IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

State of Washington, Respondent,	)	No. 65067-0-I
v.	)	UNPUBLISHED OPINION
Mikael Rashid, Appellant.	)	FILED: June 13, 2011

Schindler, J. — A jury convicted Mikael Rashid of assault of a child in the third degree–domestic violence. Rashid contends that the trial court erred in denying his motion for a mistrial based on prosecutorial misconduct. Because Rashid cannot establish prejudice, we affirm.

FACTS

In July 2008, eight-year-old R.W. lived in Federal Way with his mother, Sirrether Latoya Lanier, and his two older half-siblings, J.H. and C.H. Lanier's boyfriend Mikael Rashid spent a lot of time at the house.

On July 28, 2008, R.W.'s second grade teacher, Ryan Van Baalen, noticed belt marks on R.W.'s wrist and ankle. Van Baalen believed that a belt had caused the marks because he saw two rows of holes, similar to a two prong belt, and the outline of

a belt. R.W. told Van Baalen that Rashid beat him with a belt. The school principal contacted Child Protective Services (CPS).

CPS Social Worker Brad Stout interviewed R.W. at school on July 31 and photographed his injuries. Stout observed scars on R.W.'s arm, "significant" bruises on his arm, ankle, and upper thigh, round marks on his ankle, and an outline of a belt on his arm and thigh. R.W. also told Stout that Rashid beat him with a belt. After the interview, Stout made several unsuccessful attempts to contact R.W.'s mother Lanier. Eventually, Lanier called Stout to tell him that she refused to cooperate with the investigation.

On August 3, R.W. went to stay with his paternal grandparents. After seeing belt shaped bruises on R.W.'s thigh, R.W.'s paternal grandfather Emanuel Washington contacted CPS. On August 8, CPS Social Worker Karen McGiveron interviewed R.W and took photos of R.W.'s injuries. McGiveron said that R.W. had bruises on his thigh.

CPS referred the case to the special assault unit of the Federal Way Police Department. Detective Heather Castro met with R.W. at his paternal grandparents' house. R.W. identified Rashid from a Department of Licensing photo.

The State charged Rashid with one count of assault in the fourth degree. In an amended information, the State charged Rashid with assault of a child in the third degree–domestic violence.

Prior to trial, the defense filed a motion to preclude the State from "mentioning the facts of any prior alleged abuse under ER 404(b), 401, 403," and any "[a]llegations that the other children were disciplined." The trial court granted the defense's motion

and ruled that "as to any acts that pertain to other siblings, that the 404(b) evidence is not admissible."

A number of witnesses testified at trial on behalf of the State, including R.W., Van Baalen, Stout, Washington, and McGiveron. The court also admitted photos taken by Stout and McGiveron during the CPS interviews. The photos show bruises on R.W.'s wrist, ankle, and thigh.

R.W. testified that Rashid beat him with a beaded belt more than 10 times. R.W. said that he was beaten while lying down and that Rashid struck him "[o]n my bottom" and "[m]y thigh, my arms and my ankles." R.W. said that Rashid beat him for a period of about two minutes at a time but "[i]t felt like an hour." R.W. testified that "[i]t felt really hurting" and that he "cried for a long time." R.W. also testified that when Rashid beat him, his mother was usually present. When asked by the prosecutor what he "got in trouble for," R.W. said that it was because he "took the blame for stealing chips [and] milk."

The defense theory at trial was that the physical discipline used by Rashid was lawful. The defense called Lanier to testify that Rashid's physical discipline of R.W. was "reasonable and moderate." During the cross-examination of Lanier, the prosecutor asked, "Did you know that [J.H.] had indicated that she had been abused by Mr. Rashid?" The defense attorney objected. The trial court sustained the objection and instructed the jury to disregard the question. After Lanier testified, the defense moved for a mistrial because the prosecutor violated the court's ruling by asking the question

about abuse of R.W.'s sibling. The trial court denied the motion for a mistrial.

> I did sustain the objection, told the jury to disregard it. The jury is presumed to follow the Court's instructions. . . . The motion for a mistrial, I'm satisfied, is not well taken, is denied.

Rashid did not testify.

The trial court instructed the jury on assault of a child in the third degree and the lesser included offense of assault in the fourth degree. The jury convicted Rashid of assault of a child in the third degree–domestic violence. The trial court imposed a high-end standard range sentence of three months with a recommendation for work release.

ANALYSIS

Rashid contends the trial court erred in denying his motion for a mistrial based on prosecutorial misconduct. A trial court's decision to deny a motion for a mistrial is reviewed for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Granting a motion for a mistrial is appropriate "'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" Rodriguez, 146 Wn.2d at 270 (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

A defendant who alleges prosecutorial misconduct must establish that the conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). To establish the conduct was prejudicial, the defendant must prove there is a "substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). When the defendant moves for a mistrial based on prosecutorial misconduct, we give deference to the trial court's

ruling since "'[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.'" State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (quoting State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). However, "'[i]f misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.'" State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)).

Rashid argues that the improper question during the cross-examination of Lanier affected the jury's verdict and was prejudicial. Rashid's reliance on State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996); Belgarde, 110 Wn.2d 504; and State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) is misplaced. In Copeland, the court held that while the prosecutor asked an improper question, there was no prejudice because it was a single question, a curative instruction was given, and the jury learned about the defense witness's criminal history through other evidence. Copeland, 130 Wn.2d at 284-85.

Belgarde and Escalona are distinguishable to this case. In Belgarde, the court concluded the prosecutor's inflammatory comments about the murder and defendant's affiliation with "a deadly group of madmen" and "butchers that kill indiscriminately"[1] were so prejudicial as to warrant reversal. Belgarde, 110 Wn.2d at 508-09. In Escalona, this court held that the prosecutor's violation of an order in limine warranted reversal because the witness made an unsolicited statement on cross-examination regarding the defendant's prior conviction for the same crime. Escalona, 49 Wn. App.

[1] (Internal quotation marks omitted.)

at 254-56.

Because the victim's testimony was inconsistent and the police's testimony corroborated the defendant's testimony, the court concluded an instruction could not cure the highly prejudicial effect of the evidence of the prior conviction given the seriousness of the misconduct, the weak evidence that supported the State's case, and the logical relevance of the statement. Escalona, 49 Wn. App. at 252-56.

Here, unlike in Belgarde and Escalona, while the prosecutor's question on cross-examination was in flagrant disregard of the court's ruling in limine, it was not so prejudicial it could not be cured by an instruction, and there was overwhelming evidence to support Rashid's conviction.

The trial court sustained the defense attorney's objection to the prosecutor's single question and instructed the jury to disregard the question. We presume the jury follows the court's instructions. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).[2] Further, the evidence in support of the State's case was overwhelming. R.W. testified about the beatings from a beaded belt Rashid used on him. A number of witnesses testified about the bruises on R.W.'s wrist, ankle, and thigh that were consistent with the use of a belt. And the photographs introduced also show bruises described by the witnesses.

We conclude that Rashid cannot establish prejudice requiring reversal as a result of the question asked during cross-examination. The trial court did not abuse its

[2] In addition, the trial court instructed the jury, in pertinent part:

If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict. . . . If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

discretion in denying the motion for a mistrial.

Affirmed.

WE CONCUR: