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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2010 JAN 22 PM 2:41

NO. 63546-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AFTON SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES

1. The invited error doctrine precludes appellate review of a jury instruction that the defendant proposed at trial. Here, Smith proposed the instruction he now claims is in error. Does this preclude appellate review of this instruction?

2. A defendant had ineffective assistance of counsel if the trial counsel's performance was deficient and this deficiency prejudiced his defense. Here, Smith's trial counsel strategically offered a jury instruction that had no negative effect on his trial. Was his trial counsel ineffective for proposing this instruction?

3. A trial prosecutor commits misconduct if her closing argument is improper and this argument prejudiced the defendant's right to a fair trial. Here, the trial prosecutor's closing argument was consistent with the court's jury instructions and there was no prejudice to Smith. Was there prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Afton Smith was charged by second amended information with a count of DV¹ Felony Violation of a Court Order for violating a protection order when he assaulted his wife, Geraldine,² in June 2008. CP 43. He was also charged with a second count of DV Tampering with a Witness for attempting to induce Geraldine in the fall of 2008 to absence herself as a witness from the trial. CP 43-44. The trial began on March 9, 2009. 1RP³ 1-3.

During the motions in limine, the State sought to admit prior domestic violence incidents between Smith and Geraldine.

1RP 13. Smith indicated that he had no objection and would be stipulating to the admission of these incidents.⁴ 1RP 13, 22. Smith

¹ Domestic Violence.

² Geraldine Smith, the wife of the defendant, is referred to as Geraldine in this brief to avoid confusion.

³ The Verbatim Report of Proceedings will be referred to as follows: 1RP (03/09/09); 2RP (03/10/09); 3RP (03/11/09); 4RP (03/12/09-03/13/09); 5RP (03/13/09); 6RP (04/15/09 sentencing hearing).

⁴ Defense counsel indicated that she would be objecting to later incidents but as to these referenced incidents she had no objection. 1RP 13. The State sought to admit the evidence pursuant to ER 404(b), but Smith indicated formal findings were not necessary since they were stipulating to the admission of these incidents. 1RP 22.

in his pretrial motions asked that the State try not to use the terms “defendant” and “victim” in the trial. CP 41. The court instructed the State to try to avoid the use of the term “victim,” allowing the term “defendant” to be used freely. CP 42.

Following testimony, Smith proposed a jury instruction to limit the jury’s consideration of his prior domestic violence incidents to assessing “the victim’s state of mind and her credibility.” CP 39; 4RP 101. The court accepted this instruction and gave it to the jury. CP 39; 4RP 101-02.

The trial concluded on March 13, when the jury found Smith guilty as to the first count of violation of a court order and not guilty as to the second count of tampering. CP 45-47; 1RP 1-3. The trial court imposed a standard range sentence. CP 55-56; 6RP 22. Smith now appeals his conviction. CP 60-61.

2. TRIAL FACTS

Geraldine first met Afton Smith at church in 2004. They would be married a year later. 3RP 6. By February 1, 2006, Geraldine was calling 911 to report an intoxicated Smith breaking property and yelling. 3RP 34-35. A no contact order was issued by the court, which Smith would violate a few days later. She again

called police. 3RP 35. Over the next year, Smith and Geraldine separated several times. 3RP 40. Each time they would reconcile, but by 2007, Geraldine was beginning the process for a legal separation. 3RP 41.

Nevertheless, Smith was still living off-and-on with Geraldine. 3RP 36. On May 19, 2007, after some drinking, Smith again started breaking property. 3RP 36-37. Geraldine again called 911. 3RP 37. Smith broke the phone after she called police. 3RP 38.

After this incident, Smith told Geraldine that he wanted help for his drinking, wanted to get back to church, and would like their relationship to return to how it began. 3RP 41-42. By June 2007, they again were trying to reconcile. 3RP 42. Geraldine moved to a new apartment and Smith stayed with her. Id.

Unfortunately, however, things were not getting any better by August 2007. 3RP 8. Smith was threatening to burn the apartment down with Geraldine in it. Id. He was also saying how he understood why men killed their wives. Id. That month, Geraldine got a protection order from the King County Superior Court. 3RP 9-10. The court order was in effect for a year, expiring August 22, 2008. 3RP 11.

