IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63718-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JOSE SANCHEZ-FLORES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 9, 2010

Spearman, J.—Jose Sanchez-Flores challenges his conviction for felony violation of a no-contact order, arguing, among other things, that admission of the no-contact order was error because the no-contact warnings required by RCW 10.99.040(4)(b) were printed on the back of the order. We reject his arguments and affirm.

FACTS

After a night of drinking on New Year's Eve, Jose Sanchez-Flores ascended the stairs to the bedroom of his wife, Brittani Martinez, who was then eight months pregnant, where she was sleeping with her two-year-old son. Sanchez-Flores began cursing and yelling at Martinez. It is undisputed that Sanchez-Flores' presence in Martinez's house violated a no-contact order.

Martinez' mother, Kimberlee Coggins, and Coggins' boyfriend, Hipolito Hernandez, heard the arguing and came upstairs to the bedroom. Coggins and Hernandez told Sanchez-Flores to stop. Shortly thereafter, while Coggins and Hernandez were still in the room, Sanchez-Flores suddenly struck Martinez in the face, causing her nose to bleed. Coggins went to a neighbor's apartment to contact the police.

The State charged Sanchez-Flores with felony violation of a no-contact order. Based on the presence of Martinez' two-year-old son, the State also sought a finding that the crime was an aggravated domestic violence offense. Sanchez-Flores moved in limine to exclude the no-contact order, arguing it did not apply because the mandatory no-contact warnings specified in RCW 10.99.040(4)(b) were not printed on the front of the order. The court denied the motion. After trial, the jury found Sanchez-Flores guilty of felony violation of a no-contact order, and found the crime was an aggravated domestic violence offense. Sanchez-Flores appeals.

DISCUSSION

Applicability of No-Contact Order

A charge of violation of a no-contact order must be based on an "applicable" order. State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005). "An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise

will not support a conviction of violating the order." Id. at 31. No-contact orders that are not applicable to the crime are not admissible. Id. Issues regarding the sufficiency of the order are resolved in the same manner as any other question relating to the sufficiency of the evidence. Id. at 32. We "will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Sanchez-Flores contends that the no-contact order is not applicable because General Rule (GR) 14 generally forbids putting information on the back of a document. We recently considered and rejected this very argument in State v. Turner, No. 63147-1-I, 2010 WL 2674040 (Wash. Ct. App. July 6, 2010):

> First, . . . the relevant inquiry is whether the legislature intended that the statutory legend appear in any particular place on the no-contact order. As we have explained, [RCW 10.99.040(4)(b)] states that the order "shall bear the legend." While a no-contact order must meet this requirement to be valid, there is nothing in the language of the statute requiring any specific placement of the legend. . . .
>
> Second, nothing in this statute refers, either expressly or impliedly, to the provisions of GR 14. Turner fails to persuade us that we should read into the statute, which expresses legislative intent, the words of GR 14, a court rule regarding formatting of documents. We decline to do so.

Turner, at *3-*4. In short, as we stated in Turner, nothing in GR 14 requires placement of the legend on the front of a no-contact order. As such, the no-contact order at issue in this case was "applicable," and we reject Sanchez-Flores' argument on this issue.

Aggravated Domestic Violence Offense Instruction

Sanchez-Flores next argues that the aggravated domestic violence offense instruction amounted to an improper comment on the evidence because it included the term "victim." Instruction 13 states:

> To find that this crime is an aggravated domestic violence offense, each of the following two elements must be proved beyond a reasonable doubt:
>
> (1) That the victim and the defendant were family or household members; and
>
> (2) That the offense was committed within the sight or sound of the victim's and/or defendant's child who [was] under the age of 18 years.

Although he challenges this instruction on appeal, Sanchez-Flores failed to take exception to it or propose his own instruction in the trial court. Accordingly, Sanchez-Flores has waived the issue, and we decline to consider it. RAP 2.5(a).

Even if we were to consider the issue, however, it is without merit. We review jury instructions de novo, within the context of the instructions as a whole. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "A judge is prohibited by article IV, section 16 of the state constitution from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" Id. (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "'The determination of a prohibited comment depends upon the facts and circumstances of each case.'" State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982) (quoting

State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980)).

In Alger, the trial court read the following stipulation to jury: "'There has been a stipulation, that is an agreement between the State, the Plaintiff, and Mr. Alger and his lawyer, that Mr. Alger's age is 36, and, that he has never been married to the victim.'" Alger, 31 Wn. App. at 248-49. We noted that, "[i]n the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." Id. at 249. As such, we held that "the one reference to 'the victim' by the trial court judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." Id.

Here, the trial court never used the term "victim" during trial. The term appeared only in the aggravated domestic violence offense instruction; none of the other jury instructions used the term. Additionally, the applicability of the aggravating factor was something the jury considered only after it had already found Sanchez-Flores guilty. Moreover, Sanchez-Flores did not dispute that Martinez was a "victim." Indeed, he conceded he was guilty of violating the no-contact order; he disputed only that he hit Martinez intentionally. For these reasons, use of the term "victim" in the aggravated domestic violence offense instruction was not an impermissible comment on the evidence.

Prosecutorial Misconduct

Sanchez-Flores next argues that prosecutorial misconduct deprived him of his right to a fair trial. During closing argument, the prosecutor invoked the "wisdom" of the judge who issued the no-contact order, and implied the judge knew Sanchez-Flores was dangerous:

> You learned that the judge was right. We learned that the judge knew that Brittani wasn't safe around Jose Sanchez-Flores. And the wisdom of the judge's order is proving overwhelmingly –

At that point defense counsel objected, claiming the prosecutor was arguing facts not in evidence. The trial court overruled the objection, but admonished the jury that closing argument is not evidence to be considered when deliberating:

> Ladies and Gentlemen, this is closing argument. You don't have your notebooks because this is not evidence. I'm going to overrule the objection but simply remind you to rely on the facts in evidence as it came in through the testimony and the exhibits.

After the prosecutor's closing argument, outside the presence of the jury, defense counsel moved for a mistrial, contending the prosecutor "is invoking the authority of a judicial hearing to argue that somehow it was in the judge's mind that my client is dangerous." The trial judge denied the motion, ruling that he had already reminded the jury not to rely on argument, and that additional instruction would draw attention to the prosecutor's argument:

> He talked about the judge's wisdom and knowing that he was dangerous. The record will remain as it is. I would tend to agree with [defense counsel]. Any additional instructions at this point in time would simply emphasi[ze] that particular point. I did remind the jury to rely only on the evidence and testimony presented. It was not on argument, but I will deny the motion.

To prevail on a claim of prosecutorial misconduct, an appellant "bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial." State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359, 392 (2007). "A prosecutor's improper comments are prejudicial 'only where there is a substantial likelihood the misconduct affected the jury's verdict.'" Id. (emphasis omitted) (internal quotation marks omitted) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments . . . by looking at the comments in isolation but by placing the remarks 'in the context of the total arguments, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" Id. (internal quotation marks omitted) (quoting Brown, 132 Wn.2d at 561).

Here, even if the prosecutor's comments were improper, there is no substantial likelihood they affected the jury's verdict. Sanchez-Flores' admitted he violated the no-contact order. Indeed, during closing argument, defense counsel explicitly told the jury that Sanchez-Flores violated the order:

> Right now what I'm asking you for is to hold the State to their burden, to find Mr. Sanchez-Flores guilty only of what he is guilty of. Yes. He violated the no-contact order.

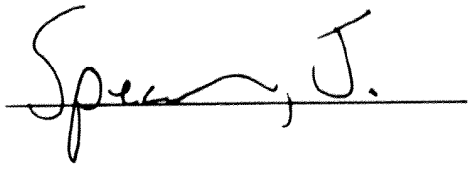
The only disputed issue at trial was whether Sanchez-Flores intentionally or accidentally hit Martinez, and the evidence on that issue was very one-sided. Martinez testified that after drinking on New Year's Eve, Sanchez-Flores came

upstairs to her bedroom where she was sleeping with her two-year-old son, and began arguing with her. Sanchez-Flores was cursing and yelling. Martinez testified that her mother and her mother's boyfriend heard the arguing and came upstairs to the bedroom. Coggins testified that she and Hernandez told Sanchez-Flores to stop. Shortly thereafter, while Coggins and Hernandez were still in the room, Sanchez-Flores suddenly struck Martinez in the face, causing her nose to bleed. Although Hernandez agreed with defense counsel during cross-examination that the incident "could" have been an accident, there was no substantive evidence contradicting Martinez's story.

Viewing, in context, the charges against Sanchez-Flores, the issues central to the case, the evidence admitted at trial, as well as the trial court's instruction to the jury that closing arguments are not evidence to be considered during deliberations, there is no substantial likelihood that the prosecutor's comments affected the jury's verdict, and we therefore reject Sanchez-Flores' arguments.

Given our resolution of Sanchez-Flores' assignments of error, we also reject his argument that cumulative error warrants reversal.

Affirmed.



WE CONCUR: