

64569-2

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NO. 64569-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN MESINA,

Appellant.

2010 JUL 22 PM 2:42
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State is generally afforded wide latitude in making arguments to the jury. Absent a proper objection and a request for a curative instruction a defendant waives the issue of prosecutorial misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not cure the prejudice. Here, the State was required to prove that Mesina had at least two prior convictions for violating the provisions of a no contact order, and the prosecutor referred to those convictions in a manner that did not inflame the passions of the jury. Should Mesina's claim of prosecutorial misconduct be rejected because the trial prosecutor's arguments in closing were proper and not prejudicial?

2. Due to a scrivener's error, the Judgment and Sentence inaccurately lists the date of crime as December 12, 2009. The undisputed evidence indicates this crime occurred on June 28, 2009. Should page one of the Judgment and Sentence be amended to correct the scrivener's error and reflect the correct date of crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL AND SUBSTANTIVE FACTS

Josefina Castro Rios and the appellant, Juan Mesina, have been married for approximately 18-19 years. RP 140. They have two children together. RP 147. Josefina resides at 725 37th Street SE #10 in Auburn, WA. RP 141. Alejandra Ocon is married to Mesina's younger brother. RP 140. Alejandra resides in space #41 at the same complex. RP 139. Alejandra and Josefina are friends though they do not have a particularly close relationship. RP 141.

On December 19, 2007, a Domestic Violence No Contact Order was entered in Auburn Municipal Court prohibiting Mesina from contacting Josefina until December 19, 2009. RP 172-173, Ex 18. Specifically, Mesina was not allowed to be within 500 feet of Josefina's residence, school, or workplace. RP 173.

On December 12, 2008, an Order Prohibiting Contact as a Condition of Sentence (Domestic Violence) was entered in Superior Court prohibiting Mesina from contacting Josefina until December 12, 2013. RP 171-172, Ex 17. Again, Mesina was specifically not allowed to be within 500 feet of Josefina's residence. RP 172.

On June 28, 2009, Alejandra was at her home in Auburn when Josefina came over to her house. RP 143. Josefina had just

observed Mesina heading toward her house. RP 150. Alejandra met Josefina outside where they had a brief conversation. RP 143. Alejandra saw Mesina standing at Josefina's front door, then watched Mesina as he entered Josefina's home. RP 144. Alejandra knew there was a no contact order in place prohibiting Mesina from contacting Josefina and her home. RP 142. Because Josefina does not speak English, Alejandra called 911. RP 145.

Officer Arneson and Officer Anderson from the Auburn Police Department responded and contacted Josefina and Alejandra. RP 85, 93, 150. The officers knocked on Josefina's front door, but there was no answer. RP 95-96, 128-129, 148. Josefina gave the officers her house keys and permission to enter her home. RP 96, 130, 150. The officers quickly located Mesina standing next to the dresser in a dark bedroom. RP 101-102, 133-134. Officer Anderson arrested Mesina and transported him to the jail. RP 104-105.

The next day, on June 29, 2009, Detective Randey Clark went to meet with Mesina at the Auburn jail. RP 157-158. Using a language line, Detective Clark advised Mesina of his Miranda rights. RP 159-160. Mesina acknowledged he understood those rights and then provided a tape recorded statement to Detective Clark. RP 160-169. In that statement, Mesina admitted that he knew about the No

Contact Order and was aware that he was not allowed to be within 500 feet of Josefina's residence. RP 166.

Mesina was charged with one count of Felony Violation of a No Contact Order. CP 1-4, 28. At trial, the parties stipulated that on June 28, 2009, Mesina had at least two prior convictions for violating a no contact order issued under the provisions of RCW 10.99. CP 46, RP 186. The jury found Mesina guilty as charged and he was sentenced within the standard range. CP 50-58. Mesina filed a timely appeal. CP 47-48.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT.

Mesina argues that his conviction must be reversed because of prosecutorial misconduct. Specifically, Mesina argues that the prosecutor committed misconduct during closing argument by improperly arguing Mesina committed bad acts not in evidence and by unfairly appealing to the jurors' passions rather than reason. Appellant's Brief at 7. Mesina takes issue with the prosecutor's remarks about the dynamics of domestic violence. Id. In the same context, Mesina further contests the prosecutor's comments that Mesina had been previously convicted of domestic violence

offenses on multiple occasions and that Mesina had a history of violating no contact orders. Id. Mesina's arguments fail.

