IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASINGTON, Respondent, v. DION EARL JOHNSON, Appellant.	)	No. 65703-8-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2012

Appelwick, J. — Johnson appeals from his conviction for counts of felony harassment, felony violation of a court order, tampering with a witness, and bail jumping. He argues his right to a fair trial was violated by limitations on cross-examination of the victim, by prosecutorial misconduct during closing argument, and by an outburst during opening statements. Johnson also argues the trial court gave an improper unanimity instruction in the special verdict form for sentencing enhancements and miscalculated his offender score by including a federal conviction. Johnson is

barred from raising the unanimity instruction argument under the invited error doctrine. Any other alleged error at trial was harmless. We affirm.

FACTS

Denise Hunter and Dion Johnson have known each other for approximately 11 years and have dated on and off during that time. They have two children together, and they have lived together for stretches as well. Hunter became pregnant with their first child in 2001, when she was 18 years old. Johnson was often abusive of Hunter during the relationship. He was convicted of a 2005 assault on Hunter, after punching her in the face, breaking her nose, and knocking her unconscious. Because of that conviction, the trial court entered a no contact order.

Despite the court order, after Johnson got out of prison in 2008, he and Hunter began seeing each other again, and Hunter became pregnant with their second child, who was born in February 2009. He continued to abuse her both emotionally and physically. Hunter eventually began cooperating with law enforcement and stopped interacting with Johnson. She moved to a confidential shelter for domestic violence victims and began receiving services from domestic violence counselors. Each of the ten counts charged in this case occurred after Hunter took these steps. The charged crimes included:

Count I: Felony Violation of a Court Order (FVCO) (11/18/08)

Count II: Felony Violation of a Court Order (2/14/09)

Count III: Felony Harassment (2/14/09)

Count IV: Tampering with a Witness (8/3/09)

Count V: Felony Violation of a Court Order (8/23/09)

Count VI: Tampering with a Witness (8/23/09)

Count VII: Bail Jumping (9/11/09)

Count VIII: Felony Violation of a Court Order (9/18/09)

Count IX: Tampering with a Witness (9/18/09)

Count X: Felony Violation of a Court Order (12/8/09)

Count I (FVCO): The facts giving rise to the first count arose on November 18, 2008, when Hunter was approximately 7 months pregnant with her second child and went to a health clinic for a prenatal checkup. Hunter went with her daughter and her grandmother. While Hunter's grandmother was waiting in the car, Johnson pulled up and asked her where Hunter was. When Hunter was inside the clinic, Johnson approached her and tried to kiss her and grab her. Hunter wrote down the license plate number of the car in which Johnson arrived. The nurse encouraged Hunter to call the police but she did not.

Count II (FVCO) and Count III (Felony Harassment): On February 14, 2009, Hunter went to Champ's Restaurant and Bar with her cousin and a friend. Hunter was nine months pregnant at the time. Hunter testified she saw Johnson's sister and cousin when she arrived, and decided to stay in the parking lot rather than go inside. Johnson then came towards her and grabbed her forcefully by her hair. He said, "I got something for you and whoever you're calling on the phone." Hunter believed, from past experience, that Johnson meant he had a gun in his car. Hunter's friend pulled the car around, picked her up, and they drove away. Hunter tried to call the police

when she got into the car, but her phone broke. She was able to call again later from a bowling alley. Police were dispatched to Champ's, where they located Johnson and arrested him.

Count IV (Witness Tampering): Hunter testified that on August 3, 2009, while she was living in the domestic violence shelter, Johnson called her from a blocked phone number and they had a 25 minute conversation. Johnson offered to return belongings he had stolen from her if she would stop cooperating with law enforcement. He also offered her $5000 and a car, if she would not show up in court to testify. Hunter called her advocate and provided police with her phone records.

Count V (FVCO) and Count VI[1] (Witness Tampering): On August 23, 2009, Johnson again called Hunter from a blocked number. They spoke for a short period of time, and Johnson offered her $3000 to not appear in court and testify.

Count VII (Bail Jumping): On September 11, 2009, Johnson failed to appear as required at a scheduled court hearing on the FVCO charge that was filed as a result of the incident in November 2008 at the clinic.

