not to come to trial. RP 510.

At trial, Brooks admitted to contacting Wilturner, but he explained that he thought the no-contact order had been dismissed and that any new one would apply only if he were convicted. RP 662-63, 666, 670.

Meanwhile, Wilturner did not respond to the State's subpoena and did not testify. RP 196-97. The jury was permitted to hear her statement that Brooks assaulted her, however, because the trial court found Brooks had forfeited by wrongdoing his right to confront this witness. RP 198-200.

C. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED APPELLANT FORFEITED HIS RIGHT TO CONFRONT THE COMPLAINING WITNESS.

The Sixth Amendment gives criminal defendants the right to confront the witnesses against them. A criminal defendant may forfeit this right only if he causes a witness to be unavailable. State v. Mason, 160 Wn.2d 910, 925, 162 P.3d 396 (2007). This rule is known as the forfeiture by wrongdoing doctrine, and it permits the introduction of a witness' statements if the defendant causes the

witness to be unavailable through wrongdoing. State v. Dobbs, 180 Wn. 2d 1, 10-11, 320 P.3d 705, 709 (2014).

When deciding whether to apply the doctrine of forfeiture by wrongdoing, the trial court must determine whether there is clear, cogent, and convincing evidence that the wrongdoing of the accused caused the witness' unavailability. Under the clear, cogent, and convincing standard, the fact at issue must be shown to be "highly probable." In re Welfare of Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

As the Washington Supreme Court has stated, "We recognize that this is not an easy standard to meet, but the right of confrontation should not be easily deemed forfeited by an accused." Mason, 160 Wn.2d at 927. Under this high standard, the State must make a substantial showing of causation before a defendant may be stripped of his constitutional right to confront his accusers. See, e.g., Dobbs, 180 Wn. 2d at 1-2 (causation proved by showing defendant repeatedly threatened the witness with physical violence); Mason, 160 Wn.2d at 925 (causation proved by showing defendant murdered the witness).

The record in this case does not contain clear, cogent, and convincing evidence that Brooks caused Wilturner's unavailability.

Although the State produced evidence of unlawful contacts in which Brooks urged Wilturner not to show up at trial, there is nothing to show these contacts actually caused Wilturner to avoid testifying. Indeed, there was compelling evidence showing that Wilturner had her own motive for making herself unavailable. Wilturner loved Brooks and did not want to cooperate with his arrest. RP 380, 383; CP 6. She wanted to protect him and would not let officers take a picture of her alleged injuries. RP 280. She refused to give a written statement to officers unless Brooks was released. CP 6; RP 383.

Given Wilturner's personal disdain for moving forward with the prosecution, it is not "highly probable" that the defendant's actions caused Wilturner to absent herself from trial. Instead, it is far more probable that she independently chose not to appear because she did not want to support the prosecution of her boyfriend in any way.

In sum, the State did not prove it was highly probably that Brooks was indeed the cause of Wilturner's absence from trial. Consequently, the trial court erred when it found Brooks forfeited his right to confront his accuser and admitted Wilturner's hearsay statement regarding the alleged assault. This Court should,

therefore, reverse the assault conviction.

II. BROOKS WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

Brooks was denied his right to a fair trial when the prosecutor appealed to the emotions of the jurors, argued facts not in evidence, and diverted the jury's attention away from its duty to independently and impartially render a verdict.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citations omitted).

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Even if a defendant does not object, he does not waive his right to have the flagrant misconduct by a prosecutor reviewed on appeal. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

It is improper for a prosecutor to make comments designed to appeal to the passion and prejudice of the jury or to encourage a verdict based on emotion rather than evidence. Belgarde, 110 Wn.2d at 507–08. Appeals to the jury's "passion and prejudice" through use of inflammatory rhetoric constitutes misconduct. Id. Prosecutors must refrain from making comments that are reasonably calculated to align the jury with the prosecutor and against the accused. Reed, 102 Wn.2d at 147–48.

Prejudicial allusions to matters outside the evidence are improper because they encourage the jury to render a verdict based on something other than the admitted evidence. Id. at 507. Such arguments improperly divert the jury's attention from its duty to independently decide the case on the evidence. See, ABA

Standards for Criminal Justice 3–5.8 (setting forth such duty). A prosecutor cannot argue facts that are not in evidence. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704–05, 286 P.3d 673 (2012).