The State was required to prove as an element of the charged crime that Mesina had at least two prior convictions for violating the provisions of a no contact order. The prosecutor merely referred to those prior convictions and did not argue that Mesina committed other bad acts not in evidence. In her closing argument, the prosecutor did not discuss any specific underlying facts of those prior convictions or bring to light any inadmissible evidence.

The State was also required to prove as an element of the charged crime that there was a valid no contact order in place prohibiting Mesina from contacting his wife. There were in fact two separate domestic violence no contact orders in place, both of which were issued as a condition of Mesina's sentence and conviction. Both orders were also clearly designated as domestic violence no contact orders and contained multiple references to the term "domestic violence." Further, the prosecutor's comments regarding the dynamics of domestic violence and Mesina's prior convictions did not unfairly appeal to the jurors' passions. Notably Mesina failed to object to all but one of the challenged remarks. To

the extent that any of the prosecutor's arguments were improper, any error was harmless.

a. The Prosecutor's Comments Were Not Improper.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The Appeals Court reviews the prosecuting attorney's allegedly improper remarks 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. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

In determining whether prosecutorial misconduct occurred the Court first examines whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the Court concludes that the prosecutor's statements were improper and defense objected at the time they were made,

the Court will then consider whether there was a substantial likelihood that the statements affected the jury. Id. Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

Mesina contends that the prosecutor committed prosecutorial misconduct by improperly arguing Mesina committed bad acts not in evidence and by unfairly appealing to the jurors' passions rather than reason. Appellant's Brief at 7. As grounds for the alleged misconduct, Mesina points to comments made by the prosecutor during closing argument regarding the domestic violence nature of the offense. Id. In particular, Mesina takes issue with the prosecutor's arguments about the dynamics of domestic violence, Mesina's multiple prior convictions for domestic violence offenses, and Mesina's history of violating no contact orders. Id.

Mesina objected to only one of the prosecutor's comments. RP 221. This objection was overruled by the trial court. RP 221. Specifically, there was an objection by Mesina when the prosecutor stated, "This is a man who has been convicted on multiple

occasions of domestic violence offenses." Because the trial court is in the best position to determine prejudice, it is accorded a high degree of deference. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

The prosecutor's comment was not improper because the State was required to prove as an element of the charged crime that Mesina had at least two prior convictions for violating the provisions of a no contact order. The prosecutor merely referred to those prior convictions and did not argue that Mesina committed other bad acts not in evidence. The prosecutor did not refer to any of the underlying facts of Mesina's prior convictions, nor suggest that the jury should convict Mesina of this Felony Violation of a No Contact Order because he had violated no contact orders in the past.

Mesina claims that simply by using the words "domestic violence," the prosecutor implied that Mesina had used actual physical violence against Josefina and therefore the prosecutor committed misconduct. Appellant's Brief at 7-10. This argument fails. The prosecutor in making the argument was simply stating that Mesina had prior convictions for violating no contact orders. Using the words "Domestic Violence" in the context of a discussion

about Mesina's prior convictions does not insinuate that Mesina was physically violent with Josefina, nor elude to any specific underlying facts or circumstances concerning those convictions.

Further, the term "Domestic Violence" was used throughout the trial, including during voir dire, closing argument, and in the two separate Domestic Violence No Contact Orders that were admitted into evidence. Ex 17 and 18. Both orders were captioned with the term "Domestic Violence" and both were clearly designated as pertaining to a domestic violence offense and conviction. On the 2008 No Contact Order, the term "Domestic Violence" was used twice. Ex 17. On the 2007 No Contact Order, "Domestic Violence" was used six different times. Ex 18. This latter order also detailed the relationship between Mesina and Josefina, specifically that they were current or former spouses, had children in common, and were current or former cohabitants as intimate partners. Ex 18. The domestic nature of Mesina and Josefina's relationship was also discussed by Alejandra during her testimony. RP 139-147.