Count VIII (FVCO) and Count IX (Witness Tampering): On September 18, 2009, Johnson called Hunter from a blocked number, while she was sleeping. He was "frantic" and asked her not to let the police get him. He again offered to return belongings he had taken from Hunter if she would refrain from testifying in court. He also told her that his family would be angry with her if she went to court

Count X (FVCO): On December 8, Hunter was contacted by Johnson via an intermediary third party, Toni Washington. Washington is Hunter's cousin, and has a

[1] Johnson was acquitted of Count VI.

child in common with one of Johnson's cousins. Washington told Hunter that Johnson had just called her and that Hunter's charges were the only thing preventing him from being released from jail. Washington told Hunter she needed to drop the charges. Hunter was angry that Washington would agree to contact her on Johnson's behalf and reported the call to her case detective. At trial, the State introduced a recording of Johnson's call to Washington as an exhibit, which was played for the jury. Despite this recording, Washington testified at trial that she did not talk to Hunter on that date.

With the exception of the bail jumping charge, each of these counts included a domestic violence aggravating factor, based on the State's allegations of an ongoing pattern of psychological, physical, or sexual abuse of the victim. The trial court conducted a trial on these charges in January and February 2010. At the conclusion of trial, the jury convicted Johnson of 9 of the 10 counts as charged, including the domestic violence aggravating circumstances. Johnson was acquitted of count VI. Johnson timely appeals.

DISCUSSION

I. Confrontation

Johnson argues the trial court abused its discretion and violated his constitutional right to confront Hunter when it ruled that he could not cross-examine Hunter regarding her drug use and could not present his related expert testimony. He contends such evidence should have been admissible as relevant to Hunter's credibility, to the extent that drug use could have affected her ability to perceive or testify accurately about the events in question.

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Wash. Const. art. 1, § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). The right to cross-examine an adverse witness is not absolute, however. Darden, 145 Wn.2d at 620. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. Id. at 620-621. And, such determinations are limited by general considerations of relevance. Id. at 621; see ER 401, 403. A defendant's right to introduce relevant evidence must also be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. Darden, 145 Wn.2d at 621. The trial court should exclude impeachment evidence if it is only marginally relevant and its probative value is outweighed by the potential for prejudice. See State v. Carlson, 61 Wn. App. 865, 875-76, 812 P.2d 536 (1991).

On January 27 and February 1, 2010, the trial court heard substantial pretrial argument from each side on the matter of Hunter's drug use and her mental health issues. On January 27, 2010, the trial court indicated that for testimony about Hunter's drug use to be elicited, an expert would be required to establish that it would affect her ability to perceive the events she testified about accurately. On February 1, 2010, the court decided to hear from Hunter outside the presence of the jury. Hunter stated that she was diagnosed with post traumatic stress disorder, or PTSD, and suffered from

nightmares, anxiety attacks, and flashbacks of the violence she suffered. She also stated that she could distinguish between flashbacks and reality; her symptoms did not impact her perception of actual events. When asked about her drug use, Hunter testified that she had used PCP (phencyclidine) in late November 2009, and the last time she had used the drug was approximately a year and a half prior to that, before her second pregnancy.[2] The events giving rise to these charges occurred between November 2008 and December 2009, and the event that was closest in time to the November 2009 drug use, was Hunter's phone conversation with Washington on December 8, 2009. Hunter stated she was not under the influence of PCP during any of the relevant events.

The defense identified an expert witness, a pharmacologist, to address the issue. However, it made no formal offer of proof to establish—based on what Hunter used, how much she used, and when she used it—that she was necessarily unable to accurately perceive the offenses she alleges were committed. The trial court ruled that Hunter's drug use was not admissible, stating: "I don't think there's any basis for the defense to elicit the drug use because there just isn't any way of tying that into what's going on here and there is no evidence that it affects either her perception or her ability to recall or ability to testify truthfully now." It also ruled that Hunter could be questioned about the symptoms of her PTSD, though not the diagnosis itself, because the symptoms were relevant to her perception and ability to recall relevant events.

Johnson argues that evidence of Hunter's drug use should have been admitted

[2] Hunter referred to PCP as "sherm", which the State describes as "generally a marijuana cigarette dipped in embalming fluid."

and was particularly vital in this case, where her credibility was so central to the State's case. He relies on State v. Brown, 48 Wn. App. 654, 739 P.2d 1199 (1987) and State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974) to support his argument. In Brown, the appellate court ruled that evidence showing the testifying victim had used LSD (lysergic acid diethylamide) was relevant and should have been admitted at trial. 48 Wn. App. at 660. But, that case is plainly distinguishable because the victim's drug use occurred on the night of the crime, in a way that could have impacted her ability to perceive and recall what was occurring during the crime itself. By contrast, there was no evidence that Hunter was under the influence of PCP during any of the relevant incidents here. And, Renneberg similarly does not support Johnson's argument. While the Supreme Court upheld the admission of evidence related to drug use there, that was because it addressed the witness's character, rather than credibility. Renneberg, 83 Wn.2d at 737-38. The court also recognized how prejudicial evidence of drug use could be:

> In view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of the average juror.

