

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) No. 65353-9-I
)
 Respondent,) DIVISION ONE
)
 v.) UNPUBLISHED OPINION
)
 IDRIS TURNER,)
)
 Appellant.) FILED: October 31, 2011

Grosse, J. — A prosecutor’s use of the term “child abuse” in opening statement despite an order in limine prohibiting an expert witness from using that term is neither grounds for a mistrial, nor does it amount to reversible prosecutor misconduct where the information charged the defendant with causing physical pain or agony that was “equivalent to that produced by torture,” the expert witness complied with the order in limine and the remark was cumulative of evidence properly admitted at trial. Accordingly, we affirm.

FACTS

P.T. was born on April 11, 2006. Her mother, Trina Washington-Eastland (Washington) was 18 years old at the time and living with her foster parent, Afua Ndiaye. Since she was an infant, P.T. had constipation problems and when she was about 16 months old, Washington began spanking her to encourage her to move her bowels.

In July 2007, Washington began dating Idris Turner. Turner moved in with her

and in February 2008, Washington was pregnant with Turner's child. Washington's pregnancy was high risk and she was often confined to bed. As a result, Washington temporarily relinquished full care and custody of P.T. to Ndiaye, who cared for P.T. primarily during the week between April and September 2008.

On July 10, 2008, while Ndiaye was out of town, Turner and P.T. were visiting Washington at the hospital. A nurse saw Turner take P.T. over his lap and strike her forcefully on her lower back and backside while P.T. cried loudly. The nurse reported the incident to Child Protective Services (CPS). When Ndiaye returned a few days later and resumed custody of P.T., she noticed bruises on P.T.'s buttocks, hip, and lower back, which were not present before she left town. A CPS investigator spoke with Ndiaye and Washington, and Ndiaye reported the bruises. The investigator examined P.T., photographed the bruises, and opened a file, but did not take any action at that time.

Later that summer, unbeknownst to Washington, Turner began dating Courtney Douglas and within a week, he moved into Douglas' apartment in downtown Seattle. A week later, Turner introduced Douglas to his "best friend," Joy Brannon. Brannon then moved into Douglas' apartment along with Turner. Turner also introduced Douglas to P.T., his "step-daughter," and explained that P.T.'s mother was pregnant and unable to care for P.T.

Turner and Brannon lived with Douglas in her apartment for about three weeks, until Douglas was evicted. The three then moved to a condominium in Renton. During this time, P.T. often stayed there with Turner. Washington was confined to bed rest at

this time due to the late stage of her pregnancy and Turner had primary responsibility for P.T.'s care from approximately mid-September to mid-October 2008 and again in November 2008.¹

During this time, Turner became frustrated with P.T.'s constipation problem and lectured her daily about "pooping." He grabbed her face if she did not seem attentive, leaving bruises on P.T.'s jaw line. Turner then began whipping P.T. with a leather belt when she would not have a bowel movement. He would also put P.T. in the bathtub and spray water in her face with a shower nozzle.

On one occasion, after lecturing P.T., Turner took her into the bathroom. Douglas then heard two loud "smacks" and stood outside the bathroom door, listening to Turner speaking firmly to P.T. When Douglas opened the door, she saw P.T. on the floor, in a fetal position, not making a sound. Turner had a belt high above his head, ready to strike P.T. again. When Douglas asked him what he was doing, he attacked Douglas and struck her repeatedly with the belt. He then returned to P.T. and whipped her, beating her entire body. Douglas was too scared of Turner to call the police.

Shortly after this incident, Brannon and Turner had a dispute in which Brannon struck Turner with a metal compact disk rack and attempted to stab him. Turner had P.T. with him at the time, but fled, leaving P.T. with Douglas. Douglas took P.T. to the West Seattle apartment of her friend Myel Jewell and Turner, Douglas, and P.T. ended up staying with Jewell from about November 21, 2008 through November 29, 2008.

On the day before Thanksgiving, Jewell and Douglas heard Turner yelling and P.T. crying inside the bathroom. When Douglas opened the door, Turner screamed at

¹ The baby was born on November 20, 2008.

her. She saw P.T. in the bathtub, naked, as Turner held the showerhead and sprayed water in her face. P.T. gasped for air and appeared to Douglas as though she could not breathe. Later, Douglas noticed that P.T.'s mouth was "messed up," and Turner told her she fell in the tub.