The words "Domestic Violence" were utilized throughout the trial and the prosecutor's reference to that common term during closing argument did not constitute an improper argument about prior bad acts not in evidence, nor imply that Mesina used actual physical

violence against Josefina. Rather, the prosecutor used this general phrase in the context of a discussion about the domestic relationship between Mesina and Josefina, and about the fact that the evidence suggested that Josefina was not even at her home when Mesina violated the no contact order by going to her house. The prosecutor commented on the arguably harmless nature of Mesina's conduct and how despite no actual contact with Josefina herself, Mesina's conduct still amounted to a violation of the no contact order and thus constituted a crime. Further, the prosecutor remarked that no contact orders are issued by judges and are not optional, and therefore it is not up to Mesina to decide when, or if, he elects to abide by the order. Therefore, in this context, the prosecutor's use of the words "Domestic Violence" and remark that Mesina had prior convictions were not improper.

Even if the Court finds that the prosecutor's comment about Mesina being "convicted on multiple occasions of domestic violence offenses" is improper, there is not a substantial likelihood that the statement affected the jury. There was an overwhelming amount of evidence proving that Mesina committed the crime of Felony Violation of a No Contact Order. There were two no contact orders admitted into evidence that prohibited Mesina from contacting

Josefina or her residence. Ex 17 and 18. Alejandra testified that she observed Mesina enter Josefina's residence. RP 144-145. Two police officers testified that they located Mesina in a bedroom inside of Josefina's residence. RP 102, 133. Finally, Mesina's confession was also admitted into evidence. Ex 9 and 10. In his confession, Mesina admitted that he went to Josefina's residence and he knew he was not allowed to be there because of the no contact order. RP 161-167. Given the vast amount of evidence pointing to Mesina's guilt, it is highly unlikely that this one contested comment by the prosecutor had any impact on the jury's verdict.

Additionally, the trial court instructed the jury that the lawyers' arguments were not evidence. CP 33. The jurors were also given a limiting instruction for the sole purpose for which they were to consider Mesina's prior convictions. CP 42.

In sum, the State was required to prove as an element of the charged crime that Mesina had at least two prior convictions for violating the provisions of a no contact order. The prosecutor properly referred to those prior convictions and did not argue that Mesina committed other bad acts not in evidence. The State was also required to prove as an element of the charged crime that there was at least one valid no contact order in place prohibiting

Mesina from contacting his wife. There were two separate no contact orders in place, both of which were clearly designated as domestic violence no contact orders and referenced the term "domestic violence" on multiple occasions. The prosecutor's remark about Mesina's prior convictions for domestic violence offenses was not improper and there is not a substantial likelihood that the contested statement affected the jury's verdict.

b. Arguments By The State Were Not Sufficiently
Flagrant To Justify Reversal.

Mesina's other claims of misconduct must also be rejected. Mesina did not object to any of the prosecutor's other comments at trial, nor did he request a curative instruction. RP 212-228. Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment 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). 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). In this case, reversal is not required because any error easily could have been cured by an instruction to the jury.

Further, reversal is inappropriate because Mesina cannot establish that he suffered any resulting prejudice. Prejudice is established only if the defendant demonstrates that there is a substantial likelihood that the misconduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Thus, even if the prosecutor commits error, a conviction will not be reversed "unless, within reasonable probabilities, the outcome of the trial could have been materially affected had the error not occurred." State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citations omitted), cert. denied, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007). Here, Mesina cannot meet this burden.

First, referring to the dynamics of domestic violence in closing argument is not improper. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). In Magers, the prosecutor during closing asked the jurors to "consider the dynamics of domestic violence relationships" as they were discussed in voir dire. Id. at 191. Magers objected that the State was discussing facts not in evidence. Id. Although the objection was sustained, the prosecutor continued this line of argument and stated, "knowing what you

know about domestic violence, whether or not the traits and dynamics of those types of relationships...” Id. Magers objected again, the trial court overruled this objection, and the prosecutor again asked the jurors to determine whether the case was “an example of domestic violence relationships and the dynamics within them.” Id. at 192.

In Mesina's case, the prosecutor spent the initial portion of closing argument discussing how the State had met its burden and proved beyond a reasonable doubt the elements of the charged offense as detailed in the To Convict instruction. RP 212-215, CP 43. The prosecutor spoke at length about the evidence, the testimony of the State's witnesses, Mesina's actions throughout the crime, and various tools to use when judging credibility. Next, the prosecutor discussed Mesina's various inconsistent and implausible statements, including the tape recorded confession he initially provided to the case detective and the subsequent contradictory story that he testified to in court before the jury. RP 215-220. Finally, in the last minutes of argument, the prosecutor stated,

"Some of you may be sitting here thinking okay, fine, sure, we'll check off all those. Yeah, okay, fine, he did it. He knew about the order. But why should I really care? Maybe he--maybe this wasn't that bad of a deal. So what if he did it? He was over there. He

was at her house. And it seems innocuous enough, it seems harmless enough. As far as we know, she wasn't even there. What's the big deal why he's there? Even if he did do it, why should we hold him accountable and why should we convict him of a crime 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."

