

65726-7

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NO. 65726-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN JAY FOSTER,

Appellant.

2018 FEB 17 PM 9:54

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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 10-1-00087-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

- I. STATEMENT OF THE ISSUES1
 - A. Whether the appellant’s conviction should be affirmed when he failed to object at trial to the prosecutor’s arguments and when those arguments were not improper.1
 - B. Whether the imposition of financial obligations should be affirmed when the appellant’s future ability to pay could not be considered by the trial court.....1
- II. STATEMENT OF THE CASE1
 - A. Substantive Facts1
 - B. Statement of Procedural History2
- III. ARGUMENT4
 - A. Standard of Review4
 - B. The appellant’s conviction should be affirmed because the prosecutor’s arguments were not improper.....4
 - 1. The prosecutor’s arguments were not so ill-intentioned or flagrant as to allow review without an objection at trial...4
 - 2. The prosecutor’s arguments were not improper.7
 - 3. There was no substantial likelihood the misconduct affected the jury’s verdict.10
 - C. The trial court did not abuse its discretion in imposing financial obligations as part of the appellant’s sentence.....12
- IV. CONCLUSION14

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT DECISIONS

Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)
..... 14

WASHINGTON SUPREME COURT DECISIONS

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997)..... 12, 13
State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995)..... 7, 10
State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 8
State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992)..... 4, 12, 13, 14
State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003). 7
State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981) 10
State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)..... 5
State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 4
State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997)..... 4, 7

WASHINGTON COURT OF APPEALS DECISIONS

State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (Div. 1, 1996)..... 5, 6

WASHINGTON STATUTES

RCW 26.50.110 10
RCW 9.94A.760..... 13

I. STATEMENT OF THE ISSUES

A. Whether the appellant's conviction should be affirmed when he failed to object at trial to the prosecutor's arguments and when those arguments were not improper.

B. Whether the imposition of financial obligations should be affirmed when the appellant's future ability to pay could not be considered by the trial court.

II. STATEMENT OF THE CASE

A. Substantive Facts

A no contact order was issued by the Island County District Court prohibiting the appellant from contact with Mary Foster. RP 46. The appellant's signature appears on that order. RP 46. While that no contact order was in effect, the appellant contacted Mrs. Foster and told her he had signed some divorce papers. RP 45. Mrs. Foster went to the appellant's hotel room at approximately 10:30 pm on April 26, 2010 to pick up the papers. RP 47. She knocked on the door of the room, and the appellant opened the door and let her in. RP 47.

The appellant and Mrs. Foster spoke for a short time before they began fighting. RP 57. The appellant yelled in Mrs. Foster's face while she was sitting in a chair, stopped her from reaching the door, grabbed her, and threw her on the bed. RP 54-55. As a result of the appellant's actions, Mrs. Foster hit her knee on the bed frame, suffering a bruise. RP 51, 55. During the fight, Mrs. Foster yelled for help and asked that someone call 911. RP 46.

A neighbor heard Mrs. Foster's yells for help and called 911. RP 61. Oak Harbor police officers reported to the scene at approximately 12:40 am on April 27. RP 75. Sergeant Larry Ferguson of the Oak Harbor Police Department spoke with the appellant. RP 77. The appellant admitted to Sgt. Ferguson that he let Mrs. Foster into his room, though he denied assaulting her. RP 80.

B. Statement of Procedural History

The appellant's jury trial was conducted June 29 and 30, 2010. RP 1, 121. At the trial, Mrs. Foster testified that she went to the appellant's room to pick up divorce papers and he let her into his room. RP 45, 47. She also described the fight with the appellant and his assaultive behavior. RP 53-57, 59-60. Sgt. Ferguson testified that the appellant admitted letting Mrs. Foster into his room. RP 80. He also described the condition of the appellant's room and his observations of Mrs. Foster's injuries. RP 85-88.

Defense counsel made no objection during the prosecutor's closing and rebuttal arguments. RP 128-32, 141-43. At the conclusion of the trial, jury found the appellant guilty of Violation of a No Contact Order. CP 13.