Id. at 737. The same reasoning is applicable in this case. The evidence was that Hunter had not used drugs during the relevant events and that her drug use thus did not impact her truthfulness or her ability to credibly recall those events. And, the same concerns of undue prejudice exist here as well.

State v. Tigano, a case the State relied on at trial, is on point. 63 Wn. App. 336, 818 P.2d 1369 (1991). The appellate court held that, where there was no evidence of

drug use at the time of the events, the trial court exercised sound discretion by excluding evidence of the drug use. Id. at 345. "For evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial. . . . Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial." Id. (footnote omitted) (citations omitted) (citing Renneberg, 83 Wn.2d at 737).

Johnson attempts to distinguish Tigano, arguing that if he had been allowed to present his expert testimony, he would have established that Hunter's PCP use impacted her ability to perceive accurately, even at the time of the events in question or at trial. However, Johnson did not make a formal offer of proof. The drug use was not relevant to Hunter's credibility; on this record, his argument is mere speculation. It had no probative value to be balanced against the clear prejudice associated with drug use. Darden, 145 Wn.2d at 621. We hold that Johnson has not demonstrated the trial court violated his constitutional right to confrontation and cross-examination of the witness.

Finally, Johnson argues this line of questioning on Hunter's drug use should have been admissible under the "open door" doctrine. He points to testimony from Hunter where she stated: "My daughter wasn't living with me. She's living with my grandmother because of the abuse." Under the open door doctrine, a party may "open the door" for the other party to pursue evidence that would not otherwise be admissible. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 303 (2011). Once a party has

raised a material issue, the opposing party is generally permitted to explain, clarify, or contradict the evidence. Id. at 939. This is the long-recognized rule that when a party opens up a subject of inquiry, that party "'contemplates that the rules will permit cross-examination or redirect examination . . . within the scope of the examination in which the subject matter was first introduced.'" Id. (alteration in original) (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Johnson argues Hunter's testimony raises the issue of their daughter's dependency matter, yet paints an incomplete picture, suggesting their daughter was found dependent based on Johnson's abuse, without mentioning Hunter's drug use. But, as the State points out, the issue in question must be material, and the trial court retains the discretion whether to allow additional evidence. Here, Hunter's reference to her daughter and the dependency matter that was ongoing was not material to Johnson's separate criminal case. The trial court acted within its discretion when it declined to apply this doctrine and concluded that Hunter's testimony did not open the door to her occasional drug use.

II. Prosecutorial Misconduct

Johnson argues the prosecutor committed misconduct by expressing a personal view and vouching for Hunter's credibility during closing argument. Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The defendant bears the burden of establishing the impropriety of the statements. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence

presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Monday, 171 Wn.2d at 675. Further, the prosecutor may not make heated partisan comments that appeal to the passions of the jury. In re Pers. Restraint of Davis, 152 Wn.2d 647, 716, 101 P.3d 1 (2004). The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727.

A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Monday, 171 Wn.2d at 675. When addressed for the first time on appeal, reversal is only required if the conduct is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008). Prejudice is only established when there is a substantial likelihood the prosecutor's comments affected the verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Johnson first points to two specific comments, which he contends were intended to inflame the jurors' emotions and were an improper reflection of the prosecutor's personal opinions. He did not raise an objection following either of these statements, and accordingly bears the burden of demonstrating that they were not only prejudicial but also flagrant and ill intentioned. In the first, the prosecutor stated:

> Denise's testimony is corroborated by other witnesses' testimony and by other evidence you may have heard in this case. Because of that there is no reason to doubt her.

Johnson correctly asserts it is improper for a prosecutor to state a personal belief

vouching for the credibility of a witness. Warren, 165 Wn.2d at 30. But, this is not what the prosecutor did here. Rather, she asked the jury to find Hunter's testimony to be credible based on the evidence at trial. She encouraged the jury to rely on evidence rather than on the prosecutor's opinion. We hold that this comment was proper and, certainly, was not flagrant, ill-intentioned, or incurably prejudicial.

The second comment Johnson takes issue with was:

> In opening, defense told you that Denise was a scorned woman. I don't believe Denise is scorned and I believe that hell hath no fury like a woman who's gone through nine years of physical and emotional abuse and has come out the other side through domestic violence support advocacy.