Mesina objected and trial court overruled the objection. The prosecutor continued and stated,

"He has prior domestic violence convictions and a judge, multiple judges just like this, made decisions that he was not allowed to have 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. And there's reasons why those orders are in place. And we need to keep that in mind. Domestic violence no contact orders are not optional. They are not discretionary. The defendant does not get to choose. He does not get to choose whether or not he feels like following a no contact order that day. He lost that right when he was convicted."

RP 220-221.

The prosecutor then concluded her closing argument by reiterating that the State had met the burden of proving the charge beyond a reasonable doubt. The prosecutor asked the jury to find Mesina guilty as charged. RP 222.

The defense contends that the prosecutor's remarks in this case are similar to those in Belgarde. Appellant's Brief at 7. In Belgarde, a prosecutor made inflammatory remarks about the American Indian Movement based on the prosecutor's own personal recollection of the events at Wounded Knee. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The Court found that those statements were not based on any evidence in the record and were made to appeal to the jury's passion and prejudice. Id.

The facts in this case, as in Magers, are not even close to as flagrant as those in Belgarde. Clearly, in light of Magers, the prosecutor's comments to the "dynamics of domestic violence relationships" in relation to the total argument cannot be viewed to be so egregious as to warrant reversal.

Second, given the overwhelming amount of evidence against Mesina, it is unlikely that the prosecutor's challenged remarks and use of the term "domestic violence" had any effect on the verdict in this case. The prosecutor's overall closing argument focused on the elements of the crime, how the State had proved those beyond a reasonable doubt, what to consider when judging credibility, and Mesina's various inconsistent explanations of the incident. RP 212-

220. The remarks about domestic violence were a rather minor, insignificant part of the prosecutor's overall closing argument. RP 220-221. It is difficult to imagine how these brief comments had any noteworthy impact on the jury's verdict.

Third, the court instructed the jury prior to closing argument that its duty was to decide the case based solely on the evidence produced at trial, and that counsel's argument is not evidence. CP 33. The jury is presumed to follow the court's instructions. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001), opinion corrected, 39 P.3d 294 (2002). There is nothing inherent in the facts of this case or in these particular remarks to forestall that presumption. Thus, it is unlikely that these remarks influenced the jury's decision.

Finally, the court properly instructed the jury on the purpose for which they were permitted to consider Mesina's prior convictions for violating the provisions of a no contact order. CP 42. Specifically, the court instructed the jury that, "Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the stipulation by the parties that the defendant has twice been previously convicted for violating the provisions of a court order and may be considered by you only for the purpose of

that element of the charged offense. You may not consider it for any other purpose." CP 42. Again, the jury is presumed to follow the court's instructions. See State v. Smith, 144 Wn.2d at 679. There is no reason to doubt that presumption as to this instruction as well.

Given the above, the outcome of the trial could not have been materially affected by the challenged remarks. To the extent that any of the prosecutor's arguments were improper, any error was harmless. Thus, reversal is unwarranted.

2. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND THE DATE OF THE CRIME BASED ON A SCRIVENER'S ERROR.

The State asks this Court to accept its concession that the judgment and sentence should be corrected to reflect the proper date of crime as June 28, 2009. Page one of the Judgment and Sentence states that the date of crime is December 12, 2009. CP 50. The undisputed evidence indicates this crime occurred on June 28, 2009. Therefore, this Court should remand this case to the trial court for a correction of the scrivener's error in the judgment and sentence. See State v. Moten, 95 Wn. App. 927, 976 P.2d 1286

(1999). Page one should reflect the proper crime date for the convicted offense.

D. CONCLUSION

The prosecutor's arguments were not improper, and even if the court finds that they were, they did not rise to the level requiring reversal. The trial court should be affirmed as to the issue of prosecutorial misconduct. This Court should remand this case to the trial court though for a correction of the scrivener's error in the judgment and sentence.

DATED this 21st day of July, 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 Jennifer Winkler, 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. JUAN MESINA, Cause No. 64569-2-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.



Janice Schwarz
Done in Kent, Washington

July 21, 2010