IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ANJUM NAWAZ KHAN, Appellant.	))))))))))	No. 65536-1-I UNPUBLISHED OPINION FILED: June 20, 2011

Ellington, J. — Anjum Khan appeals his conviction for second degree rape. He contends certain testimony was improperly admitted and that the prosecutor committed misconduct by eliciting it. Khan also argues the court abused its discretion by denying his motion for a new trial based upon ineffective assistance of counsel. Finding none of these claims persuasive, we affirm.

BACKGROUND

Khan and K.D. became acquainted through friends on the social networking website MySpace and exchanged phone numbers. A few weeks later, K.D. agreed to go to Khan's apartment for pizza and a movie.

After eating, K.D. and Khan went to his bedroom to watch a movie. K.D. testified that the two kissed, but when Khan tried to put his hand in her shirt, she grabbed his hand and told him "no."[1] Khan resisted moving his hand and asked, "Why not? It's just

your boobs."[2] K.D. was annoyed and uncomfortable. She told Khan she was "a good girl."[3]

Khan tried to put his hand down the front of her K.D.'s pants. She grabbed his hand and told him no again. He again asked "why not?" and said no one would find out.[4] When K.D. suggested they just watch the movie, Khan said he would just go to sleep then. K.D. rolled onto her stomach so Khan could not touch that side and tried to think of an excuse to leave without making him angry. While K.D.'s back was turned, Khan began rubbing her bottom and then put his hands inside the back of her pants. Khan quickly got on top of K.D., pressing her flat on her stomach. A large man, Khan held both of K.D.'s wrists in one hand and pulled down her loose-fitting pants and underpants. When K.D. told him to get off, Khan told her, "It'll just take a couple minutes."[5]

K.D. testified Khan then penetrated her vagina with his penis. She told him "no" and "stop," started yelling and crying, and told him again that she was a "good girl" and "[hadn't] slept with a lot of people."[6] When Khan told her he was almost done, she told him she was not on birth control and urged him to stop. He did not stop then, but soon ejaculated and rolled off.

---

[1] Report of Proceedings (Mar. 23, 2010) at 83.

[2] Id.

[3] Id.

[4] Id. at 85.

[5] Id. at 94.

[6] Id. at 97-98. The court instructed the jury that the comment was not admitted for the truth of the matter asserted.

K.D. left immediately. She was hysterical and crying when she called a friend to report she had been raped. She then drove to Tacoma to meet several friends at the store where they worked, and together, they went to the hospital where K.D. underwent a sexual assault examination. Swabs taken during the examination revealed the presence of sperm in K.D.'s anal and perineal areas with a DNA profile matching Khan's.

Khan's defense was that intercourse did not occur. In his testimony, he denied that he had penetrated K.D. and claimed that he had ejaculated after K.D. fondled him behind her back and he rubbed his penis on her bottom.

The State charged Khan with rape in the second degree and rape in the third degree based on this one incident, and the jury found him guilty as charged.[7] After the verdict, Khan retained new counsel and filed a motion for arrest of judgment and for a new trial. The court denied this motion, as well as the subsequent motion to reconsider. Khan appeals.

DISCUSSION

Khan contends certain testimony was improperly admitted, the prosecutor committed reversible misconduct by eliciting it, and these errors deprived him of a fair trial. The challenged evidence consists of the sexual assault nurse's testimony concerning features of a sexual assault examination, which Khan argues conveyed the nurse's personal belief that K.D. was raped; a lieutenant's testimony concerning the nature of a search warrant, which he argues suggested that the prosecutor and judge

[7] The rape in the third degree count merged with the rape in the second degree count.

had predetermined his guilt; and a detective's testimony that he obtained certain information during Khan's "booking," which Khan contends eroded the presumption of

innocence by unfairly suggesting he was in custody or dangerous.

Because Khan raised no objections to any of the testimony he challenges on appeal, we may not consider his arguments unless he demonstrates a manifest error of constitutional magnitude.[8] To do this, he must show actual prejudice.[9] He cannot.

Sexual Aassault Examination

Before discussing the details of K.D.'s examination, Sexual Assault Nurse Examiner Nicole Albery testified generally about sexual assault examinations. The prosecutor asked Albery to talk about "the notion of obtaining consent to perform an examination."[10] Albery said she tells patients about the process, the evidence she will try to collect and how she will collect it, and what happens to the evidence. "[F]rom there we also talk to her about crime victims' compensation, and she tells me what parts we can do and what parts we can't do."[11]

The prosecutor asked Albery to explain the crime victim's compensation fund. She responded:

> A: The State of Washington has a fund set aside called crime victims' compensation, and so anyone in the state of Washington who is a victim of a crime is entitled to apply for those benefits. And what that means is that the emergency room visit is automatically covered, the screening exam—the medical screening exam here, as well as my portion of the exam, the actual evidence collection.
>
> Q: So in other words, you are not paying out-of-pocket medical expenses—

---

[8] RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).

