IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON , Respondent, v. THOMAS EUGENE HALL, Appellant.	)	No. 64368-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: October 11, 2010

Appelwick, J. — Hall appeals his convictions for violation of a domestic violence no-contact order and bail jumping. Hall claims the prosecutor committed flagrant and ill intentioned misconduct during closing arguments and that his attorney was ineffective for failing to object to the misconduct. Because Hall received an unfair trial, we reverse.

FACTS

Thomas Hall dated J.E. for about four years, starting in high school. In 2007, they had a daughter together. Also in 2007, the court issued a domestic violence no-contact order under chapter 10.99 RCW prohibiting Hall from contacting J.E. in person, in writing, or by telephone for a period of five years.

On November 10, 2008, officers from the King County Sheriff's Office responded to a call at J.E.'s home. J.E. was upset and crying and had injuries to her face. J.E. later reported to Highline Medical Center's emergency room for medical treatment. J.E. reported to the nurse at the hospital that she had been assaulted by the father of her daughter. J.E. did not testify at trial.

J.E.'s mother, Lora Lynn McPherson, testified that Hall had called J.E. on J.E.'s cell phone in August 2009. She testified that J.E. received a phone call and McPherson heard Hall's voice on the line before J.E. walked away to continue the conversation away from McPherson.

The State charged Hall with two counts of felony violation of a domestic violence no-contact order. Count I was based on the November 2008 contact. Count II was based on the August 2009 contact. The State also charged Hall with one count of bail jumping for failing to appear for a hearing on count I. The court severed the bail jumping count from the trial for the no-contact order counts. In the bifurcated trial for violations of the no-contact order, a jury found Hall guilty on count I and acquitted him on count II. After the jury verdict, Hall stipulated that he had been previously convicted twice of violating a no-contact order. The jury then deliberated again and returned a special verdict elevating

the court order violation in count I from a misdemeanor to a felony. Hall then pleaded guilty to the bail jumping charge. The trial court imposed a standard-range sentence.

Hall appeals his conviction for violation of the no contact order.

DISCUSSION

I. Prosecutorial Misconduct

Hall contends that the prosecutor committed misconduct during closing arguments of the first phase of trial. A prosecuting attorney's duty is to see that an accused receives a fair trial. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The prosecutor, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. Id. A defendant claiming prosecutorial misconduct who has preserved the issue by objection bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill intentioned. Belgarde, 110 Wn.2d at 507. If it is, the petitioner has not waived his right to review of the conduct and to request a new trial. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

"Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." Id. at 664–65. In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial,

i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A court must consider the prosecutor's comments 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. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If we are unable to say from our reading of the record whether the petitioner would or would not have been convicted but for the comment, then we may not deem it harmless. Charlton, 90 Wn.2d at 664.

At trial, the prosecutor ended her initial closing argument by stating:

> Ultimately, while the State is asking you to consider this case as the violation of a court order case, there is a lot more going on here than simply a court order violation. It doesn't really do it justice, but that's what we are going with, two court order violations.
>
> And I ask you to convict the Defendant because he essentially refuses to abide by the court's orders. I am asking you to convict the Defendant because this toxic cycle for this girl needs to end somehow. Someone has to do it, and I am asking you to convict the Defendant because [J.E.] needs us to have the strength to compensate her, but I'm asking you mainly to convict the Defendant because he is guilty of these crimes.

Defense counsel argued that the State had not proven the elements of the

charged crimes beyond a reasonable doubt. The prosecutor responded in rebuttal with the following discussion of the reasonable doubt standard:

> After listening to Defense Counsel, you must be left with the impression that beyond a reasonable doubt is some insurmountable mountain, Mt. Everest.
>
> But 12 like minded people just like you across this country every single day gather in courthouses and deal with this same very workable standard. It is called reasonable for a reason.
>
> If you know in your gut that the Defendant is guilty, then you know it beyond a reasonable doubt. It is not rocket science.
>
> Defense did not object.