The next day, on Thanksgiving, P.T. had a big scarf tied around her head in a bow that covered her cheeks, ears, and part of her head. Turner forced her to stand while she ate to teach her that "people won't do things for her." Later that night, Jewell awoke to the sound of P.T. crying and gurgling coming from the bathroom. She also heard what sounded like a body part bumping against the tub. Turner came out of the bathroom and explained that P.T. had fallen but was okay. P.T. whimpered.

The following day Jewell agreed to watch P.T. so Turner could visit Washington and the new baby. P.T. had been asleep in Turner's arms and was bundled up in a jacket and hat that covered part of her face. When Turner left, Jewell laid P.T. down and let her sleep. Several hours later, Jewell became concerned because P.T. had slept all day and she had trouble waking her. She then removed the hat and hood and saw bruises on P.T.'s face and a knot on her forehead.

When Douglas returned home from work, Jewell told her that something was wrong with P.T. Turner then arrived home and Jewell told him to take her to the hospital. Turner became very angry and insisted that P.T. was playing a game. He tried to stand her up next to him and when she reached for his leg to brace herself from falling, he moved his leg and let her fall. Turner then whipped her on her leg because he thought she was disobeying him. He continued to demand that she stand, but she

kept falling down.

Turner then held P.T. in his arms and insisted that she was fine and was just asleep. P.T. then began having seizures and Douglas and Jewell began to rub ice on her to stop the seizures. They then removed P.T.'s clothing and saw that she was bruised all over her body, hair was missing from both sides of her head, and that there were cuts on her stomach from the belt whippings and finger marks on her arms.

Turner then said he could not believe he had done this to his baby and told Douglas and Jewell that the injuries were from him whipping and grabbing P.T. He then told P.T. to fight and be strong and said, “[O]h, my baby, I did this to you. I am so sorry. . . . I don’t want to go to jail, I don’t want to go to prison.” He threatened to kill himself and everyone else. P.T. continued to have seizures, but no longer woke up or moaned. Jewell and Douglas repeatedly told Turner they needed to take P.T. to the hospital, but he refused.

The next morning Turner took P.T. to see Washington, who was still on bed rest. Turner said that P.T. was fine, but according to Jewell, P.T. was still unconscious when they left. When Washington saw P.T., she immediately knew that P.T. needed to be hospitalized and they took her to the emergency room.

At the emergency room, P.T. was unresponsive, was breathing abnormally, and had retinal hemorrhaging. Her CT (computed tomography) scan was abnormal, indicating possible traumatic brain injury. Her body was bruised all over and several areas were swollen, including her buttocks. She also had puncture like wounds to one leg. She was intubated and transferred to Harborview Medical Center in critical

condition.

At Harborview, she was treated by Dr. Kenneth Feldman, an expert in pediatric child abuse. Feldman noted that P.T. had areas of skin that had been torn off, muscle damage, traumatic injuries to her scalp where she had hair loss, a burn mark on one hand, a torn retina in one eye, bleeding in both eyes, fresh blood in the normal fluid space around her brain and old fluid around her brain, which was indicative of previous brain trauma. According to Feldman, these injuries were likely the result of non-accidental trauma. Additionally, she was left blind in one eye and had impaired vision in the other. According to Dr. Jason Cheung, a pediatric ophthalmologist, it would take a severe force, not a seizure, to separate the layers of P.T.'s retina.

Turner was eventually arrested and interviewed by police detectives. He admitted to whipping P.T. with a belt during toilet training sessions. He also told police that on that Wednesday, he had hit P.T. with a belt while she was on the toilet and she fell off on to the floor. He said that she defecated while she was on the floor and then he put her in the bathtub. He also said that she had hit her head while he was whipping her and he noticed a knot or bump on her forehead, but that it was an accident.

The State charged Turner with first degree assault of a child. At trial, Turner presented expert testimony from Dr. Lily Jung, a neurologist who reviewed P.T.'s medical history and noted that P.T. suffered a previous seizure in June 2006 and had a brain defect that predisposed her to have seizures. According to Jung, P.T. had a hole in her corpus collosom, a structure in her brain that sends signals from one hemisphere of the brain to the other. Jung further noted that P.T. was born with a sickle cell trait

that predisposed her to clotting of the veins and testified that based on the CT scan done when she was brought to the hospital on November 29, 2008, P.T. had such a clot that was deep within her brain in a place where a clot was not likely to be a result of trauma. According to Jung, the trauma from increased brain pressure, which had been caused by the blood clot, damaged P.T.'s optic nerve and caused her to lose her sight.

The jury found Turner guilty as charged. The trial court imposed a standard range sentence of 147 months, with 24 to 36 months' community custody. Turner appeals.

ANALYSIS

Turner first contends that the prosecutor committed reversible misconduct by using the term "child abuse" during opening statement in direct violation of the court's order in limine prohibiting use of the term. We disagree.

Before trial, Turner made a motion in limine to exclude testimony from Dr. Feldman that P.T.'s injuries were a result of child abuse and/or non-accidental trauma because this was a question for the jury. The trial court granted the motion as to the use of the term "child abuse," but denied it as to the use of the term, "non-accidental trauma." During opening statement, the prosecutor stated:

Dr. Feldman will tell you that he determined, based on everything, based on the injuries that [P.T.] sustained . . . that [this] was not accidental trauma. Dr. Feldman will tell you that of the number of years, decades that he has been doing this work, this is one of the worst cases of child abuse that he has ever seen.

After the prosecutor's opening statement, the court took a brief recess and then

addressed a motion brought by Turner. Turner alerted the court that the prosecutor had violated the court's pretrial ruling excluding reference to "child abuse." The prosecutor responded that she did not recall using the term and stated that if she did, it was "completely inadvertent." The court agreed with Turner that she did in fact use that term, but declined to grant a mistrial, explaining:

The purpose of opening statement is to advise the jury of what the witnesses will testify to. At this time, Dr. Feldman will not be allowed to testify this is the worst case of child abuse he has ever seen because he won't be referring to it as child abuse. Whether he can refer to it as the worst case of this type of incident he has ever seen, is not before the Court. But given that it is not a direct violation or intentional violation of the Court's Order in Limine, I am going to deny the motion for mistrial, but remind [the prosecutor] that there is not to be testimony with respect to "child abuse." He is to use the term non-accidental trauma.

Turner contends that the trial court erred by failing to grant a mistrial because the prosecutor's comment was a direct violation of the court's order in limine.² We review a trial court's ruling on a motion for a mistrial for an abuse of discretion.³ A mistrial is proper only when a trial irregularity is so prejudicial that it renders the trial unfair and nothing short of a new trial can ensure that the defendant will be tried fairly.⁴ "In determining whether a trial irregularity deprived a defendant of a fair trial, [we] examine several factors: (1) the seriousness of the irregularity, (2) whether challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction

² While the court obviously addressed Turner's motion as one for a mistrial, the record does not reflect that Turner actually moved for a mistrial. He simply argued that the prosecutor violated the court's order in limine, but did not ask for a mistrial or any other remedy.

³ State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

⁴ State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008).

which a jury is presumed to follow.”⁵ Because the trial court is in the best position to most effectively determine whether prosecutorial misconduct prejudiced a defendant’s right to a fair trial, we give the trial court’s ruling deference on appeal.⁶

Turner contends that the irregularity here was the prosecutor’s remark in violation of the court’s order of limine. But the prosecutor’s remark was not a direct violation of the court’s order, which excluded testimony that the injuries were caused by child abuse.⁷ As the State points out, the prosecutor’s opening remarks are not testimony and the jury was properly instructed that the attorneys’ statements are not evidence and that it must disregard any remark, statement, or argument that is not supported by the evidence.⁸ Thus, the trial court properly ruled that there was no direct violation of the order in limine and a mistrial was unwarranted on that basis.⁹

Nor do the prosecutor’s comments amount to prosecutorial misconduct requiring reversal, as Turner contends. To establish prosecutorial misconduct, the defendant must show that the prosecutor’s conduct was both improper and prejudicial.¹⁰ While objectionable given the order in limine, the prosecutor’s single reference to “child abuse” was not so prejudicial as to deprive Turner of a fair trial.

Again, the remark was not evidence and in fact Dr. Feldman complied with the

⁵ Babcock, 145 Wn. App. at 163 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

⁶ State v. Luvane, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

⁷ The trial court’s ruling states, “[T]he State’s witnesses may not refer to the trauma as ‘child abuse.’”

⁸ State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997) (jury is presumed to follow the court’s instructions).

⁹ The case law cited by Turner addresses mistrial motions based on a witness’s remarks, not those of the prosecutor during opening statement. See Babcock, 145 Wn. App. at 163 (the “irregularity” was hearsay testimony about a dismissed charge).

