

70943-7

70943-7

NO. 70943-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FRANCIS BATO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JOSEPH MARCHESANO
Deputy Prosecuting Attorney
Attorney for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUN 23 PM 3:17

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A. ISSUES PRESENTED

A prosecutor's comments are prejudicial only where there is a substantial likelihood that the comments affected the jury's verdict. The prosecutor's closing argument and rebuttal argument in this case were based on reasonable inferences from the evidence. Did the trial court properly deny the defendant's motion for a mistrial based on prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 19, 2012, the State of Washington charged Francis Bato by way of information with one count of unlawful imprisonment – domestic violence and one count of assault in the fourth degree – domestic violence. CP 1-2.

In its third amended information, the State of Washington added one count of interfering with domestic violence reporting and one count of domestic violence misdemeanor violation of a court order. CP 13-15.

Trial commenced on August 7, 2013, and the jury found Bato guilty of unlawful imprisonment, guilty of assault in the fourth degree, not guilty of interfering with domestic violence reporting,

and guilty of violation of a court order. CP 45-48. The jury also found that Bato and Dinah Jimenez were members of the same family or household prior to or at the time the crimes were committed. CP 49-50.

2. SUBSTANTIVE FACTS

During the trial, Dinah Jimenez testified that she and Bato began dating in the summer of 2012. 8/8/13 RP 40-41. On December 13, 2012, Jimenez noticed that Bato appeared intoxicated. Id. at 46. Bato's friend gave Bato and Jimenez a ride to Jimenez's home. Id. at 47. After Bato's friend left, Jimenez asked Bato to leave, but he told her he wanted to stay, which he did. Id. at 48. The next morning, Bato drove Jimenez to work. Id. at 49. Unbeknownst to Jimenez, when she exited the car, her iPod fell out of her pocket. Id. at 51. Jimenez customarily used her iPod to access Facebook and message friends. Id. at 50. Approximately two hours later, Bato angrily rushed into Jimenez's workspace and told her that she needed to excuse herself from work and go talk with him. Id. at 51.

Jimenez testified that Bato drove her back to her home and told her that he saw messages on her iPod that led him to believe

she was cheating on him. 8/12/13 RP 104. Bato saw Jimenez sending messages to the person he suspected her of having a relationship with, Ronel Bunger. 8/8/13 RP 60-61. Jimenez told Bato that it was time to go home, and Bato became very angry, asking if Bunger was coming to the house. Id. at 61. Jimenez insisted several more times that Bato leave, but he repeatedly refused to honor her request. Id.

Jimenez testified that Bunger called her phone, and Bato told her not to answer. Id. at 62. When she tried to pick up the phone, Bato took the phone out of her hand, removed the battery, and put the phone in his bag. Id. at 62-63. Again, Jimenez told Bato to leave and he replied that "Nobody will be leaving this house . . ." Id. at 63. Jimenez tried three separate times to leave herself, but Bato refused to let her leave. Id. at 65. Bato prevented Jimenez from leaving by grabbing her forearms and pushing her down on her bed. 8/12/13 RP 111-12. Deputy Chivington later observed that Jimenez had finger-shaped bruises on her forearms and biceps consistent with being grabbed. 8/8/13 RP 21-24.

At one point, Bato went outside and Jimenez testified that she used her laptop to message Bunger, asking him for help. Id. at 70. Jimenez's phone rang again and Bato grabbed the phone so

hard that he caused Jimenez's hand to bleed. Id. at 73-74. Bato taunted Jimenez, singing "Where are the policemen?" Id. at 75.

Police eventually arrived and questioned Bato. He admitted that when Jimenez tried to leave the apartment, he grabbed her hand off of the doorknob and that he would not let her leave the home. 8/7/13 RP 102.

During the trial, Jimenez admitted that she told the responding officers that Bato dragged her, but that she made that statement because she was not in her right mind. 8/8/13 RP 65. She stated that she told police that Bato threw her on the bed. Id. at 67.

C. ARGUMENT

Bato claims the prosecutor referred to facts not in evidence and that the trial court improperly denied his motion for a mistrial based on the prosecutor's arguments. He is mistaken. The prosecutor made reasonable inferences based on the facts in evidence. Even assuming the prosecutor did refer to facts not in evidence, any error was harmless.