[9] State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

[10] RP (Mar. 22, 2010) at 147.

[11] Id. at 148.

A: No.

Q: —because you happen to be a victim of a crime?

A: That is correct.[12]

The prosecutor then asked Albery why she informs patients that they may decline any portion of the exam. Albery responded:

> This process of doing this examination is pretty invasive. Especially after being in a sexual assault, the patient is traumatized at that point already. And then to have a stranger, me, look at her body, every single inch of it, take pictures of it, document it, for her to tell me what happened, it's traumatic. So the last thing that I want to do is retraumatize her all over again.[13]

Nothing in this portion of Albery's testimony related specifically to K.D.'s examination or allegations. Indeed, the challenged testimony occurred before Albery began to discuss her examination of K.D. and did not refer to K.D. or Khan. Rather, the testimony and the questions that elicited it were framed in general terms about Albery's procedure in examining patients reporting a sexual assault.

Because Albery expressed no opinion as to Khan's guilt or K.D.'s veracity and none can reasonably be inferred, we see no possibility of prejudice. Accordingly, Khan may not raise the issue for the first time on appeal. And since prejudice must also be shown to prevail on a claim of prosecutorial misconduct, Khan cannot establish that claim even if the prosecutor's questions were improper.[14]

---

[12] Id.

[13] Id. at 149.

[14] State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (to prevail on a claim of prosecutorial misconduct, appellant must show both improper conduct and resulting prejudice).

Search Warrant

During testimony by Bellevue Police Lieutenant Kleinnecht about his participation in the execution of a search warrant at the apartment where the incident occurred, the prosecutor asked, "[J]ust as a general matter, what is a search warrant, and what authority does a search warrant give you, and from whom do you get the authority?"[15] The lieutenant explained:

> A: A search warrant is a document that is approved by—usually by a King County prosecutor and then submitted to a judge in person, basically outlining the elements of a crime that we believe has occurred, the location that we believe . . . evidence will be found, which is usually the location where the crime occurred, the type of evidence that we believe will be found there, and it requests permission to go to that location to collect evidence.
>
> Q: And this permission slip, if you will, from a judge to go to a particular location, you need that obviously before you go to the location to search it?
>
> A: Yes. It gives us the authority to break and enter if nobody shall be home so we can go in there and do what we need to do to collect evidence.[16]

Khan contends this testimony constituted improper "vouching" for the State's case and conveyed to the jury that the prosecutor and judge had already determined his guilt.

The lieutenant's two sentences on this topic conveyed nothing more than that the police believed a crime had occurred and that a judge issued a warrant allowing them to search Khan's residence. Unlike the cases on which he relies,[17] the witness

---

[15] RP (Mar. 24, 2010) at 75.

[16] Id. at 75-76.

[17] See United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006) (government introduced testimony explaining the extensive procedures it used to obtain court

did not testify in elaborate detail about the process for obtaining a warrant, nor did he actually state that the judge had determined probable cause existed to show that a crime had occurred. While the information he provided was arguably irrelevant, we see no likelihood of prejudice. Accordingly, Khan may not raise the issue for the first time on appeal and cannot establish reversible misconduct.

Booking

The prosecutor asked Detective Jerry Johnson whether he had obtained the defendant's name and date of birth "for the purposes of documenting in booking, if you will, of the defendant."[18] The detective answered, "Yes."[19]

Khan contends the evidence that he was booked "into jail"[20] undermined his constitutional right to the presumption of innocence by conveying that Khan was either in custody or considered dangerous. He relies on cases in which defendants were shackled or gagged in the jury's presence,[21] appeared in jail attire,

---

authorization for wiretaps on the defendants' phones and suggested several senior government attorneys and agents believed probable cause existed to show the defendants were involved in a drug conspiracy); United States v. Brooks, 508 F.3d 1205, 1211 (9th Cir. 2007) (government improperly vouched for the strength of its case by "discussing at length the process involved in obtaining a wiretap authorization," which "indicated that many government attorneys and a federal judge had decided that [the defendant] was guilty"); State v. Stith, 71 Wn. App. 14, 17, 856 P.2d 415 (1993) (reversal required where prosecutor argued that "incredible safeguards" prevented a case from coming to court without good evidence and that "the question of probable cause is something the judge has already determined").

[18] RP (Mar. 24, 2010) at 165.

[19] Id.

[20] Amended Br. of Appellant at 27.

