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NO. 64708-3-I

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

REC'D
SEP 14 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LUMPKIN,

Appellant.

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct denied appellant his constitutional right to a fair trial by an impartial jury.

2. The trial court erred by denying appellant's motion for a mistrial based on prosecutorial misconduct.

Issues Pertaining to Assignments of Error

1. Did the prosecutor deprive appellant of his right to a fair trial by an impartial jury by arguing in both opening and closing remarks that appellant had a propensity to commit the crime charged because he had been convicted of the same crime twice before?

2. Did the trial court err by denying appellant's motion for a mistrial made after the prosecutor argued in opening statements that appellant has a propensity to commit the crime charged?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Robert Lumpkin with a felony violation of a court order. CP 36; RCW 26.50.110(1), (5). After jurors found Lumpkin guilty, the court imposed a standard range

sentence of 38 months of confinement. CP 145, 151-59; 8RP-10RP,¹
11RP 5. Lumpkin appeals. CP 160-61.

2. Substantive Facts

a. *Pretrial and Opening Remarks*

Lumpkin offered to stipulate to the existence of two convictions for protection order violations. 9RP 34. The prosecutor agreed and asked the court to read the stipulation to the jury after the State rested. CP 98; 9RP 35.

Shortly thereafter, the prosecutor opened Lumpkin's trial with the following remarks to the jury:

[Prosecutor]: . . . Ladies and gentleman [sic] this is a case about a man who has not yet learned his lesson. It's about the defendant's repeated and blatant defiance for a domestic violence no contact order.

[Defense Counsel]: Your Honor, I'm going to object at this point. This is not opening statement. This is argument and it's prejudicial.

[Court]: Sustained. Let's proceed.

[Prosecutor]: On the morning of June 11th of 2009 the defendant defied not one but two separate no contact orders when he decided to go over to his ex-girlfriend's home. There were two separate orders in place for her protection.

¹ The 11-volume verbatim report of proceedings is referenced as follows: 1RP - 09/03/09; 2RP - 09/25/09; 3RP - 10/15/09; 4RP - 10/19/09; 5RP - 10/20/09; 6RP - 10/22/09; 7RP - 11/04/09; 8RP - 11/30/09; 9RP - 12/01/09; 10RP - 12/02/09; and 11RP 12/18/09.

He's been convicted multiple times before for violating no contact orders and he did it anyway. . . .

9RP 38.

After the defense opening remarks, and before the first witness was called, defense counsel moved for a mistrial based on the prosecutor's opening remarks. Counsel argued the prosecutor improperly told jurors Lumpkin has a propensity to violate protection orders because he has been convicted of doing so in the past. 9RP 42. The prosecutor characterized the defense claim as "ridiculous" and explained she routinely made the same argument. 9RP 42.

The trial court reviewed the verbatim report of the prosecutor's remarks before ruling, then stated:

The Court gleaned the following two sentences from the recording, . . . "this is a case about a man who has not learned his lesson, this is a case about a defendant's repeated and blatant defiance of domestic violence no contact orders." The defense objected on the grounds of argumentative, . . . the Court sustained that objection, the defense is raising two issues. The first is that the second sentence which refers to repeated and blatant defiance of no contact orders is propensity. The Court is not persuaded by that argument. One of the elements of the offense is that the defendant violated a no contact order when he had been previously convicted of the same thing. So propensity is part of the definition of the crime in this case.

9RP 43-45.²

² The court also rejected defense counsel's contention that the prosecutor's use of the phrase "domestic violence" warranted a mistrial. The court noted that the term was used

b. *The Trial*

Police officers Kevin Eades and Christopher Mills responded to a report of a no-contact order violation. 9RP 47, 65-66. Mills testified that on the way to the reported location, he saw Lumpkin -- who fit the description of the alleged violator -- waiting at a bus stop several blocks from the address where the alleged violation occurred. 9RP 67-70. Mills stopped and asked the man at the bus stop if he was "Robert." 9RP 70. Lumpkin said yes and asked "what he had done?" 9RP 70. Mills told Lumpkin he was being investigated for an order violation. 9RP 71. Mills handcuffed Lumpkin and placed him in the back of his patrol car. 9RP 71. Mills confirmed that Lumpkin was compliant and did not attempt to flee. 9RP 75.