The appellant was sentenced on July 6, 2010. CP 3-12. At the sentencing hearing, the State recommended fourteen months in custody, plus statutory costs and assessments, including a victim assessment, domestic violence assessment, and fees for a court-appointed attorney. RP (July 6, 2010) 4. Defense counsel recommended twelve months, plus one day, in custody, and asked that no DNA collection fee be assessed. *Id.* at 6. No additional argument was made regarding financial obligations, and no argument was made regarding the appellant's financial situation. *Id.* at 5-6. The appellant made a statement, but also did not address any imposition of financial obligations. *Id.* at 8. The trial court imposed thirteen months in custody, the fines and fees requested by the State, and the DNA assessment. The court also found that the crime charged involved domestic violence. CP 4.

The appellant timely appealed. CP 1.

III. ARGUMENT

A. Standard of Review

A defendant bears the burden of showing that the prosecutor's remarks were improper. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A defendant's failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been cured by an instruction to the jury. *Id.* at 719. Even if the defendant proves remarks were improper, the error does not require reversal unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

Imposition of fines is within the trial court's discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

B. The appellant's conviction should be affirmed because the prosecutor's arguments were not improper.

1. *The prosecutor's arguments were not so ill-intentioned or flagrant as to allow review without an objection at trial.*

The appellant's conviction should be affirmed because his failure to object to the prosecutor's arguments constituted a waiver. A defendant's failure to object to prosecutor's remarks constitutes a waiver. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Reversal is

not required if error can be obviated by a curative instruction which the defense did not request. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Therefore, a conviction must be affirmed unless the prosecutor's argument was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.* The prosecutor's arguments in this case were not improper, and were certainly not so flagrant that they could not have been cured by an instruction had the appellant objected at trial.

The appellant claims the state committed misconduct when the trial prosecutor argued that Mrs. Foster's voluntary presence at the appellant's apartment did not alleviate his criminal culpability. See Opening Brief of Appellant at 6. However, no objection was made during the state's closing or rebuttal arguments. RP 128-32, 141-43.

While this court has allowed review in rare cases when defendants do not object to improper arguments at trial, those cases have included flagrant, obvious misstatements of law and infringements on defendants' rights, which were not present in this case. For example, In *State v. Fleming*, a prosecutor argued that the jury had to find the complaining witness lied or was confused in her testimony in order to acquit the defendant. *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (Div. 1., 1996). The Court of Appeals held that argument misstated the basis on

which a jury could acquit and insidiously led to burden shifting and an invasion of the defendant's right to remain silent. *Id.* at 214. The *Fleming* court noted that the prosecutor's argument was made more than two years after it was specifically found to be misconduct. *Id.* Therefore, the court deemed the argument was not only misconduct, but flagrant and ill-intentioned. *Id.*

Even assuming, without conceding, that the prosecutor's arguments in this case were improper, they were certainly not so flagrant and ill-intentioned as to allow appellant review without an objection at trial. The argument was not made in contradiction to standing law specifically labeling it improper. Nor did the argument shift the burden of proof to the defendant or comment on his invocation of any rights. Instead, state's argument specifically addressed an issue, Mrs. Foster's voluntary appearance at the appellant's room, which was repeatedly raised by the appellant throughout the trial. See RP 62, 65, 107-08, 133.

As a general rule, an appellant may not request reversal of his conviction based on alleged prosecutorial misconduct without objecting to the allegedly improper remarks at trial. A reversal without objection at trial may not be granted unless the remarks were so flagrant and ill-intentioned that they created such an enduring prejudice that they could not be cured by an instruction to the jury. Here, the appellant did not

object to any statements or arguments made by the prosecutor at trial. The prosecutor's arguments did not shift any burden onto the defendant and did not infringe on his ability to invoke his criminal or trial rights. The remarks, if they were improper at all, were certainly not flagrant or ill-intentioned. Therefore, the appellant waived his opportunity to claim misconduct on appeal by not objecting to the prosecutor's remarks at trial.

2. *The prosecutor's arguments were not improper.*

The appellant's conviction should be upheld because the prosecutor's arguments were not improper. To prove prosecutorial misconduct, the appellant must first establish that the prosecutor's conduct was improper. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Prosecutors' arguments should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The prosecutor's arguments in this case were not improper because they were supported by the evidence and they were not inflammatory.

