

EMP

NO. 64569-2-I

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

REC'D

STATE OF WASHINGTON,

Respondent,

v.

JUAN MESINA,

Appellant.

APR 29 2010
King County Prosecutor
Appellate Unit

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COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct denied appellant a fair trial.
2. The trial court erred in overruling the appellant's objection during closing argument.
3. The judgment and sentence contains a scrivener's error that must be corrected.

Issues Pertaining to Assignments of Error

1. Appellant was charged with violation of a no-contact order elevated to a felony based on two prior violations. In closing argument, the prosecutor argued the appellant had committed multiple "domestic violence" offenses against his wife, implying they were crimes of violence rather than no-contact order violations. In doing so, the prosecutor argued facts not in evidence despite an earlier promise to avoid such facts. The prosecutor's argument also urged the jury to reach a verdict based on passion and prejudice directed against domestic violence offenders. Defense counsel objected, but the objection was overruled. Is reversal required based on the prosecutor's misconduct?

2. Appellant's judgment and sentence mistakenly lists the "date of crime" for appellant's conviction as December 12, 2009, rather than June 28, 2009. Should the judgment and sentence be corrected to reflect the correct date?

B. STATEMENT OF THE CASE

1. Procedural facts

The King County prosecutor charged appellant Juan Mesina with violation of no contact order based on an incident involving his wife. CP 1-4, 28. The charge was elevated to a class C felony based on the allegation Mesina had two prior convictions for the same crime. CP 28. A jury convicted Mesina as charged and he was sentenced within the standard range. CP 50-58.

2. Pretrial discussion of other bad acts and domestic violence

The trial court granted the State's motion to admit Mesina's prior third degree theft conviction under ER 609 for impeachment purposes. 1RP 68-69; see also CP 38 (Instruction 5, limiting instruction regarding theft conviction). Mesina asked the court to preclude evidence of his "arrest and criminal history" other than the theft conviction. 1RP 70; CP 9, 14 (defense trial memorandum). In response, the prosecutor assured the court, "I'm not intending to go into any [ER] 404(b) [evidence]." The defense then asked the court to preclude any mention of the facts of any prior alleged domestic violence. The prosecutor once again assured the court and the defense, "I think that would be 404(b). Again, we're not intending to elicit [that] at this point." 1RP 70.

In addition, the defense moved to preclude mention of the term “domestic violence” as “irrelevant and prejudicial because there was no assertion of violence. 1RP 72; CP 13. The prosecutor stated she planned to use the term during “jury selection and (inaudible).” 1RP 72. The court indicated it would not use the term in the reading of the information. 1RP 72. The remainder of the court’s ruling is reported as being inaudible. 1RP 72.

3. Trial testimony

Following a 911 call, police officers were dispatched to unit 10 at the Don Juan mobile home park in Auburn. 1RP 87-88, 121. The officers knocked loudly at the door, but no one answered. 1RP 91, 94-95. The officers then spoke with two women standing nearby, Josefina Castro Rios and Alejandra Ocon. 1RP 124. Castro was Mesina’s wife. She lived in unit 10. Ocon, Mesina’s sister in law, also lived in the mobile home park. 1RP 139-41.

The officers obtained Castro’s permission to enter the residence and found Mesina standing in a bedroom. He appeared sad and somber and was staring at the ground. 1RP 99-102, 128-30, 132-33. After confirming Mesina’s identity, the police arrested him. 1RP 104-05.

The day the police came, Ocon saw Mesina in front of Castro’s door. 1RP 144. Ocon was aware of a no-contact order and called 911 on

behalf of Castro, who did not speak English. 1RP 145, 150-51. Castro did not testify.

A detective interviewed Mesina the day after his arrest. Mesina said he knew there was a no-contact order in place¹ but explained he went to the residence to check on some maintenance work and to see his children. 1RP 161. He knew Castro was not home at the time. 1RP 161, 165-66. Mesina also told the detective he lay down in the bedroom because he was not feeling well due to his high blood pressure. 1RP 167-68.

Mesina testified he was watching soccer with some friends when he began to feel ill due to his high blood pressure. Mesina asked a friend for a ride and fell asleep in the friend's truck. He was surprised to wake up in front of Castro's residence. 2RP 187-88, 195-97. Mesina suspected his friend took him to her home because he appeared to be in "bad shape." 2RP 197. The friend left him in front of Castro's, and Mesina felt so poorly he was capable only of going to sleep inside. 2RP 196. The knocking eventually woke him. 2RP 198.

Mesina explained he still did not feel well the next day when he spoke with the detective. 2RP 198. Mesina may not have answered

¹ The State admitted no-contact orders prohibiting Mesina from coming within 500 feet of Castro's residence. 1RP 172-73; Exs. 17, 18.

accurately because he only wanted the interview to be over so he could rest. 2RP 200.

4. Closing argument

The prosecutor argued:

Some of you may be . . . thinking [Mesina] knew about the order, but why should I . . . care? So what if he did it? He was at her house. And it seems . . . harmless enough. What's the big deal [?] [W]hy should we hold him accountable . . . for it?

That's a good question. Keep in mind folks, that this is a domestic violence offense. The dynamics of domestic violence are such that they warrant no contact orders. This is a man who has been convicted on multiple occasions of domestic violence offenses.

[Defense counsel]: Objection.

[Court]: Overruled.

[The State]: He has prior domestic violence convictions and a judge, multiple judges just like this, made decisions that he was not allowed to make further contact with his wife. Domestic violence no contact orders are put in place for a reason. Do not be so foolish to think that this was innocuous or harmless. This is a man with history here.

2RP 220-21.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MESINA A FAIR TRIAL.