Here, the prosecutor made a blatant appeal to the jury's passion and emotion through the use of speculation and inflammatory rhetoric that painted a picture of Wilturner as a vulnerable young pregnant woman whose life was ruined by Brooks, the man who impregnated her and controls her through continuous illegal contacts. To this end, the prosecutor first argued:

> [Brooks] didn't want [Wilturner] to have to get up here, and, under oath, have to tell you what happened to her, that she was punched in the face by somebody that says he loves her, the father of her unborn child.

RP 696 (emphasis added). The prosecutor went on to state:

> He called her again and again and again, a 17-year-old pregnant mother of his unborn child.

RP 720 (emphasis added). The prosecutor then ended her argument with the following story:

> Ms. Wilturner is 17. She should be having her first week of high school, or first week of her senior year in high school, having fun with her friends, shopping for school clothes, getting excited. She's not. She's fielding angry and abusive phone calls. "Buy me money, put money on my books, you better call me more, send me more pictures, send me more

> letters, talk to this person, do this, do that, do this, do that.
>
> But she's running around, trying to go to her doctor's visits for this baby. She's not enjoying life, like she should be. But we're going to punish her because she falls prey to his manipulations? And he is able to control her? She's young. She's scared. That's not okay. And that's why this is important. So we've shown you that the State has proven every one of these charges beyond a reasonable doubt.

RP 721.

The prosecutor's argument constitutes flagrant misconduct. First, there was no legitimate reason for the prosecutor to refer to Brooks as "the father of [Wilturner's] unborn child" and refer to Wilturner as the "pregnant mother of his unborn child." The pregnancy was irrelevant in the context of the prosecutor's argument. The fact of the pregnancy was in no way integral to proving the assault or the violation of the no-contact order. Instead, the prosecutor's fixation on this fact was designed to have the jury envision Brooks as a man who would be so despicable as to punch his partner knowing she was carry his unborn child and to envision Wilturner as an overwhelmed pregnant woman whose life was ruined by her boyfriend's continuous contact. The record does not support such inflammatory rhetoric.

Second, much of the prosecutor's argument amounts to nothing more than pure fantasy. She suggested Brooks alone has denied Wilturner the Pollyanna life of a senior high school student as envisioned by the prosecutor. Yet, there was no evidence Wilturner was even enrolled in high school or would have been excited to start another school year, especially as she was about to give birth. There was no evidence that Brooks' contacts prevented Wilturner from "having fun with her friends, shopping for school clothes, [or] getting excited" about the school year. There was no evidence Wilturner was "not enjoying life" due to Brooks' contacts, or that Wilturner was somehow burdened in getting to her doctor's appointments because of his contacts.

The prosecutor's argument was nothing more than a fantasy that was put forth to the jury for one reason – to gain their sympathy and align them with the alleged victim. This was patently improper. Forfeiture by wrongdoing permits the State to bring in an unavailable witness' statements without confrontation. It does not give the prosecutor license to make up a story about the victim or speculate as to her feelings, emotions, demeanor, and motives in order to elicit sympathy from the jury.

Third, there was no evidence to support the prosecutor's claim that Wilturner was "fielding angry and abusive phone calls" during the week before school was to start (i.e. the week of trial). This improper argument was particularly prejudicial because it invited the jury to speculate that Brooks was engaging in criminal conduct and continued to violate the no contact order up to the very day of argument. There was no proof of this. As such, the prosecutor's argument served no purpose other than to prejudice the jury against Brooks and divert the jury away from its duty to render a fair and impartial verdict based on a reasoned consideration of the evidence, not speculation of continuous criminal action.

In sum, the prosecutor committed flagrant misconduct when she: (1) unnecessarily and prejudicially emphasized the fact that Wilturner was carrying Brooks unborn child, (2) suggested that Brooks knew Wilturner was pregnant when the alleged assault occurred, (3) crafted a fantasy as to Wilturner's life at the time of the trial (i.e. "the first week of her senior year in high school") and suggested Brooks had destroyed any enjoyment and happiness she might have, and (4) speculated that Brooks continued to violate

the no contact order and contact Wilturner up to and throughout the trial. The degree of wild speculation and the blatant appeals to the jury's sympathies demonstrate that the prosecutor's misconduct was a flagrant disregard of Brooks's right to a fair trial. Consequently, this Court should find he was denied this right and reverse his convictions.