¹⁰ State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

court's order in limine and testified that the injuries were a result of non-accidental trauma.¹¹ Additionally, as the State notes, the formal charging language for the crime contained in the information and the jury instructions referred to child "torture," which is as prejudicial, if not more, than the term "child abuse."¹² The comment was also cumulative of evidence properly admitted. Feldman testified that he had extensive experience with child abuse and that he had a "vivid" memory of P.T.'s injuries, the extent of which was "quite dramatic." The court also permitted, and Turner elicited, testimony that Feldman's expertise was "child abuse," and the nurse who saw the spanking incident at the hospital testified without objection that she made a report of "child abuse" to CPS.¹³

Turner next contends that the prosecutor improperly elicited testimony from Dr. Feldman about child torture and abuse because it was a violation of the order in limine and amounted to impermissible profiling evidence. We disagree.

Before Dr. Feldman testified, the prosecutor asked the court to clarify its ruling prohibiting him from using the term "child abuse," when testifying about P.T.'s injuries.

¹¹ The only reference to "abuse" was in the following testimony to which there was no objection: "The types of body injuries you almost only see with inflicted injury so that the whole constellation of, none of it fits with accidents and all of it fits with abuse, or with inflicted injuries."

¹² Both the information and the "to convict" instruction included the language, "the defendant had previously engaged in a pattern or practice of assaulting P.L.T. which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks or causing P.L.T. physical pain or agony that was equivalent to that produced by torture."

¹³ The cases relied on by Turner involved prejudicial remarks by witnesses (not the prosecutor), the prosecutor's reference to excluded evidence during examination of a witness and the prosecutor's closing argument that referenced stricken evidence, none of which occurred here. See State v. Farr-Lenzini, 93 Wn. App. 453, 460, 970 P.2d 313 (1990); State v. Wood, 44 Wn. App. 139, 146, 721 P.2d 541 (1986); State v. Jungers, 125 Wn. App. 895, 902-06, 106 P.3d 827 (2005).

The court ruled that he would be permitted to use the term in testimony about his qualifications, but would not be permitted to characterize the charged incident as child abuse. The prosecutor then examined Feldman as follows:

Q: Okay. You mentioned that one of the topics you are researching right now is child torture.

A: That's correct.

Q: Have you reached any findings with regard to commonalities in the victims of child torture?

A: Yeah we have. I am doing this with several other doctors around the country and we have found that it is very common for the victim child to be scapegoated and if the child is attributed with being willful or stubborn or having problems with eating or having problems with urine or bowel movements and these attributions in turn allow the abuser and often many of the other household members

[Defense counsel]: Your Honor, I am going to object at this time. Move to strike his answer.

Judge: I'm sorry?

[Defense counsel]: Move to strike this answer about research on torture.

Judge: On what basis counsel?

[Defense counsel]: Pretrial ruling. I can elaborate if you want.

Judge: All right. Excuse us. Counsel, side bar.

The sidebar was not recorded and no ruling on the objection was made on the record.

The record does not support Turner's argument that the prosecutor elicited testimony in violation of the order in limine. As discussed above, the court clarified that the order prohibited the State's witnesses from testifying that the trauma experienced in this case was "child abuse." But this testimony does not address the trauma suffered by P.T.; it discusses Dr. Feldman's research about child torture generally. Thus, the prosecutor did not violate the order in limine by this questioning.

Turner also contends that this testimony should have been stricken as improper profile evidence. But because the record does not indicate that he objected on this basis or that the trial court considered such an objection, he has failed to preserve the

issue for review. A party may not appeal a trial court's admission of evidence absent a timely and specific objection at trial.¹⁴ Here, the sidebar was not recorded and at most the record indicates that Turner objected based on a "pretrial ruling," presumably the order in limine prohibiting the use of the term "child abuse." In fact, Turner argues in his brief that the basis for the objection was the order in limine excluding reference to child abuse, not that it was improper profile evidence.¹⁵ Thus, by failing to object at trial that the testimony should have been stricken as improper profile evidence, he has waived the argument on appeal. Turner also fails to show a manifest error affecting a constitutional right that may be raised for the first time on appeal.¹⁶ Any error in the admission of this alleged profile testimony was simply an evidentiary error.¹⁷

Turner further argues that the prosecutor committed reversible misconduct by improperly disparaging defense counsel during closing argument. We disagree.