Eades came upon Mills as he was detaining Lumpkin at the bus stop, which he later determined was 1,109 feet from the home of the alleged victim, Natasha Fagan. 9RP 48, 56. Eades went to Fagan's home and met with Fagan and a Kevin Watson. 9RP 50-51. Another man and woman appeared on the scene at some point. 9RP 50, 63. The man was Kerry Smith, but Eades never identified the woman. 9RP 51. Eades spoke to all four of these people at once. 9RP 52. He described Fagan as

repeatedly during voir dire without objection by either party and thus the domestic violence aspect of the case was already apparent to the jurors.

calm, and heard Smith claim he was the one that called 911. 9RP 63, 10RP 69.

At the beginning of the next day of trial, defense counsel revisited the trial court's ruling denying his motion for mistrial. Counsel said,

Your Honor . . . in ruling on the motion for a mistrial yesterday the Court indicated that it would consider a curative instruction. I am not sure exactly what the best instruction would be and quite frankly my concern is that offering any instruction at all at this point simply calls attention to what seemed to me to be overly inflammatory statement by the State. However I believe the case law . . . require[s] that I request a curative instruction in order to preserve the issue for appeal and I know how much appellate courts, in particular Division 1, like to find waiver wherever they can. So I am proposing an instruction that simply states . . . ["D]uring the State's opening statement I sustained an objection to the prosecutor's initial comments[.] [Y]ou are to disregard these comments.["] In the Court's ruling the Court identified the first two sentences. I guess we could phrase it that way but then I think the jurors are going to say well, . . ., what were those two sentences[?] If we repeat the statements in particular it is simply going to serve to reinforce them. So . . ., I'm kind of at a loss as to how best attempt [sic] to cure that. This is the best I could come up with and as I say I think I am required at least by some cases to propose one even though it seems to me that by objecting and moving for a mistrial I should have preserved the issue sufficiently but I am not clear that it does. So I've submitted that and I'm asking for the instruction.

10RP 1; see CP 127 (written defense proposed instruction).

The prosecutor did not object to the instruction. 10RP 1. The court, after opining that most of the jurors would be confused by counsel's proposed instruction, instead told jurors:

Before we get started I wanted to give you an instruction relating to an objection that occurred during the State's opening statement. You may recall that at the very beginning of the State's opening statement [defense counsel] objected. I sustained the objection and I am going to instruct you to disregard the statements that were made by, in opening statements that were subject to that objection and with that let's proceed.

10RP 2.

Thereafter, the jury heard testimony from the State's remaining two witnesses, Danielle Williams (Fagan's younger sister) and Kerry Smith (Williams' fiancé). 10RP 2, 9, 37. Neither Fagan, Watson, nor Lumpkin testified. 10RP 5.

Smith testified he and Watson planned to go to "work source" the morning of June 11 to try to find jobs. 10RP 41. Smith made the two-minute drive to the home Watson shared with Fagan. When he arrived, he saw Lumpkin "storming out of the house hollering and screaming" about Smith interfering with him and claiming that if he had had a gun earlier he would have killed Smith, Williams, Fagan and Watson. 10RP 42-44. When asked what he thought Lumpkin was talking about, Smith explained that a day or two earlier he had seen Lumpkin at the daycare next to

Fagan's home - the same daycare where Fagan works - and they had an amicable encounter. 10RP 45-48. 60. Later that same day, however, Fagan asked Smith to help her get Lumpkin out of her house. 10RP 44-46.

While Lumpkin yelled at him, Smith noticed Fagan's car was gone, so he returned home and picked up Williams so they could look for Fagan together. 10RP 48. They returned to Fagan's house in time to see Lumpkin leaving the area. 10RP 48-50, 64. Once they pulled up, Williams screamed at Lumpkin and then called 911. 10RP 49-50, 65. Lumpkin, who was aware police were on the way, asked Smith for a ride out of the area. Smith refused. 10RP 50-51.

Lumpkin was gone by the time police arrived a few minutes later. 10RP 52. Fagan and Watson arrived back at the house only after police arrived. 10RP 52, 66.

In contrast, Williams claimed that when she and Smith drove up to Fagan's home, she saw Lumpkin come out the front door and walk down the street. 10RP 12, 20, 25 31. Williams claimed Lumpkin threatened to kill people, but when he realized she was calling 911, he asked Smith to give him a ride somewhere. When Smith refused, Lumpkin left the area. 10RP 13-15. Thereafter, the police arrived and started talking to her before Fagan and Watson arrived. 10RP 18, 30.

Like Smith, Williams recalled a previous incident in which Smith helped Fagan get Lumpkin to leave her home. Unlike Smith, however, Williams recalled that incident occurred nearly one week earlier. 10RP 30.