A few months passed, and they reconciled again. 3RP 43. Smith moved back in with Geraldine. 3RP 44. In fact, by the end of 2007, Geraldine was ready to ask the court to terminate the protection order. 3RP 43. She thought that terminating the protection order would help with Smith getting back on track with his rehabilitation. 3RP 44. She went to the court, but the judge refused to terminate it on both occasions. 3RP 43-44. She even lied in written documents to the court to support this termination. 3RP 127. Smith continued to encourage her to re-petition the court. 3RP 44. But with the protection order still in place, they started living together again. 3RP 45.

On June 28, 2008, Geraldine had returned home after spending the day with Smith. 3RP 13. She fell asleep, and awoke when Smith told her he wanted to go to the casino. Smith said that Geraldine's direct deposit would be on-line at midnight and he wanted to go out. Not wanting to go to the casino, Geraldine offered to take Smith somewhere else instead. 3RP 14. It appeared that he had been drinking, so she said that he should not be driving. 3RP 18-19.

With that statement, Smith flew into a rage, yelling and spitting in Geraldine's face. Smith yelled that she was making him

feel stupid. 3RP 19. He began to push and hit Geraldine. 3RP 19-20. She was trying to protect her face, and she asked him to stop. 3RP 20-21. After being cornered against the refrigerator, she was able to run shoeless out of the apartment to the apartment manager, Elsa Fultz. 3RP 21-23. Fultz saw Geraldine crying at her door, complaining of pain. 4RP 12-13. Geraldine did not look like her normal, well-kept self. 4RP 13. Fultz could see that Smith and Geraldine had been in an argument. 4RP 15. Geraldine called police. 3RP 24-25. When police arrived, Fultz saw Smith run from the apartment complex. 4RP 17.

Smith and Geraldine again separated, and she moved to a new apartment in Tacoma. 3RP 46. Ultimately, in August 2008, after Smith told her that he could not find a place to live and was now in alcohol treatment, he again moved in with Geraldine. 3RP 46-47. He was working and things were better between them. Id. At this point, Smith knew that there were pending criminal charges against him from the June incident. 3RP 51.

During the fall of 2008, Smith started to pressure Geraldine to call the prosecutor and change her story, because he was scared that he would go to prison if she did not. 3RP 51-52. Smith told Geraldine to call her advocate and say that at the time of the

offense in June, Geraldine had convinced him there was no longer a protection order. 3RP 52. He would pressure her daily to make the call, and she began to feel threatened. 3RP 53-54. Geraldine ultimately agreed to leave a voicemail that indicated that everything she reported to police had not happened. 3RP 53. She knew that she was not telling the truth when she left this voicemail. 3RP 51.

After the case was still not dismissed, Smith got more agitated and started to drink again. By November 2008, Geraldine had him move out for good. 3RP 60. A few weeks later, he started calling, telling her to change her story for trial. 3RP 61. She called police. 3RP 60. Their divorce became final in February 2009.

C. ARGUMENT

1. THE INVITED ERROR DOCTRINE PRECLUDES REVIEW OF ANY INSTRUCTIONAL ERROR.

Smith claims that the trial court improperly instructed the jury. He argues that the trial court erred when it referred to Geraldine as the “victim” in its limiting instruction regarding his prior domestic violence incidents. But Smith proposed this instruction. Because the invited error doctrine precludes review of any

instructional error that was proposed by the defendant, Smith's claim fails.

"The invited error doctrine precludes review of any instructional error -- even one of constitutional magnitude -- where the challenged instruction is one that was proposed by the defendant." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)). The defendant invites an error when the trial court gives a jury instruction almost unchanged from what the defendant proposed. State v. Studd, 137 Wn.2d 533, 538-39, 973 P.2d 1049 (1999).

This doctrine exists so that a defendant may not "request an instruction and later complain on appeal that the requested instruction was given." Id. at 546 (quoting Henderson, 114 Wn.2d at 870). Our Supreme Court has held that this is a strict rule that does not allow for any flexibility, regardless of the circumstances or the nature of alleged constitutional error. Studd, 137 Wn.2d at 546-48.

On appeal, Smith challenges jury instruction number 18,⁵ which was a limiting instruction he proposed at trial. 4RP 101. His trial counsel indicated that this proposed instruction was nearly identical to the approved language⁶ from State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Counsel told the court:

The only thing I changed was prior bad acts, prior incidents. It is just a lot of stuff going back and forth, but we believe that that instruction is appropriate in this case. There is nothing else really that I need to add.