A prosecutor commits misconduct by personally attacking defense counsel, impugning counsel's character, or generally disparaging defense counsel as a means of convincing jurors to convict the defendant.¹⁸ A prosecutor's allegedly improper comments are viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given, which are

¹⁴ State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).

¹⁵ Turner states, "It is apparent from the context of the objection that the "pretrial ruling" to which counsel referred was the trial court's preclusion of the conclusory term "child abuse."

¹⁶ See RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)).

¹⁷ See In re Detention of Thorell, 149 Wn.2d 724, 757, 72 P.3d 708 (2003), cert. denied, 541 U.S. 990 (2004) ("We have clearly rooted our rejection of profile testimony in ER 403, ER 702, and ER 703.").

¹⁸ Warren, 165 Wn.2d at 29-30.

presumed to have been followed.¹⁹ Reversal is not required unless there is a substantial likelihood that the argument affected the jury's verdict.²⁰

During closing argument, the prosecutor stated, "[T]he defense has done a good job of raising self-willed red herrings to distract your attention from the real issue." Turner's counsel objected, stating, "I am going to object to arguing. The calling question, the defense calling question [sic] to the legitimacy of the defense and I would object to that." The trial court overruled the objection.

Turner contends that the prosecutor's comments amounted to an impermissible personal attack on defense counsel. But unlike the cases upon which he relies, the challenged remark here was directed at the defense strategy, not the attorney himself.²¹ Indeed, Turner's objection to the comment was that it questioned the legitimacy of the defense, not that it disparaged defense counsel.

Viewed in context, this remark was proper argument. It is not misconduct for the prosecutor to make a fair response to defense counsel's arguments.²² Here, the prosecutor was responding to the defense argument that there were other explanations for P.T.'s injuries, arguing that these explanations were not reasonable and were being used to distract the jury from the evidence that supported Turner's guilt. The prosecutor then went on to challenge the defense explanations for the injuries based

¹⁹State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

²⁰ Mak, 105 Wn.2d at 726.

²¹ See Bruno v. Rushen, 721 F.2d 1193, 1194 (1983) (prosecutor implied that defense counsel had tampered with a witness and suggested that the defendant's mere act of hiring counsel implied guilt); State v. Negrete, 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (prosecutor argued that defense counsel "is being paid to twist the words of the witnesses") (emphasis omitted).

²² State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

on the evidence in the record. She pointed out that Dr. Jung's testimony was not conclusive that the hole in P.T.'s corpus collosum was not the result of injury or trauma and that Turner himself admitted that he caused P.T.'s injuries.

But even if improper, Turner fails to show that the comment amounts to reversible error. In State v. Negrete, the prosecutor stated in closing argument that the defense counsel was "being paid to twist the words of the witnesses by Mr. Negrete."²³ While the court found the comments improper, it held that they did not deprive the defendant of a fair trial.²⁴ Considering the strength of the State's evidence, the isolated nature of the comment, and the court's instructions to the jury that counsel's remarks are not to be considered as evidence, the court concluded that the defendant failed to establish a substantial likelihood that the remark affected the jury.²⁵ Likewise here, Turner fails to establish any prejudicial effect of the prosecutor's remark. As noted above, there was strong evidence of guilt, the jury was properly instructed that the attorneys' remarks are to not be considered as evidence, and the remark was an isolated incident.

Finally, Turner contends that the trial court erred ordering a substance abuse evaluation as a condition of community custody because there was no evidence that substance abuse was involved in the commission of the crime. The State concedes that the condition should be stricken, but argues that the court should impose as a condition of community custody that Turner undergo an alcohol abuse evaluation and follow treatment recommendations because there was evidence that alcohol abuse

²³ 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (emphasis omitted).

²⁴ 72 Wn. App. at 67-68.

²⁵ 72 Wn. App. at 67-68.

contributed to the offense. The State points to Turner's admission of his history of alcohol abuse during the time that he had custody of and abused P.T., which is contained in the sentencing memorandum he submitted to the court. Because Turner did not file a reply brief or otherwise contest the alcohol abuse allegations and they do have support in the record, we remand for the trial court to strike the substance abuse condition, but to consider imposing a condition requiring an alcohol abuse evaluation and treatment follow up.

We affirm the conviction and remand for resentencing on the community custody conditions.

Grosse, J.

WE CONCUR:

Elemyon, J.

Cox, J.