Bato cites six instances he categorizes as prosecutorial misconduct. 8/13/13 RP 38, 45, 46-47, 48, 49, 53. In each instance,

the trial court overruled Bato's objection, instructing the jury that statements by the attorneys during argument are not in and of themselves evidence. Id. at 38-39, 45, 47, 48, 49, 53.

Instances two, three, and four were proper, reasonable inferences drawn from admitted evidence. Instances one and five did not prejudice Bato. Finally, in instance six, the prosecutor did not ask the jury to render a decision inconsistent with their duty.

1. BATO HAS FAILED TO SHOW THAT THE PROSECUTOR'S COMMENTS WERE IMPROPER AND HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY'S VERDICT.

While a prosecutor should refrain from statements not supported by evidence, "[h]e may prosecute with earnestness and vigor . . ." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). "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. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008) (quoting State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)).

To prevail on a claim of prosecutorial misconduct, the burden is on the defendant to show that the prosecutor did not act in good faith and that the conduct complained of was both improper and so prejudicial as to deny him a fair trial. See State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985). A reviewing court examines the 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 instruction. Jones, 144 Wn. App. at 284.

Based on these principles, "[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom." State v Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting State v. Navone, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Id. (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Even assuming the prosecutor's statements were improper, Bato must show that the prosecutor's misconduct resulted in

prejudice that had a substantial likelihood of affecting the jury's verdict.¹ See Emery, 174 Wn.2d at 760-61.

- a. Instance Two – The Prosecutor's Argument Was Proper And Not Prejudicial Where She Used Admitted Evidence To Argue Bias And Credibility.

During direct testimony, the prosecutor questioned Jimenez's sister-in-law, Chanda Gorospe, exploring her relationship with Bato to see if Gorospe had motive to pressure Jimenez to recant.

Jimenez testified that she kept her relationship with Bato a secret. 8/8/13 RP 42. She stated it was a secret because she was still married, although separated, and she did not want her children to be affected. Id. at 41-42. Even Gorospe, who lives with Jimenez, did not know about the relationship. 8/8/13 RP 138.

Gorospe admitted that Bato is a friend; that she met at work because they shared the same shift and worked in the same

¹ This standard applies because Bato objected to each instance of alleged prosecutorial misconduct. Had Bato failed to object at trial, he would be deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict. See id.

department. Id. at 137. She stated that she still talked with Bato “[w]henever I see him . . .” Id. at 141. Additionally, she talked with Bato on the phone every week to two weeks. Id. Finally, she admitted she missed seeing Bato at work. Id. at 142.

When asked if Bato spoke with Gorospe about this case, she stated, “[n]ot yet really.” Id. at 144. When the prosecutor asked what Bato told her about the case, Gorospe denied speaking with Bato. Id. Later Gorospe stated, “No, we didn’t talk. We didn’t have a talk and I just showed that statement of [Jimenez].” Id. at 144-45.

During closing argument, the prosecutor stated:

But when I asked [Gorospe] about if she and the Defendant have talked about this case, she balked at that question and she asked for clarification. The fact is, they talk pretty frequently and they’re still friends. And you bet they have talked about this. And you bet that [Jimenez] is getting pressure from her about this case.

8/13/13 RP 45.

The prosecutor’s argument was proper and not prejudicial because it presented reasonable inferences from admitted evidence. Not only does the prosecutor have latitude to discuss bias, but the jury could have drawn the same inferences from the evidence before it. Prior to closing argument, the trial judge instructed the jury that they “are the sole judges of the credibility of

each witness” and may consider “any bias or prejudice that the witness may have shown . . .” CP 53. Here, Gorospe’s close friendship with Bato was clear motive to pressure Jimenez to recant; and the prosecutor’s argument as to that point was not improper.

b. Instance Three – The Prosecutor’s Argument Was Proper Where She Summarized Jimenez’s Testimony.

In the third instance of alleged misconduct, the prosecutor stated in closing argument:

So you’ve got those two versions of what [Jimenez] said happened that night: what she told the police that night and what she said here in court. And you know she told a different story than what she told them at the time . . . She said that he didn’t cause her any pain that night. She said that he didn’t drag her to the bedroom, that he didn’t grab those knives, he didn’t threaten to kill the police, he didn’t threaten to kill her.