The prosecutor's statements were improper. The State concedes this. As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). It is also improper for a prosecutor to misstate the burden of proof. See State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (holding that prosecutor's statement, "[The burden of proof beyond a reasonable doubt] 'doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt,'" was improper), cert. denied, Warren v. Washington, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). The prosecutor here distorted the burden of proof when she told the jury it could convict if the jury members knew in their "guts" that the defendant was guilty.

The prosecutor's comment that the jury must find the "strength to compensate" J.E. was also improper. Hall reads that comment as saying that the jury should compensate for the lack of evidence resulting from J.E.'s failure

to testify. We believe it is more fairly read to implore the jury to punish the defendant to compensate J.E. for her injuries received during her violent relationship with Hall. This comment improperly urged the jury to find that the charges had been proved on grounds beyond just the evidence of the crimes. It is improper for a prosecutor to invite the jury to decide a case based on anything other than the evidence. In re Det. of Gaff, 90 Wn. App 834, 841, 954 P.2d 943 (1998). Compensation to J.E. was an inappropriate consideration where it did not relate to the elements of the crime. The prosecutor's comments constituted a flagrant attempt to encourage the jury to decide the case on improper grounds.

The State's evidence of Hall's violation of the no-contact order was not overwhelming on count I. The nurse who treated J.E. testified that J.E. had reported that she had been assaulted by the father of her daughter. The State entered medical records from the emergency room visit that included notes by a social worker who met with J.E. that night. The notes stated J.E. reported that Hall had caused her injuries and that there was a "long history" of domestic violence between the two. But, neither J.E. nor Hall testified. No witnesses actually saw Hall with J.E. Although the responding officer testified at trial that J.E. told him who the assailant was, he testified that the police did not locate Hall. No other evidence connected Hall to the alleged assault.

We cannot say from the record that Hall would have been convicted but for the prosecutor's multiple flagrant statements. Accordingly, we conclude Hall was denied a fair trial and reverse.

II. Ineffective Assistance

The prosecutor was not the only individual whose performance was deficient here. Were we to conclude that the prosecutorial misconduct was not so flagrant that it could have been cured by timely objection and proper instruction to the jury, we would reverse for ineffective assistance of counsel.

Hall claims that he received ineffective assistance of counsel when his counsel failed to object to the prosecutorial misconduct or request curative instructions. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Counsel's performance here certainly fell below an objective standard of

reasonableness. The prosecutor's comments were clearly improper. An objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments. Counsel had no tactical reason for not objecting. The first prong of the ineffective assistance test is met.

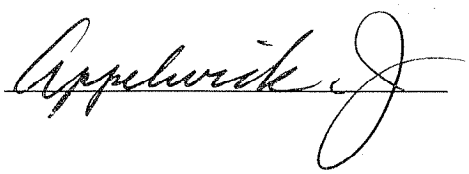
To show prejudice, Hall must prove that, but for the deficient performance, there is a reasonable probability that the outcome in his trial would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Warren, 165 Wn.2d at 28.

As we previously explained, the State presented relatively little evidence that Hall had violated the no-contact order. The thin case presented by the State rendered his trial vulnerable to prejudicial comments unfairly tipping the jury in favor of the State. The multiple objections invited by the prosecutor's misconduct, but not made, would have highlighted the paucity of evidence to support conviction.

The jury was otherwise properly instructed. The court properly instructed the jury regarding the burden of proof. The court also instructed the jury to disregard any questioning or evidence that the court ruled inadmissible. Juries are presumed to follow the court's instructions. Warren, 165 Wn.2d at 28. During closing argument, defense counsel objected to another comment by the

prosecutor and the court provided a curative instruction, once again emphasizing the importance of the jury rendering a decision based on the evidence, not the attorneys' arguments. Yet, other flagrant abuses went unchallenged, implying to the jury that nothing was wrong with those unobjected-to comments. Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. See Neidigh, 78 Wn. App. at 79. Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial. Given the weak evidence and the confusing nature of the prosecutor's comments, it is reasonably probable that there may have been a different outcome at Hall's trial had he objected to the State's improper closing. Hall received ineffective assistance of counsel when counsel failed to object to the prosecutor's obvious and prejudicial misconduct.

We reverse the conviction on count I.



WE CONCUR:

Cox, J.

Becker, J.