[21] See Illinois v. Allen, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (shackling or gagging should be a last resort for an obstreperous defendant because it "might have a significant effect on the jury's feelings about the defendant," impair the dignity and decorum of the proceeding, and impede the defendant's ability to

[22] or where mug shots or other information improperly suggested the defendant had been arrested or incarcerated on another occasion.[23] The rationale is that jurors might infer that a person in custody during trial is apparently considered dangerous, or a person who has been arrested or incarcerated for other crimes is more likely to be guilty.

Here, there was no evidence that Khan was in custody or that he had been incarcerated or arrested on any other occasion. No one testified that he was booked "into jail." Rather, the evidence was that Khan was not in custody pending or during trial.[24] Further, "booking" does not refer to incarceration. Its common and legal meaning is to document a charge or arrest in a police register.[25] It would not have

---

communicate with counsel); Duckett v. Godinez, 67 F.3d 734, 747-48 (9th Cir. 1995) (shackling may also confuse and embarrass defendant, thereby impairing his mental faculties, and may cause pain; it comports with due process only when used as a last resort to protect an essential state interest).

[22] See Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (denial of due process to compel a defendant to appear in jail attire, recognizable to the jury as such); accord State v. Stevens, 35 Wn. App. 68, 665 P.2d 426 (1983) (recognizing the rule).

[23] State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000) (reference to a photograph the sheriff's office already had "on hand" unfairly suggested defendant had been arrested or convicted on another charge); United States v. Fosher, 568 F.2d 207, 213 (1st Cir. 1978) (mug shots are generally indicative of past criminal conduct from which jury is likely to infer such behavior).

[24] Khan's friend Diana Dreve testified that she regularly went to movies and restaurants with Khan during the two years before trial and that Khan had driven her home the night before her testimony at trial. See RP (Mar. 24, 2010) at 61-62, 71.

[25] Webster's Third New International Dictionary 253 (1993) ("book" means "to enter the name of and tentative charges against (a person) usu. in a police register"); Black's Law Dictionary 206-07 (9th ed. 2009) ("book" means "[t]o record the name of (a person arrested) in a sequential list of police arrests, with details of the person's identity (usu. including a photograph and a fingerprint), particulars about the alleged offense, and the name of the arresting officer").

been news to the jury that Khan had been arrested on the charges being tried before it. Admitting the testimony was not error and eliciting it was not misconduct.

Motion For New Trial

Khan argues the court abused its discretion by denying his motion to arrest judgment and for a new trial. He contends the Supreme Court's clarification in State v. Jones that the rape shield statute does not bar evidence of contemporaneous sexual conduct means that his counsel was ineffective for failing to present certain evidence.[26]

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[27] "The decision to grant or deny a new trial based on a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion."[28]

In Jones, the defendant proffered evidence that the sexual intercourse occurred at a drug-fueled sex party at which the victim and another woman danced for money and engaged in consensual intercourse with three men.[29] The trial court excluded any reference to the sex party, citing the rape shield statute.[30] The Supreme Court reversed, concluding that the exclusion of the highly probative evidence was error because it deprived the defendant of his ability to testify to his version of the incident.[31]

In contrast, the evidence proffered here is not relevant, let alone highly probative. Nor does it relate to contemporaneous sexual conduct. It consists of

---

[26] 168 Wn.2d 713, 230 P.3d 576 (2010).

[27] State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

[28] Id.

[29] Jones, 168 Wn.2d at 717.

[30] Id. at 717-18.

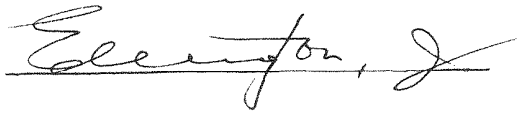
[31] Id. at 721.

MySpace

messages showing that K.D. was the first to initiate contact—nearly one month before she went to his apartment; that she knew Khan worked at a nightclub that she attended nearly one month after the incident; and that about one week before the incident, K.D. disclosed to Khan that she "woke up in [a mutual friend's] bed."[32] Jones does not apply.

Further, because this evidence does not make it any more or less likely that Khan penetrated K.D.'s vagina, the only fact at issue, its lack of relevance makes it inadmissible apart from the application of the rape shield statute.[33] Defense counsel, therefore, was not remiss for failing to offer that evidence. Further, since Khan's defense was not consent, but that penetration did not occur, we see no likelihood that presenting evidence of K.D.'s past sexual conduct or reputation for promiscuity would have changed the outcome of the trial. And finally, the trial court observed it would not have admitted the evidence if offered, so Khan can show no prejudice. Khan has not satisfied either prong of the two-part test for ineffective assistance of counsel, and the court did not abuse its discretion in refusing a new trial on that basis.

Affirmed.



WE CONCUR:

[32] Clerk's Papers at 94.

[33] See ER 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").