8/13/13 RP 46-47.

The prosecutor’s argument was, in fact, an accurate summary of Jimenez’s statements to police and what she testified to at trial. During her testimony, Jimenez denied that she had a physical confrontation with Bato. RP 8/8/13 62. However, she later admitted that Bato caused the bruises on her arm when he refused

to let her leave her bedroom. Id. at 68. She denied that Bato pushed or dragged her. Id. at 65-66. She did, however, admit to telling the police that Bato dragged her. Id. Similarly, she admitted telling police that Bato threw her on the bed, but in court she denied that act occurred. Id. at 67. She denied that Bato said anything would happen with the police. Id. at 70-71. She denied that Bato had knives. Id. at 71.

Pursuant to ER 607, the credibility of a witness may be attacked, even by the party calling the witness. Because the prosecutor's argument was an accurate description of Jimenez's in-court testimony and her initial statements to police, the prosecutor's statements were proper and not prejudicial.

- c. Instance Four – The Prosecutor's Argument Was Proper And Not Prejudicial Where She Summarized Jimenez's Testimony And Discussed How Those Statements Proved The Elements Of The Charged Crimes.

In the fourth instance of alleged misconduct, the prosecutor stated in closing argument:

[Jimenez] said that she wasn't thinking clearly and she wasn't in her right mind when she gave her statement. She didn't read it over fully. And you know why she was so freaked out? Because what had just happened to her was really scary. She locked the

door, turned off the lights, grabbed her kids. That's the terror she felt that night at his hand. Now in front of you, what she's trying to do is take back what she perceives to be the worst for him: the knives, the dragging, throwing on the bed, threatening to kill. She's smart . . . She's smart, but she doesn't know that those aren't the elements of the crime he's been charged with. Counsel and I can argue all day about whether those other things happened.

8/13/13 RP 48.

As with the third instance of alleged misconduct, the prosecutor accurately summarized the facts in evidence. Jimenez testified at the time that she was in fear, took her children into her bedroom, closed the doors and windows, and shut the lights. 8/8/13 RP 72. Second, as discussed above, Jimenez admitted making other statements to police about Bato's actions. The prosecutor's statement regarding the elements of the charged crimes is accurate – the facts that Jimenez denied were not required elements to prove the charged crimes. Because the prosecutor's argument was an accurate description of Jimenez's in-court testimony and her initial statements to police, the prosecutor's statements were proper and not prejudicial.

- d. Instance Six – The Prosecutor's Statements Were Proper And Not Prejudicial Where She Did Not Ask The Jury To Render A Decision Inconsistent With Its Duty.

In the sixth instance of alleged misconduct, the prosecutor stated in closing argument:

[Jimenez] deserves justice in this case, even if she doesn't want it. And justice here means the Defendant is convicted of these crimes because it has been established beyond a reasonable doubt that he did these things. He needs to be held accountable. Find him guilty. Thank you.

8/13/13 RP 53. Bato objected, the trial court overruled his objection, and instructed the jury that the lawyers' arguments were not evidence. Id.

Mere mention of the word "accountable" by the prosecutor does not render the prosecutor's argument improper and prejudicial. Whether the prosecutor's argument is improper turns on whether the prosecutor misstates the jury's duty. For instance, in State v. Pastrana, the prosecutor invited the jury to "tell this community whether or not shooting a gun out of a vehicle on the freeway at another moving vehicle and killing somebody is first degree murder or if it's not." State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999), abrogated on other grounds by State v. Henderson, ___ Wn. App. ___, 321 P.3d 298, 300-01 (Mar. 19, 2014).

The appellate court noted the argument was not improper because the prosecutor did not ask the jury to render a decision inconsistent with its duty of applying the law to the facts. Id. The court also held that any prejudice was ameliorated by a curative instruction, informing the jury that its duty is to decide the law under the facts and circumstances of the court's instruction. Id. See also State v. Greer, 62 Wn. App. 779, 791, 815 P.2d 295 (1991) (prosecutor's request to jury "to send a clear message out from this box into the community that these two defendants are accountable" was not improper in context of full closing argument). Similarly, here the prosecutor did not suggest that the jury's duty was anything different than applying the law to the facts. The prosecutor's argument that Bato should be held accountable because the State proved the crimes beyond a reasonable doubt was entirely proper.