Before the trial ended, the court read two stipulations to the jury. The first was that Lumpkin had twice been convicted of violating the provisions of a no-contact order. The second was that Lumpkin "was released from custody of the Department of Corrections at 10:00 a.m. on May 21, 2009 and that he was in custody in the Auburn jail and Kent Regional Justice Center continuously from 2:00 p.m. May 26th, 2009 until 8:00 a.m. on June 11, 2009." 10RP 68.

The prosecutor began her closing argument with, "On June 11th, 2009 the defendant knew exactly what he was doing. He knew about the no contact order, he knew he wasn't supposed to be anywhere near his ex-girlfriend's home and he did it anyway. The defendant is truly a man who has not learned his lesson." 10RP 83. Defense counsel did not object. Towards the end of the prosecutor's argument, however, the following exchanged occurred:

Now folks some of you might have been thinking this whole time why should we really care about this? Nobody got hurt. Nothing was taken. Maybe this really wasn't that big a deal. Sure we believe [Smith] and [Williams]. Okay yes he was there but why do I care about it? Well maybe

she, [Fagan] wasn't even there. Is this really that big of a deal. Folks keep in mind that domestic violence no contact orders are put in place for a reason. This is a man.

[Defense counsel]: Your Honor I am going to object at this point.

[Court]: Sustained.

[Defense counsel]: Move to strike.

[Court]: Stricken

[Prosecutor]: This is a man who has prior convictions for violating no contact orders.

[Defense counsel]: Objection Your Honor move to strike. This is an improper use of that fact.

[Court] Why don't you rephrase.

[Prosecutor]: That would be an element of this crime.

[Defense counsel]: It's not being argued as an element at this point.

10RP 91.

Defense counsel's closing argument focused on the credibility of Williams and Smith. Counsel argued neither witness was worthy of belief because each had a motive to lie. Counsel also said their versions conflicted not only with the testimony of officers Mills and Eades, but also with each other's accounts. Counsel also asserted the events described by Williams and Smith could not have happened in light of the stipulation about when Lumpkin was in and out of custody between May 21, 2009

and June 11, 2009. 10RP 92-100. Defense counsel also emphasized that just because there was evidence of prior convictions for violating no-contact orders, the jury could not merely assume Lumpkin was guilty. 10RP 97.

During deliberations, the jury asked whether it could consider Fagan's workplace "in the determination of the distance to the bus stop and do we know what that distance is?" CP 146.

The court answered, "The Court cannot tell you whether a particular point is established by the evidence or not. That is for you to determine. Your consideration of this issue must be based on the evidence, not speculation." CP 147.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DEPRIVED LUMPKIN OF
A FAIR TRIAL BEFORE AN IMPARTIAL JURY

The prosecutor repeatedly argued Lumpkin had not "learned his lesson" from his two prior convictions, which demonstrated he had a propensity to ignore and violate protection orders and was therefore more likely to have committed the charged crime. This is misconduct. The prosecutor's improper argument deprived Lumpkin of his right to a fair trial before an impartial jury.

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 Wash. Const. article I, section 3. State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). Prosecutorial misconduct compels reversal when there is a substantial likelihood it affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

This Court reviews a prosecutor's comments by looking at the totality of the circumstances, including their context, the issues in the case, the evidence addressed in the comments, and the jury instructions. Fisher, 165 Wn.2d at 747; 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. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). At the same time, however, prosecutors must seek verdicts free from appeals to passion and prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

To determine whether misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). The misconduct may be so flagrant that no instruction can erase the prejudicial effect. Fisher, 165

Wn.2d at 747; State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 804, 998 P.2d 907 (2000).

The only contested issue at Lumpkin's trial was whether he violated a court order. The State relied on Williams and Smith, who claimed they saw Lumpkin at Fagan's house. Lumpkin, in contrast, asserted Williams and Smith had a motive to lie and should not be believed.

It is true that to convict Lumpkin of a felony court order violation, the prosecutor had to prove he had at least two prior convictions for violating the provisions of a court order. CP 139 (Instruction 7, definition of charge); CP 141 (Instruction 9, to-convict instruction); RCW 26.50.110(1), (5). Lumpkin's prior convictions were thus legally relevant to the jury's consideration of the current charge. But Lumpkin did not dispute the existence of the prior convictions. He conceded the point and agreed to have that fact told to the jury, which was done at the conclusion of the State's case. CP 98; 9RP 34; 10RP 68.

The prosecutor therefore did not need to convince the jury of Lumpkin's prior convictions. The prosecutor nevertheless argued in both opening statement and closing argument that jurors should find Lumpkin guilty because he had not "learned his lesson" from his two earlier

violations, and had a history of "repeated and blatant defiance" of court orders. . 9RP 38, 42; 10RP 83, 91.

