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NO. 64368-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

THOMAS HALL, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Hall has shown prosecutorial misconduct in closing and rebuttal argument that was so flagrant and ill-intentioned that reversal is required where the remarks in question were brief, isolated, and could easily have been cured by an instruction to the jury.

2. Whether Hall has shown that he received ineffective assistance of counsel because his trial attorney decided not to object to the prosecutor's brief, isolated remarks, which did not result in actual prejudice.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Thomas Hall, Jr., with two counts of domestic violence felony violation of a court order and one count of bail jumping as a result of his contact with the victim, Jessica Erickson, and subsequent events occurring between November 10, 2008 and September 9, 2009. CP 1-4, 11-12. The bail jumping charge was severed from the other two counts, and a jury trial on the felony court order violations was held before the Honorable Andrea Darvas in mid-September 2009.

At the conclusion of the evidence, the jury convicted Hall of count I as charged for contacting Jessica Erickson on November 10, 2008, but the jury acquitted Hall of count II, which was based on a telephone call that occurred in late August 2009. CP 40-41.

After the jury returned its verdict, Hall entered a guilty plea to the bail jumping charge. RP (9/17/09) 2-9. The trial court imposed a standard-range sentence. CP 66-74; RP (10/16/09) 8-11. Hall now appeals. CP 75-84.

2. SUBSTANTIVE FACTS

In the evening on November 10, 2008, King County Sheriff's Deputy Scott Fitchett responded to a report of a domestic violence court order violation at the Burien apartment of Jessica Erickson. RP (9/16/09) 6-8. Upon arrival, Fitchett and other deputies made contact with Erickson, who had visible injuries to her face. She was upset, crying, and holding her 19-month-old daughter. RP (9/16/09) 9, 12-13. Fitchett confirmed the existence of a domestic violence no-contact order issued under Chapter 10.99 RCW protecting Erickson from defendant Hall. RP (9/16/09) 18-20. Fitchett tried to convince Erickson to go to the hospital in

an ambulance, but she refused, preferring to drive herself.

RP (9/16/09) 16.

Upon arrival at the emergency room at Highline Medical Center, Erickson was seen by registered nurse Jeanna McLean and social worker Paige Kayihan. RP (9/15/09) 21, 25; RP (9/16/09) 66-67. Erickson reported that the father of her child, meaning Hall, had assaulted her. RP (9/15/09) 34; RP (9/16/09) 69. She stated that Hall had grabbed her by the jaw, that her face had hit a door, and that Hall had punched her. RP (9/15/09) 29-34. As a result of Hall's assault, Erickson had an abrasion above her left eye and swelling and tenderness around her jaw. RP (9/15/09) 34-35. Erickson confirmed that she had reported the incident to the police and had "taken the appropriate steps." RP (9/16/09) 69-70.

After the incident on November 10, 2008, Erickson and her young daughter moved out of the Burien apartment and moved in with Erickson's mother, Lora McPherson. RP (9/16/09) 46-47. McPherson had known Hall since he and Erickson had begun dating in high school. McPherson was also aware of the no-contact order protecting her daughter from Hall. RP (9/16/09) 43-45. Nonetheless, in late August 2009, McPherson overheard

Erickson receiving a call from Hall on her cellular telephone.

RP (9/16/09) 49. McPherson testified that she recognized Hall's voice on the other end of the line. RP (9/16/09) 50. Erickson did not testify at trial.

After the jury returned its guilty verdict on count I and its not guilty verdict on count II, Hall stipulated that he had "twice previously been convicted for violating the provisions of a no-contact order." CP 36. Accordingly, the jury returned a special verdict that elevated the court order violation from a gross misdemeanor to a felony. CP 40.

Other aspects of the trial record will be discussed below as necessary for argument.

C. ARGUMENT

1. HALL CANNOT SHOW FLAGRANT AND ILL-INTENTIONED MISCONDUCT IN CLOSING ARGUMENT; THE REMARKS IN QUESTION WERE BRIEF, ISOLATED, AND EASILY CURABLE.

Hall first argues that prosecutorial misconduct in closing argument deprived him of a fair trial and that reversal is required. More specifically, Hall argues that the prosecutor asked the jury to return a verdict based on improper grounds, erroneously stated that Hall should be convicted "mainly" because he was guilty, and

misstated the State's burden of proof. Brief of Appellant, at 3-11. These claims should be rejected. Although the remarks Hall identifies are problematic, Hall did not object to these remarks at trial, and he fails to establish on appeal that they were so flagrant and ill-intentioned that an instruction to the jury would not have cured them. Accordingly, this Court should affirm.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A defendant who did not make a timely objection has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that

could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Moreover, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

A prosecutor has a duty to argue for a jury verdict based on reason, not passion. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). It is also improper for a prosecutor to misstate the burden of proof. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). In these respects, isolated portions of the prosecutor's closing and rebuttal arguments were not correct, but they still do not merit reversal in light of the entire record under the "flagrant and ill-intentioned" standard.