The evidence in the case was replete with references to the appellant's domestic relationship with Mary Foster. See RP 44, 45, 80. In addition, Mrs. Foster testified that her contact with the appellant began

cordially, but became violent. See RP 53-57. Throughout her testimony, Mrs. Foster candidly stated that she went to the appellant's hotel room voluntarily. RP 45, 62.

Based on the evidence presented, the court instructed the jury that it is not a defense to violation of a no contact order that a protected party invited or consented to contact. CP 20, RP 125-26. In closing argument, the prosecutor addressed Mrs. Foster's decision to go to the appellant's room. RP 131. Defense counsel also addressed Mrs. Foster's action in her closing argument. RP 133, 140. The prosecutor's rebuttal argument again addressed the issue. RP 141-42.

The prosecutor's arguments were not improper they because were supported by the evidence. A prosecutor has wide latitude to draw and express reasonable inferences from the evidence. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997). Both parties introduced evidence that Mrs. Foster voluntarily went to the appellant's residence, and addressed the issue with the court. RP 45, 62, 125-26. The court provided specific instruction regarding invitation and consent to contact. CP 20. With that volume of attention, it was not improper for the prosecutor to address Mrs. Foster's action in her closing and rebuttal arguments.

The prosecutor's arguments did not suggest that the jury should return a guilty verdict based on anything other than the evidence

presented. The State's initial closing argument briefly referenced Mrs. Foster's testimony that she went to the defendant's residence. RP 131. After the appellant's closing argument repeatedly attempted to paint Mrs. Foster as the instigator and aggressor; RP 133-35, 138, 140; the prosecutor's rebuttal reiterated the law and the court's instruction that consent of a protected party is not a defense to a charge of violation of a protection order. RP 142. The prosecutor made no reference to domestic violence, and no pattern of violent behavior was alleged or argued. Instead, the prosecutor's arguments, like those of defense counsel, addressed a key issue in the case – the fact that Mary Foster's presence at the appellant's residence was, at least initially, voluntary.

The prosecutor's arguments in this case were not improper. They were supported by the evidence presented at trial and grounded in the law and the court's instructions to the jury. They did not invite the jury to reach a verdict based on evidence that was not admitted. Instead, the prosecutor's arguments addressed an issue that was repeatedly raised by both the evidence and defense counsel's arguments. Therefore, no misconduct occurred.

3. *There was no substantial likelihood the misconduct affected the jury's verdict.*

Even if the prosecutor's arguments were in error, they do not require a new trial because they did not affect the jury's verdict. A defendant is entitled to a trial free from prejudicial error, not one that is totally error free. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Thus, even if an appellant proves a prosecutor's conduct was improper, that conduct does not require a new trial unless the appellant also shows there was a substantial likelihood the conduct affected the jury's verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). When viewed in light of the overwhelming and uncontested evidence in this case, the prosecutor's arguments, even if improper, did not affect the jury's verdict.

The appellant was charged with violation of a no contact order by assault. CP 46-47. To prove that charge, the state was required to prove that on the date of the incident, a no contact order applied to the appellant, that the appellant knew of that order, that he knowingly violated the order, and that his conduct was an assault. RCW 26.50.110(4); CP 23.

A copy of a no contact order protecting Mary Foster from the appellant was admitted into evidence without objection. RP 45-47. Mrs. Foster identified both the order and the appellant's signature on the order. RP 46. Uncontested evidence also showed that Mrs. Foster and the

appellant were both at the appellant's residence on April 26, 2010. See RP 45, 80, 107. In addition, Mrs. Foster testified that the appellant yelled at her, kept her from leaving the room, grabbed her, and threw her on a bed. RP 53-55. Mrs. Foster and Sergeant Ferguson both identified photographs of her injuries that were introduced into evidence without objection. RP 50-53, 87-88.

The admitted evidence proved the elements of the crime beyond any possibility that the jury's verdict would not have been affected by the alleged impropriety in the prosecutor's argument. The allegedly improper arguments focused on the question of whether the appellant knowingly violated the no contact order when he allowed Mrs. Foster to enter his room. However, the existence of an order, the appellant's knowledge of that order, and the violation of that order were not factually disputed.