The State's closing argument was improper because it violated the State's assurance, made in response to a defense motion, that it would

avoid ER 404(b) evidence as to the offenses underlying the no-contact orders. The argument also appealed to the jury's passion and prejudice by arguing Mesina deserved to be found guilty because he had used domestic violence before. Because the misconduct denied Mesina a fair trial, this Court should reverse his conviction.

a. Introduction to applicable law

The prosecutor is a quasi-judicial officer charged with the duty of insuring that an accused receives a fair trial in compliance with the Fourteenth Amendment and Article I, section 3. State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). Prosecutorial misconduct compels reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

This Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor may not, however, make statements that are unsupported by the evidence. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991). Moreover, prosecutors are duty-

bound to seek verdicts free from appeals to passion and prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

- b. The prosecutor's argument was improper because, contrary to her assurances, she argued Mesina committed bad acts not in evidence and unfairly appealed to jurors' passions rather than reason.

Over defense objection, the prosecutor argued the “dynamics” of domestic violence warranted no-contact orders and that Mesina had been convicted of "domestic violence" offenses on multiple occasions. 2RP 220-22. After the court overruled Mesina's objection, the prosecutor continued the same strategy, stating jurors would be “foolish” to consider Mesina's behavior harmless or innocuous because he was “a man with a history.” 2RP 221.

In doing so the prosecutor argued facts not in evidence. She also encouraged a verdict based, not on reason, but on society's prejudice against domestic violence offenders. The prosecutor thus violated her duty to ensure Mesina received a fair trial. Belgarde, 110 Wn.2d at 507.

Mesina stipulated to two prior violations of 10.99 RCW no-contact orders. CP 46; 2RP 186. But nowhere in the stipulation was “domestic violence” mentioned.

The no-contact orders Mesina was accused of violating were admitted at trial. Exs. 17, 18; 1RP 171-72. While captioned “domestic

violence” orders, the orders did not inform jurors of the nature of the conduct producing the orders.

As the prosecutor knew, a “domestic violence” crime need not involve physical violence. “Domestic violence” is defined by the statute to include a list of crimes “when committed by one family or household member against another.” RCW 10.99.020(5). The list includes crimes that do not necessarily require violence, such as criminal trespass. Id. Moreover, upon conviction of a domestic violence offense as defined by RCW 10.99.020, courts are authorized to impose no-contact orders. The violation of such orders constitutes a separate incident of “domestic violence,” but not necessarily one involving any violence. State v. Hagler, 150 Wn. App. 196, 201-02, 208 P.3d 32, review denied, 167 Wn.2d 1007 (2009).

The prosecutor ignored this fact, thereby misleading the jury. By referring to multiple convictions for "domestic violence" offenses, by asserting the violation was not “innocuous” or “harmless,” and by alleging Mesina was “a man with a history,” the prosecutor implied Mesina used violence against Castro. 2RP 220-21. The prosecutor did not, however, support her assertions with any evidence. Nor could she have; evidence of violent acts was irrelevant and prejudicial.

The purpose of the evidence rules is to secure fairness and to ensure that truth is justly determined. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To promote fairness and truth, ER 404(b) prohibits evidence of past misconduct to show a criminal propensity. Id. at 336. Introduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). A court may admit such evidence for other purposes such as proof of motive, plan, or identity. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). But before admitting evidence for those other purposes, the trial court must (1) find by a preponderance that the misconduct occurred, (2) identify the purpose for which the evidence is introduced, (3) determine whether the evidence is relevant to an element of the crime charged, and (4) weigh the evidence's probative value against its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

A "domestic violence" designation does not connote violence; "rather, it signals the court that the law is to be equitably and vigorously enforced." Hagler, 150 Wn.2d at 201. As this Court stated in Hagler,

The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation . . . is neither an element nor

evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation.

Id. at 202; see also CP 43 (Instruction 10, the to-convict instruction)

Likewise, the surreptitious introduction of ER 404(b) evidence without providing the court an opportunity to rule on it may constitute misconduct. See State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (finding reversible misconduct where prosecutor introduced evidence suggesting Ra was a gang member in an indirect manner without seeking a court ruling to admit such evidence), review denied, 164 Wn.2d 1016 (2008).

The prosecutor's characterization of Mesina's past not only violated ER 404(b) but also broke her pretrial promise to avoid mentioning such evidence, which avoided a court ruling. Moreover, the prosecutor plainly appealed to society's prejudice against domestic violence batterers. The prosecutor's argument was misconduct.

c. The misconduct affected the verdict and thus denied Mesina a fair trial.

It is reasonably likely the prosecutor's misconduct affected the verdict. The court overruled the defense objection and provided no curative instruction. Moreover, Mesina offered a plausible theory that, while he knew of the no-contact order, the violation itself was not

knowing or intentional. See CP 43 (to-convict); CP 40 (“knowingly” or “with knowledge” definitional instruction). The prosecutor’s blatant invitation to hold Mesina accountable based on his history of violence was capable of unfairly swaying the jury in the State’s favor. Reversal is therefore required. Fisher, 165 Wn.2d at 747.

2. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND THE DATE OF THE CRIME.

The judgment and sentence lists Mesina’s date of conviction as December 12, 2009, five days after the entry of the judgment and sentence. CP 50. This is incorrect. The charging document, the evidence presented at trial, and the to-convict instruction establish the date of the incident as June 28, 2009. CP 28; 1RP 85. .

This Court should remand for correction of the date. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

D. CONCLUSION

This Court should reverse Mesina's conviction because prosecutorial misconduct denied him a fair trial. In any event, this Court should remand to the trial court so that the judgment and sentence may be corrected to reflect the proper date for the charge.

DATED this 28th day of April, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64569-2-1
)	
JUAN MESINA,)	
)	
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 29TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUAN MESINA
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WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*