4RP 101.

Specifically, counsel neutralized the term “defendant’s prior bad acts” from Magers to “prior incidents between Mr. Smith and Ms. [Geraldine] Smith.” CP 39; Magers, 164 Wn.2d at 181. The

⁵ The trial court’s jury instruction number 18 states:

Evidence has been introduced in this case on the subject of prior incidents between Mr. Smith and Ms. [Geraldine] Smith for the limited purpose of the victim’s state of mind and her credibility. You must not consider this evidence for any other purpose.

Instr. No. 18; CP 39.

⁶ The Supreme Court has held that an instruction is proper if it states that:

“[e]vidence has been introduced in this case on the subject of the defendant’s prior bad acts for the limited purpose of the victim’s state of mind and her credibility. You must not consider this evidence for any other purpose.”

Magers, 164 Wn.2d at 181.

rest of the language remained the same, and the court adopted it as proposed.

Accordingly, Smith proposed the instruction he now challenges for the first time on appeal. Any error resulting from this instruction was thus invited by Smith. The strict rule of the invited error doctrine applies and precludes appellate review of this matter.

2. THE INSTRUCTION WAS PROPER.

In the event this Court nevertheless reaches the merits of this claim, the instruction was proper. Smith argues for the first time on appeal that the trial court's jury instruction number 18 was erroneous, because by using the word "victim" in the instruction, the court impermissibly commented on the evidence.

Whether an instruction is legally correct is reviewed de novo. State v. Becklin, 163 Wn.2d 516, 525, 182 P.3d 944 (2008). Judges may not comment or instruct the jury on what the testimony proved or failed to prove. State v. Baxter, 134 Wn. App. 587, 592-93, 141 P.3d 92 (2006). The use of the term "victim" is neither encouraged nor recommended. See State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982). However, "in the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily

been held not to convey to the jury the court's personal opinion of the case.” Id. (citing Lister v. State, 226 So.2d 238, 239 (Fla. DCA 1969)).

This Court in Alger did not expressly hold that the use of the word “victim” by a trial court is proper. Alger, 31 Wn. App. at 249 (holding that any error in the trial court’s use of the term “victim” need not be determined because any error would be harmless as it relates to the unique facts of that case). However, the Supreme Court held the general language as contained in jury instruction number 18 was proper⁷ as a limiting instruction. Magers, 164 Wn.2d at 181 (holding that a trial court properly used this instruction to allow “the jury to consider Magers's prior acts of domestic violence toward the victim on the issue of the victim’s credibility and his other acts of violence.”).

In this case, the trial court used the general language as approved by the Magers Court.⁸ Geraldine was simply identified by the term “victim” in a defense-proposed limiting instruction. By

⁷ While the Supreme Court did not address the specific issue of whether the term “victim” was proper in this instruction, it did indicate that this jury instruction language, which included the word “victim,” was appropriate in order to access the state of mind and credibility of a “recanting victim.” Id.

⁸ See supra § n. 5, 6.

using this term, it did not relieve the State of proving any elements of the offense. It only limited the purpose of some of the evidence against Smith. Since use of the term “victim” does not convey to the jury the trial court’s personal opinion on the case, there was no error in using the term “victim” in jury instruction number 18. As such, the jury instruction was proper.

But if the jury instruction was an improper comment on the evidence, any error is harmless. When a court improperly comments on the evidence, the State must show the absence of prejudice, unless the “record affirmatively shows no prejudice could have resulted.” Baxter, 134 Wn. App. at 593 (quoting State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006)).

In Alger, this Court found that there was no prejudice to the defendant in a case where a stipulation between the parties referred to the person raped as the “victim.” Alger, 31 Wn. App. at 249. This Court stated that this was close to being invited error, but did not hold whether there was error in this stipulation. Id. Instead, this Court reasoned that regardless of whether any error exists, it would be harmless beyond a reasonable doubt. Id. This was because a lack of defense objection indicated the term’s insignificance, there was other evidence of guilt, and the court

through its other jury instructions directed the jury to disregard any evidentiary comments it made. Id.