The existence of a no contact order and the appellant's knowledge of that order were shown by his signature on a copy the order. The violation of the order was shown by the testimony from all witnesses that the appellant was knowingly in the same room as Mrs. Foster. Despite defense counsel's closing argument to the contrary, the jury's instructions clearly stated that Mrs. Foster's acquiescence to contact did not alleviate the appellant's culpability. Therefore, there could be no question for the

jury as to whether the appellant knowingly violated the requirements of a no contact order.

C. The trial court did not abuse its discretion in imposing financial obligations as part of the appellant's sentence.

The court should affirm the imposition of financial obligations because the appellant's financial situation is not relevant until the point of collection. Imposition of fines is within the trial court's discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). A trial court is not required to enter formal, specific findings regarding a defendant's ability to pay court costs. *Id.* In fact, an inquiry into a defendant's ability to pay should not be made at the time of sentencing. *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment. *Id.*

The defendant was sentenced on July 6, 2010. CP 3-12. At the sentencing hearing, the State recommended incarceration for 14 months with imposition of costs and fees, including court costs and a crime victim assessment, but not including a DNA fee or restitution. RP (July 6, 2010) at 4-5. Defense counsel recommended 12 months plus 1 day in custody, but made no mention of fees or costs, except to also recommend against assessment of a DNA fee. *Id.* at 6. The appellant spoke briefly on his own behalf, but also made no argument regarding his financial situation and did

not oppose imposition of fees. *Id.* at 8. The court imposed 13 months in custody, plus costs and fees as recommended by the State. CP 5-8.

Common sense dictates that an inquiry into a defendant's finances is not required before a recoupment order is entered as it is nearly impossible to predict his ability to pay over a long period of time. *Blank*, 131 Wn.2d at 242. In this case, the trial court will retain jurisdiction over the appellant, for the purposes of payment of legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760(4). Thus, the court may retain jurisdiction over the appellant long enough for him to fulfill his obligations over a period of years, if necessary, which would allow payment in reasonable monthly installments. In addition, the current sentencing scheme contains numerous safeguards that protect the appellant from imposition of additional penalties for nonpayment due to indigence. *Curry*, 118 Wn.2d at 918 (citing show cause hearings prior to imposition of sanctions, availability of lenient treatment of violations found to be not willful, and requirement that violations be found to be intentional). Therefore, consideration of the appellant's future ability was not required, and would have been premature, at the time of sentencing.

In addition, the trial court in this case did not have enough information to make any finding on the appellant's future ability to pay.

Neither the appellant nor his trial attorney raised the issue of financial obligations at the sentencing hearing. RP (July 6, 2010) at 5-6, 8. The imposition of a penalty assessment, standing alone, is not enough to raise constitutional concerns. *Curry*, 118 Wn.2d at 918 n.3. While the appellant's representation by a court-appointed attorney suggests limited current financial resources, no information was provided to the trial court regarding the appellant's employment history or prospects for future employment following his incarceration. RP (July 6, 2010) at 5-6, 8. A defendant's poverty in no way immunizes him from punishment. *Curry*, 118 Wn.2d at 918 n.3 (citing *Bearden v. Georgia*, 461 U.S. 660, 669, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983)). With no objection to the assessment of financial obligations and no information in the record regarding the defendant's future ability to pay, there is no evidence with which to review the trial court's exercise of its discretion to impose fees and costs as part of the appellant's sentence.

IV. CONCLUSION

The court should affirm the appellant's conviction because he failed to object to the prosecutor's arguments at trial and those arguments were not so flagrant and ill-intentioned that they could not have been addressed with instructions to the jury. In addition, the prosecutor's

arguments were not improper, and they did not affect the jury's verdict in this case.

The court should also affirm the imposition of legal financial obligations in this case as the appellant's alleged indigence is an issue at the time of collection of costs, but not at the time of imposition.

Respectfully submitted this 14th day of February, 2011.

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DECLARATION OF SERVICE

I, MICHELE M. GRAAFF, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 16th day of February, 2011, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

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Signed in Coupeville, Washington, this 16th day of February, 2011.


MICHELE M. GRAAFF