2. THE PROSECUTOR'S COMMENTS IN INSTANCES ONE AND FIVE WERE NOT PREJUDICIAL AND WERE ALSO HARMLESS ERROR.

- a. Even Assuming The Prosecutor's Comments Were Improper, Bato Failed To Show They Were Prejudicial.

In the first instance of alleged misconduct, the prosecutor stated in closing argument:

The questions you're asked to decide are whether the elements of these crimes are met beyond a reasonable doubt. Understandably, you may want to know about everything that happened, such as the knives, the threats, the dragging. And I submit to you that is what happened that night . . . So I submit to you that that's what happened in December. But the State isn't actually trying to prove that. Those are not the elements of the crimes the defendant's been charged with.

8/13/13 RP 38.

In the fifth instance of alleged misconduct, the prosecutor stated in closing argument:

After he kept her in the room, after he had taken the knives, after he threatened her life . . . That's what she said then. That was after that happened, but before she had the opportunity to think it over, before she succumbed to pressure from her family and from the Defendant himself. So that is the version of what really happened.

8/13/13 RP 49.

Bato must show that any misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. He fails to do so.

In State v. Jones, the prosecutor provided the jury with a redacted transcript of an audio tape, but when the prosecutor played the audio, he accidentally played the redacted portion that was previously ruled inadmissible. State v. Jones, 144 Wn. App.

284, 291-92, 183 P.3d 307 (2008). The appellate court held that the prosecutor's mistake could not have affected the jury's verdict because the State provided the correct redacted transcript to the jurors. Id. Here, the prosecutor's comments pertained to facts that, although were not admitted as substantive evidence, were unrelated to the charged crimes. Her argument centered entirely on what elements the State was required to prove.

b. Assuming The Prosecutor's Statements Were Prejudicial, The Error Was Harmless.

When the prosecutor misstates the burden of proof, the court applies the nonconstitutional error standard. Emery, 174 Wn.2d at 757. Under the nonconstitutional harmless error standard, the error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

It is important to note that the alleged misconduct Bato complains of pertains to facts that the prosecutor did not use to convict Bato. Jimenez did testify that Bato refused to let her out of her room. 8/8/13 RP 63. She testified that Bato assaulted her in the

bedroom. Id. at 68. Lastly, she testified that Bato contacted her at work after the no-contact order was in place. Id. at 77.

Significantly, Bato, himself, testified to facts sufficient to support a conviction. For instance, he admitted that he contacted Jimenez when the no-contact order was in place. 8/12/13 RP 94. He admitted that he grabbed Jimenez's hands and put her on her bed to calm her down. Id. at 112. Lastly, he admitted that Jimenez continually told him to leave the room, but he did not, and he did not let her leave the room. Id. at 107; 8/7/13 RP 102.

Because Jimenez and Bato both testified to facts sufficient to support a conviction, any error pertaining to facts not used to support a conviction did not materially affect the outcome of Bato's trial.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL.

The granting or denial of a new trial is a matter primarily within the discretion of the trial court and the reviewing court will not disturb the trial court's ruling unless there is a clear abuse of discretion. State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006). An abuse of discretion will be found "only 'when no

reasonable judge would have reached the same conclusion.”

McKenzie, 157 Wn.2d at 52. This deferential standard is because the trial judge is in a better position to evaluate and adjudge than an appellate court can read from a printed record. McKenzie, 157 Wn.2d at 52.

It was not unreasonable for the trial judge to deny Bato's motion for a mistrial. Most of the prosecutor's comments were not improper. Even assuming some of the comments were improper, no prejudice occurred that would materially affect the jury's verdict.

D. CONCLUSION

This Court should affirm the defendant's conviction and sentence.

DATED this 27TH day of May, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JOSEPH MARCHESANO, WSBA #44077
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FRANCIS BATO, Cause No. 70943-7-1, 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.

Betty A. Huddleston
Name

5/28/14
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