III. THE TRIAL COURT ERRED IN ADMITTING AN INVALID NO-CONTACT ORDER AS EVIDENCE.

The trial court abused its discretion when it permitted the State to introduce the no-contact order.[2]

Pursuant to 10.99.040(3), a pretrial no-contact order was established restraining Brooks from contacting Wilturner. Ex 12. The order set forth an expiration date of 2063 – nearly fifty years in duration. Prior to trial, the defense moved to exclude the order as invalid as a matter of law on the ground the court lacked authority to issue an order where the State did not show the duration was reasonably necessary. CP 17-19; RP 28-29, 34-35. In response, the State moved to have the no contact order admitted, arguing that

---

[2] An abuse of discretion occurs when the trial court's ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

the cases cited by the defendant were distinguishable. RP 29-32. The trial court granted the State's motion without explanation. RP 39-40.

[T]he "existence" of a no-contact order is an element of the crime of violating such an order. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). However, the "validity" of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. Id. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence. Id.

The no-contact order at issue here was invalid. A trial court's sentencing authority for issuing a pretrial no-contact order is set forth by statute:

> At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed....

RCW 10.99.040(3).

Although there is no specific duration limitation set forth in RCW 10.99.040, no contact orders may be invalid on constitutional grounds if they extend beyond a reasonable timeframe. In re

Rainey, 168 Wn. 2d 367, 381-82, 229 P.3d 686, 692 (2010). Because no-contact orders restrict fundamental rights – such as freedom of speech, association, and movement – they must be sensitively imposed. Id. The duration of any restriction must be narrowly drawn and shown by the State to be reasonably necessary. Id. (striking a lifetime no-contact order because the record did not show the order was narrowly drawn to restrict only what was reasonably necessary); State v. Gitchel, 5 Wn.App. 93, 94–95, 486 P.2d 328 (1971) (holding "unhesitatingly" that a sentencing condition banishing the defendant from the state forever would be unconstitutional).

Here, the issuing court provided no reason for the nearly 50-year duration of the no-contact, and the State failed to show it was reasonably necessary. Simply put, there is no legitimate explanation that can be made for a pretrial no-contact order of such a lengthy duration. Hence, the order is invalid because it is unconstitutional restriction of Brooks' fundamental rights.

The order is also invalid because the issuing court exceeded its statutory authority. RCW 10.99.040(3) only authorizes the trial court to issue the order until "the defendant is acquitted or the

charges are dismissed."[3] Because a violation of the defendants right to speedy trial sets the outer limit for time to bring a case to trial before dismissal is required, this also necessarily establishes the extent of court's authority to issue a pre-trial no-contact order. The issuing court's authority only extends as far as the speedy trial period legitimately extends.

While the notions of what constitutes a speedy trial have been stretched to great lengths, there are still constitutional limits on prosecutorial delay. E.g., Doggett v. United States, 505 U.S. 647, 652, n. 1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (holding that delay of eight-and-one-half years between defendant's indictment and his arrest violated his Sixth Amendment right to speedy trial). "Depending on the nature of the charges, the lower courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. . . ." Even though there is no set number of days, months, or years upon which trial delay requires dismissal, this Court can presume that, given the type of

---

[3] A pretrial no-contact order can be extended as a condition of sentence. State v. Schultz, 146 Wn. 2d 540, 547, 48 P.3d 301 (2002). However, this does not help the State here, because the maximum term Brooks faced was five years (CP 95), which is well below the expiration date.

charges here, a speedy trial violation would occur well before the no contact order expired, triggering dismissal and an end of the court's authority under RCW 10.99.040(3). As such, the trial court had no statutory authority to authorize a pretrial no-contact order of such duration.

In sum, the no-contact order was invalid as a matter of law on two grounds. First, without a showing that the duration was reasonably necessary, the order was an unconstitutional restriction on Brooks' fundamental rights. Second, because the order extends beyond all notion of what constitutes a speedy trial, the trial court was without statutory authority to issue a no-contact order of that duration. Because the order was invalid on its face, the trial court erred in admitting it into evidence. Consequently, appellant's convictions for violating the no-contact order must be reversed.

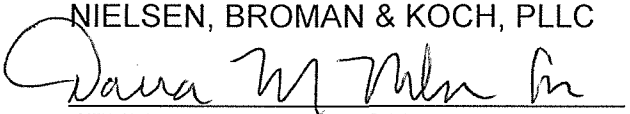
D. CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions.

DATED this 9th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER L. DOBSON
WSBA No. 30487

DANA M. NELSON
WSBA No. 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72564-5-I
	)	
AL-PENYO BROOKS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AL-PENYO BROOKS
DOC NO. 377878
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JUNE 2015.

X Patrick Mayovsky