At the beginning of the State's closing argument, the prosecutor immediately drew the jurors' attention to the court's instruction defining reasonable doubt. RP (9/16/09) 80. The prosecutor then argued, quite properly, that proof beyond a reasonable doubt does not mean absolute certainty, and that a reasonable doubt is "not made up, not conjecture, not speculation, but based on evidence or lack of evidence." RP (9/16/09) 81. The prosecutor then discussed the evidence and the credibility of the witnesses. RP (9/16/09) 81-89. The prosecutor urged the jury not to disregard the evidence just because Jessica Erickson did not appear to testify. RP (9/16/09) 89. The last few sentences of the prosecutor's closing argument were as follows:

And I ask you to convict the Defendant because he essentially refuses to abide by the court's orders. I am asking you to convict the Defendant because this toxic cycle for [the victim] needs to end somehow. Someone has to do it, and I am asking you to convict the Defendant because Jessica needs us to have the strength to compensate for her, but I'm asking you mainly to convict the Defendant because he is guilty of these crimes.

RP (9/16/09) 89.

Next, defense counsel focused her entire closing argument on the "beyond a reasonable doubt" standard of proof as set forth in the court's instructions, and the various ways in which she

believed the State's case had failed to meet it. RP (9/16/09) 90-97.

Naturally, therefore, the reasonable doubt standard was the first subject addressed in the prosecutor's rebuttal:

After listening to Defense Counsel, you must be left with the impression that beyond a reasonable doubt is some insurmountable mountain, Mt. Everest.

But 12 like minded people just like you across this country every single day gather in courthouses and deal with this same very workable standard. It is called reasonable doubt for a reason.

If you know in your gut that the Defendant is guilty, then you know it beyond a reasonable doubt. It is not rocket science.

RP (9/16/09) 98. The prosecutor went on to discuss defense counsel's arguments and refute them with specific facts based on the evidence. RP (9/16/09) 98-100.

Out of the entire closing and rebuttal arguments by the State, only two phrases are problematic. The first, which occurred at the end of closing, was when the prosecutor stated that she was asking the jury to convict "mainly" because the defendant was guilty. The second, which occurred in rebuttal, was when the prosecutor stated that the burden of proof had been met if the jurors knew it in their gut. The first statement is problematic because the word "mainly" could imply that there are valid reasons to convict other than actual guilt, and the second statement is

problematic because it not an accurate statement of the burden of proof. But as will be discussed next in turn, neither of these remarks rises to the level of flagrant misconduct that would justify overturning Hall's conviction.

First, as to the remarks at the end of the State's closing, the statements prior to the word "mainly" are reasonable inferences drawn from the evidence. For instance, the argument that Hall refused to abide by the court's orders was supported by evidence showing that he contacted the victim on multiple occasions. The argument that the victim was caught in a "toxic cycle" was evident from the facts of the case as well. Asking the jury to "compensate" for the victim was merely a way of asking the jury to convict despite the victim's failure to appear. Thus, it is only the presence of the word "mainly" in these final remarks that renders them in any way problematic.

However, viewing these remarks in the context of the entire record, they are not flagrant and ill-intentioned. Throughout the rest of her closing argument, the prosecutor drew the jurors' attention to the trial court's reasonable doubt and "to convict" instructions, and correctly stated what the jurors had to find in order to reach a guilty verdict. Thus, the context of the entire argument shows that the

prosecutor was not asking the jury to convict Hall based on anything other than factual guilt. In addition, a timely objection and an instruction from the trial court would have been more than sufficient to cure any potential prejudice.

Second, as to the remarks during rebuttal, although stating that a defendant is guilty "if you know it in your gut" is incorrect, all of the other statements made during the arguments of both the State and the defense were correct statements of the law, and both attorneys specifically drew the jury's attention to the trial court's instruction. The instruction was a standard WPIC and a correct statement of the law. CP 21. The prosecutor's isolated misstatement was not flagrant or ill-intentioned, and could easily have been cured by an instruction from the trial court. Moreover, Hall's claim of incurable prejudice belies the fact that the jury acquitted him of count II. CP 40-41. Accordingly, the record demonstrates that the jury applied the correct standard of proof as set forth in their instructions, and that the prosecutor's remark had no effect on the jury's verdicts.