As in Alger, there was no prejudice to Smith. Smith's failure to object, or in this case, his affirmative proposal of this term in the limiting instruction, indicates the term's insignificance. Moreover, the trial court instructed jurors that they were the sole judges of credibility and they should disregard any apparent comment on the evidence by the judge. CP 20. The jury convicted based on the facts of the case, which included independent witness confirmation of the no contact order violation, not based on a single usage of the term "victim" in the limiting instruction. In light of all of these factors, the single use of the term "victim" did not prejudice Smith.

3. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL.

The invited error doctrine generally forecloses review of instructional error, but does not bar review a claim of ineffective assistance of counsel based on the instruction. Studd, 137 Wn.2d at 551.

It is strongly presumed that counsel's representation was effective. Id. A two-prong test must be met to demonstrate

ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct 2052, 80 L. Ed. 2d 674 (1984)). First, the defendant must show that his counsel's performance was deficient. Id. Second, the defendant must then show that this deficient performance prejudiced his defense. Id. Smith has satisfied neither prong.

a. Smith's Counsel Was Not Deficient.

A defendant claiming ineffective assistance must first show that his counsel's representation was deficient by falling below an object standard of reasonableness, after considering all the circumstances. Studd, 137 Wn.2d at 551 (citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Deficient performance cannot be shown by matters that go to trial strategy or tactics. Studd, 137 Wn.2d at 551 (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

Smith cannot rebut the presumption that his trial counsel was effective. His trial counsel acted reasonably in proposing a

limiting instruction that was approved by the Supreme Court.⁹

There was no error in this instruction. Moreover, counsel was quite deliberate in her word choices in the jury instruction. She retained the word “victim” but removed the word “defendant,” making this tailored change, while still allowing it to be easily understood by the jury.

It was counsel's strategic decision to alter the unwanted language that referred to the "defendant's prior bad acts" to the much more innocuous reference to “prior incidents between Mr. Smith and Ms. [Geraldine] Smith.” CP 39; Magers, 164 Wn.2d at 181. Counsel's selective modification to the instruction indicates her efforts to propose an instruction -- and have the court accept an instruction -- that served her client's interests while still comporting to the language contained in Magers. This makes sense given that the State indicated that it was not objecting to defense counsel's limiting instruction if “the Court finds it consistent with Magers.” 4RP 101.

Nonetheless, Smith questions how his trial counsel could use the term “victim” in the instruction after moving pretrial to limit

⁹ A more thorough discussion of why the jury instruction was proper is discussed previously. See supra § C.2.

the use of the term during the trial. He argues that this shows that trial counsel recognized the prejudicial impact of the term and indicates that there could not be any tactical reason to now include "victim" in a proposed instruction.

However, during the pretrial motions, trial counsel simply wanted to discourage the use of the terms "victim" and "defendant" by the prosecutor throughout the trial. She wanted to avoid the overuse of these terms.¹⁰ In her proposed jury instruction, she removed the term "defendant," but understandably placed greater priority on the exclusion of the term "prior bad acts" than the term "victim." CP 39. Accordingly, trial counsel's decision to leave in the term "victim" in the instruction was a legitimate trial tactic. It allowed for language consistent with Magers, while still allowing for a targeted modification beneficial to her client. Thus, Smith does not satisfy the first prong to show that his trial counsel provided deficient performance, and his claim fails.

¹⁰ Smith wanted "the State to try to call everyone by their name." 1RP 41. "We are not going to ask for a mistrial, but we will object if the terms 'victims' and 'defendants' start getting used repeatedly in cross examination or direct, and we would just ask the Court to ask everyone to call everybody by their name." Id. The trial court did not prohibit the use of the word "defendant," but did tell the prosecutor to "try to not call [Geraldine] the victim." 1RP 42.

b. The Trial Outcome Would Not Be Different.

Even if there is deficient performance, the defendant must then show that there was a reasonable probability that counsel's unprofessional errors would have resulted in a different trial outcome. Studd, 137 Wn.2d at 551 (citing McFarland, 127 Wn.2d at 335). The defendant has the burden to show this prejudice. Doogan, 82 Wn. App at 189.

Here, there is no reasonable probability that the jury's verdict would be different if the term "victim" was omitted from the limiting instruction. The trial court instructed the jury that it was the sole judge of credibility and the jury should disregard any apparent comment on the evidence by the judge. CP 20. Indeed, the jury found Smith not guilty of Witness Tampering, which was count two in this case. Thus, the jury was not drawn to a conviction here simply due to use of the term. Instead, it is apparent that the jury evaluated the facts of the case in reaching its verdict. These facts provided significant proof of Smith's guilt. The evidence included not only the testimony of Geraldine, but also the apartment manager's testimony that she saw Smith and Geraldine together in violation of the protection order.