Although the prosecutor never used the word "propensity," the context in which the comments were made leaves no doubt that she was urging the jury to use Lumpkin's prior convictions as a basis to conclude he was guilty of the current charge. In other words, she was making the "forbidden inference" that because he did it before, he must have done it this time. See State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (holding introduction of defendant's affiliation with gangs without proper consideration under ER 404(b) "invited the jury to make the 'forbidden inference' underlying ER 404(b) that Ra's prior bad acts showed his propensity to commit the crimes charged"), citing, State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); see also Fisher, 165 Wn.2d at 746-49 (prosecutor committed reversible misconduct by improperly implicitly arguing that otherwise admissible ER 404(b) evidence showed defendant had a propensity to commit the charged crimes).

Defense counsel did what he could to counter this misconduct by moving for a mistrial following opening statement. A trial court must grant a mistrial motion where a trial irregularity may have affected the verdict. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In

deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether an instruction was given that was capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

Here, the trial court reasoned a mistrial was not warranted because "[o]ne of the elements of the offense is that the defendant violated a no contact order when he had been previously convicted of the same thing. So propensity is part of the definition of the crime in this case." 9RP 44. In other words, the prosecutor was entitled to make the propensity argument because it was an element of the offense. This was wrong.

Propensity is defined as "a natural inclination; innate or inherent tendency." Webster's Third Int'l Dictionary, 1817 (1993). The State did not need to prove Lumpkin had a natural inclination or inherent tendency to do anything. And because Lumpkin stipulated to his two prior convictions, the State had only to prove that on June 11, 2009, he violated the provisions of a valid court order. CP 139, 141; RCW 26.50.110(1), (5). Even if the State bore the burden of proving the prior convictions, it was not entitled to make a propensity argument. Instead, all the state had to do was introduce certified copies of the judgments and sentences for the priors. See State v. Chandler, __ Wn. App. __, __ P.3d __, 2010 WL 3004786 (Aug. 3, 2010) ("The best evidence of a prior conviction is a

certified copy of the judgment and sentence."). By doing so much more, the prosecutor committed misconduct.

The prosecutor's transparent attempt to persuade the jury to draw the "forbidden inference" prejudiced Lumpkin's right to a fair trial.. Although defense counsel valiantly offered a curative instruction to counter the prosecutor's improper argument, no instruction could cure the prejudicial impact of the prosecutor's repeated propensity arguments. Once the jurors' attention was alerted to such an inviting concept, it could not be ignored.

Further buttressing Lumpkin's prejudice claim is the jury inquiry. By asking whether it could rely on Lumpkin's presence at the bus stop and its proximity to Fagan's place of employment, jurors indicated they did not believe Williams and Smith. CP 146. It is apparent the jury recognized that if Lumpkin was never at Fagan's home -- as Williams and Smith claimed -- the only way to convict was if it found Lumpkin came within 1,000 feet of Fagan's workplace. But unlike with Fagan's home, which Officer Eades stated was more than 1,000 feet from the bus stop, there was no testimony establishing the distance between the daycare and the bus stop. When discussing how to respond to the jury's inquiry, all seemed to recognize that the jury might be able to find the daycare was within 1,000 feet of the bus stop, but decided to side-step the issue in the court's

response, except to remind the jury that it could not base a finding on speculation. CP 147; 10RP 105-07.

This record gives rise to a reasonable possibility the jury concluded Williams and Smith were unbelievable, but still convicted Lumpkin because he may have been within 1,000 feet of her workplace, and because he had -- as the prosecutor repeatedly asserted --a propensity to violate court orders. This is precisely why propensity arguments are not allowed.

For all these reasons, the trial court erred by denying Lumpkin's motion for a mistrial. Contrary to the court's reasoning, propensity was not an element of the offense. Because there is a reasonable possibility the jury convicted Lumpkin based on the "forbidden inference," this Court should reverse his conviction and remand for a new trial. Fisher 165 Wn.2d at 749.

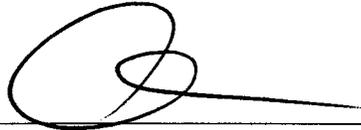
D. CONCLUSION

This Court should reverse Lumpkin's conviction and remand for retrial.

DATED this 14th day of September, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64708-3-1
)	
ROBERT LUMPKIN,)	
)	
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 14TH DAY OF SEPTEMBER, 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] ROBERT LUMPKIN
NO. 829720
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001-2049

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COURT OF APPEALS DIV. 1
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SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*