Nonetheless, Hall argues that reversal is required based on a West Virginia case, State v. Oxier, 175 W. Va. 760, 338 S.E.2d 360 (1985). But in Oxier, unlike this case, the prosecutor's remarks

were plainly egregious. Specifically, the prosecutor in Oxier argued to the jurors: 1) that they should not worry if they did not understand "all those verbs and everything" in the reasonable doubt instruction; 2) that they should just use common sense instead of "the verbage (sic) and all the lawyer talk" in the reasonable doubt instruction; 3) that if juries "followed the technical verbage (sic) and all that" in the reasonable doubt instruction "maybe you would never get a conviction"; 4) that "[w]e don't want any mealy-mouthed verdicts from any jury saying oh, no, he's not guilty and they didn't prove this and they didn't prove that"; and 5) that the jury should convict "[i]f you have a gut reaction in your heart right now[.]" Oxier, 175 W. Va. 763-64.

Unlike the isolated remarks at issue in this case, the prosecutor in Oxier engaged in a concerted effort to erode the burden of proof, and repeatedly told the jury to completely disregard the court's instructions on the applicable law. In this case, by contrast, the prosecutor properly drew the jurors' attention to the court's instructions and asked the jurors to follow them. In other words, Oxier involves flagrant and ill-intentioned misconduct, whereas this case does not.

In sum, Hall cannot show that isolated remarks in closing and rebuttal were so flagrant and ill-intentioned that an instruction would not have cured them in the context of the record as a whole. Therefore, his claim fails and this Court should affirm.

2. HALL CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE DECISION NOT TO OBJECT IS TACTICAL AND BECAUSE THERE IS NO ACTUAL PREJUDICE.

In the alternative, Hall argues that he received ineffective assistance of counsel because his attorney did not object to the prosecutor's brief, isolated remarks in closing argument and rebuttal, and that the failure to object deprived him of a fair trial. Brief of Appellant, at 12-14. This claim should also be rejected. The decision whether to object is a tactical decision, and Hall also fails to demonstrate that the outcome of the trial would have been different if an objection had been made. Accordingly, Hall cannot meet his burden of showing ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted

in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient only if it falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705. Prejudice occurs only when, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. McFarland, 127 Wn.2d at 335.

Appellate courts must employ a strong presumption that counsel's representation was effective, and should avoid the distorting effects of hindsight in judging counsel's performance. McFarland, 127 Wn.2d at 335. Moreover, matters of trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Counsel's decisions about whether to object or not are quintessentially tactical decisions, and only in egregious circumstances will the failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989).

Thus, to prevail on a claim of ineffective assistance of counsel based on a decision not to object, the defendant must

show three things: 1) that there were no legitimate tactical reasons for not objecting; 2) that the trial court would have sustained an objection if one had been made; and 3) that the result of the trial would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Furthermore, defense counsel's failure to object to a prosecutor's remarks strongly suggests that counsel did not think the remarks were unduly prejudicial at the time they were made. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Based on these standards, Hall's claim fails.

As discussed at length above, the vast majority of the prosecutor's remarks in closing and rebuttal were entirely proper. Moreover, the record shows that the remarks in question were not unfairly prejudicial in light of the entire record. Also, although defense counsel did not object to the remarks in question, counsel *did* object to a different portion of the State's closing argument on grounds of speculation, and as a result, the trial court admonished the jury. RP (9/16/09) 85-86. Accordingly, the record demonstrates that defense counsel made tactical decisions as to when to object and when not to object, and that she did not view the challenged remarks as so prejudicial as to warrant an objection.

In sum, Hall cannot meet his burden to meet both prongs of the Strickland test because counsel's decision not to object was a valid tactical decision, and because there is not a substantial likelihood that the outcome of the trial would have been different if an objection had been made. This Court should reject Hall's claim that he received ineffective assistance of counsel.

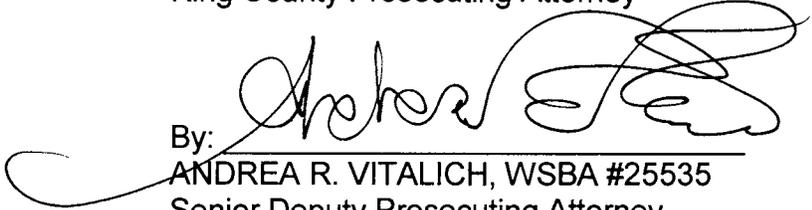
D. CONCLUSION

For all of the reasons set forth above, this Court should affirm Hall's conviction for domestic violence felony violation of a court order.

DATED this 7th day of June, 2010.

Respectfully submitted,

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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 Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. THOMAS HALL, JR., Cause No. 64368-1-I, 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.

CC Brame
Name
Done in Seattle, Washington

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Date