Despite these facts, Smith maintains that use of the term "victim" specifically affects the conviction for Violation of a Court Order because it contains a "domestic violence" connotation, "as opposed to tampering, which merely involves the attempt to influence a witness' testimony, but does not require any degree of violence, let alone domestic violence." Appellant's Brief at 20. This argument is puzzling since the term "domestic violence" is contained in the name of both counts. CP 43-44. Therefore, the word "victim" would not affect one charge more than the other.

In sum, there is no prejudice resulting from the use of the term "victim" in the limiting instruction.¹¹ Smith is unable to satisfy his burden to establish the trial would have had a different result if not for the use of the term "victim" in the jury instruction proposed by his counsel. Accordingly, his claim of ineffective assistance of counsel fails.

4. THERE WAS NO PROSECUTORIAL MISCONDUCT.

Lastly, Smith argues that he was deprived of his right to a fair trial when the trial prosecutor referenced Smith's prior bad acts

¹¹ A more thorough discussion of why there was no prejudice to Smith as result of the jury instruction was discussed previously. See supra § C.2.

in closing argument outside the scope of why they were admitted. Specifically, he claims that the trial prosecutor referenced a pattern of Smith's abuse of Geraldine "to demonstrate his propensity to commit crimes, specifically no contact order violations and assault." Appellant's Brief at 26. Because the trial prosecutor properly used the defendant's conduct to describe the reasons for Geraldine's prior recantations, there was no prosecutorial misconduct.

To prevail on his claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was improper and that it prejudiced him. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Smith's claim fails as to both prongs.

a. The Trial Prosecutor's Conduct Was Proper.

A trial prosecutor's conduct is reviewed in the context of the entire record and the circumstances at trial. Magars, 164 Wn.2d at 191. This context includes the total argument, the issues in the case, the instructions given by the trial court, and the evidence addressed in the argument. State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006). Courts afford a prosecutor wide latitude to draw and express reasonable inferences from the

evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor's comments as to the "dynamics of domestic violence relationships" can be proper in closing. See Magers, 164 Wn.2d at 192.

Here, the trial prosecutor's arguments were proper because they addressed why the victim would recant in a domestic violence case. In particular, the prosecutor highlighted how Smith would continually make promises to Geraldine and how these promises affected her truthfulness to courts and authorities. 5RP 8-10. This cycle of promises by Smith explained why she wanted the no contact order lifted, why she believed Smith when he made promises, and why she routinely recanted as the trial was pending. 5RP 41, 45.

Ultimately, the trial prosecutor established that these continued broken promises by Smith made Geraldine realize that reconciliation was not possible, and that it was time to tell the truth. The trial prosecutor summarized this by explaining to the jurors that they needed to consider Geraldine's credibility issues "in light of everything she has been through as a victim of the Defendant's

abuse, verbal abuse, broken promises, an[d] absolute disregard for anything the court told him to do." 5RP 47.

Smith on appeal argues that the trial prosecutor committed misconduct when she said:

Now, on February 3, 2006, after his first arrest for abusing Ms. [Geraldine] Smith, he shows you his true colors. He is released from jail on February 3, 2006, after a judge in Lakewood Municipal Court has told him to not have any contact with Geraldine Smith. And the first thing he does when he is released from jail is, he calls her. What he has shown you at this moment is how little regard, how little respect he has for court orders.

[Defense objection overruled by trial court]

He then promises, as Geraldine told you, things will change; I will stop drinking; I will work consistently; I will go back to church, and she wants to believe him. She is married to him. She wants to reconcile. She wants to work things out, because as she told you, she was in love with him. And when he wasn't drinking and when he was working consistently and when he was going to church, things were good. . . ."

5RP 7-8.

These statements by the trial prosecutor explained how Smith's continued broken promises slowly closed the door on any

hope for reconciliation, and how Geraldine's developing fear of Smith was rooted in his prior behavior. This was essential to the prosecutor's argument about Geraldine's credibility as their relationship deteriorated.

This statement began the discussion about the cycle of broken promises, which properly explained why Geraldine would grow fearful of Smith, why she might not feel protected by the courts from his violence, and how these experiences affected the truth in her representations throughout this case. Moreover, this initial statement by the trial prosecutor followed the jury instruction that limited this evidence for the purpose of assessing Geraldine's credibility and state of mind.

The fact that the trial court overruled Smith's objection indicates that it felt this statement was consistent with these proper arguments. Since Smith only objected to the trial prosecutor's first reference to these prior acts, it shows that even he recognized the proper context in which the trial prosecutor was using these prior

incidents.¹² 5RP 7-9; see State v. Perez-Mejia, 134 Wn. App. 907, 916-17, 143 P.3d 838 (2006). In sum, when viewing the prosecutor's remarks in the context of the trial court's instructions to the jury, the issues in this case, and the evidence addressed in the prosecutor's entire closing argument, the remarks were proper.

b. The Trial Outcome Would Not Be Different.

But if the trial prosecutor's statements had been improper, there was no prejudice to Smith. Improper conduct is prejudicial only if there is a substantial likelihood that it affected the jury's verdict. Id. There is a presumption that jurors follow the trial court's

¹² On appeal, Smith claims that the trial prosecutor in subsequent argument improperly "showed a pattern of abusing Geraldine." Appellant's Brief at 27. 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. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Smith contends that any subsequent objection by defense counsel would be a "useless endeavor" after the trial court first overruled the initial objection. Appellant's Brief at 28. He relies on State v. Cantabrana for this premise. 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996). Cantabrana is inapposite, since it addressed the failure to object to another jury instruction with the same defect as the one objected to. Id. Our case involves a closing argument and different statements. Generally, failure to object to an improper argument constitutes a waiver of the claimed error unless the improper argument was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Here, the jury was instructed as to the limited purpose for which it could consider the prior incidents between Smith and Geraldine. Smith is unable to show that the verdict would have been different if the trial prosecutor had not spoken about the February 2006 incident.

Nonetheless, Smith claims that this argument was a propensity argument that "likely caused jurors to resolve any doubts engendered by the voice mail message against Afton [Smith]." Smith argues that the voicemail in which Geraldine recanted would be more likely to be believed by the jury if not for the trial prosecutor's improper propensity argument.

However, this voicemail message was key evidence offered to prove the Witness Tampering charge for which the jury found Smith not guilty. This counters Smith's contention on appeal that, like in Fisher, the jury was left with the incorrect impression that it must convict him to make up for his prior wrongs, regardless of the

court's instructions. State v. Fisher, 165 Wn.2d 727, 749, 202 P.3d 937 (2009).

Put another way, if the prosecutor's improper argument caused jurors to believe that Geraldine was forced by Smith to make the voicemail recantation, as Smith now implies, a conviction for the Witness Tampering would have logically followed. Instead, the jury verdicts indicate that jurors followed the court's instructions, and the argument had no impact on the verdict.

By finding Smith guilty of Violating a No Contact Order, but not Witness Tampering, the verdicts show that the jury considered each charge in light of the evidence that supports it. There is strong evidence of Smith's guilt as to the no contact order violation. It includes not only the testimony of Geraldine, but also the apartment manager's testimony that she saw Smith and Geraldine together in violation of the protection order. Accordingly, the trial prosecutor's argument regarding the February 2006 incident would not have changed the outcome of the trial. Smith is unable to establish that the trial prosecutor's conduct prejudiced him.

5. THERE WAS NO CUMULATIVE ERROR.

Smith argues that this Court must reverse his conviction because of the cumulative effect of the two alleged errors. Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors, though individually not reversible, cumulatively denied the defendant a fair trial. State v. Korum, 157 Wn.2d 614, 652, 141 P.3d 13 (2006) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). The defendant bears the burden of proving that a retrial is necessary due to an accumulation of error of sufficient magnitude. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Smith has only alleged two trial errors: (1) an improper jury instruction, and (2) prosecutorial misconduct. As discussed, neither claim is meritorious. Thus, Smith does not satisfy his burden to prove that the accumulated error, if there were any, is of such sufficient magnitude to necessitate a retrial.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Smith's conviction.

DATED this 22nd day of January, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

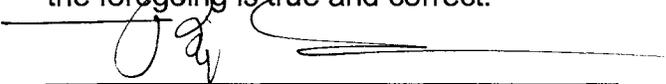


By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at 1908 East Madison, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. AFTON SMITH, Cause No. 63546-8, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington

01-22-10
Date