Johnson fixates on the prosecutor's use of the phrases "I believe" and "I don't believe" as evidence of the injection of personal opinion. But, while the State acknowledges the use of such phrases should be avoided, here it is clear that they do not concern the elements of the charged crimes, nor do they reflect a particular personal belief about Hunter's credibility or veracity. Indeed, courts weigh such comments not in a vacuum, but in the full trial context, including the evidence presented, the total argument, and the issues in the case. Monday, 171 Wn.2d at 675. Within that greater context, the prosecutor's comment did not reflect a personal belief. It was directly responsive to the arguments of defense counsel, arguing why the jury should not hold Hunter's assertive demeanor on the witness stand against her when evaluating the credibility of her testimony. Johnson has not adequately demonstrated that this comment was flagrant and ill-intentioned, nor has he shown how it prejudiced his trial.

Johnson also points to a third comment made by the prosecutor and contends

that it resulted in cumulative or compounded error when taken together with the alleged errors above. The third statement by the prosecutor that he points to was:

> And then December 8th, really, Toni Washington was going to get up on that stand and spill it for me, really, she was. I don't think so. Because Toni is exactly where Denise was 14 months, 24 months, five years ago. She's hooked into a bad relationship - -
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Sustained.

Johnson did not request a curative instruction and one was not given. This remark suggests that Johnson's witness, Washington, would not be truthful or credible because she was in a bad relationship. There was nothing in the record to reflect that Washington was in a bad relationship and this comment was thus improper, as the trial court recognized and as the State concedes. However, the record does not establish that this comment was flagrant or ill-intentioned.

Johnson relies on State v. Fleming, 83 Wn. App. 209, 215-16, 921 P.2d 1076 (1996), in support of his compounding errors argument. In that case, there were multiple errors, which, taken together and by cumulative effect, rose to the level of manifest constitutional error. Id. But, here, because we reject Johnson's arguments on prosecutorial misconduct above, Johnson has not demonstrated prejudice at his trial. We reject Johnson's prosecutorial misconduct argument.

III. Trial Irregularity During Opening Statements

Johnson next argues his constitutional right to a fair trial and an impartial jury was violated when his wife, a spectator at trial, interjected with an outburst during opening statements. She came into the courtroom and exclaimed, "Your Honor, she's

scaring me" and "[T]his lady is scaring me." It was clear that she was referring to Hunter. The trial court instructed Johnson's wife to leave. Johnson did not request a curative instruction or move for a mistrial.

In order to preserve a trial irregularity issue for appeal, counsel must request some relief at the time the irregularity occurs. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (defense failure to object during prosecution closing argument or ask for curative instruction or immediate mistrial precluded appellate review); State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007); see also 14A Karl B. Tegland, Washington Practice: Civil Procedure § 30:41, at 281 (2d ed. 2009). A party may seek relief in the form of a curative instruction or immediate mistrial. See Swan, 114 Wn.2d at 661. Johnson's counsel failed to request any relief from the court at the time. Johnson argues the issue should be preserved because his trial attorney mentioned it in a motion for a new trial, which she filed shortly before she withdrew and was replaced by another attorney following Johnson's conviction. But, this relief was not requested at the time of the irregularity. Moreover, as the State points out, Johnson's new counsel did not ask the trial court to rule on the motion, and it was thus never addressed.

A party who fails to preserve an error may be entitled to review if the defendant raises a manifest error affecting a constitutional right. RAP 2.5(a)(3). Johnson asserts that the error implicated his constitutional right to a fair trial and impartial jury. A defendant claiming such an error has the burden of showing that the alleged error actually affected his rights. State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002).

"'[I]t is this showing of *actual prejudice* that makes the error "manifest", allowing appellate review.'" Id. (alterations in original) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Johnson argues his wife's outburst left the jurors to extrapolate and wonder at issues beyond those presented to it. But, he offers no support for the assertion that he suffered actual manifest prejudice to his constitutional rights as a result of the outburst. Indeed, his counsel's failure to seek a curative instruction or mistrial at the time suggests it did not seem prejudicial to his case.

The cases that Johnson cites in support of his claim involve facts that are distinguishable and much more extreme than those in this case. For example, he cites to Woolfork v. State, 81 Ga. 551, 8 S.E. 724 (1889), a case from the Supreme Court of Georgia. The court there granted a new trial, in part because of a disturbance during closing argument, when "'from the crowd in the rear of the court-room came, in an excited and angry tone, the cry "Hang him!" "Hang him!" and some of the crowd arose to their feet.'" Id. at 727. Johnson also cites to Manning v. State, 37 Tex. Crim. App. 180, 184-85, 39 S.W. 118 (1897), where a large crowd of courtroom spectators crowded around the jury and the bench. On several instances, the crowd cheered loudly during the prosecution's opening argument without reprimand or attempt at order from the court. Id. At the end of opening argument, the crowd "broke into a wild and uproarious applause, cheering, clapping their hands, and one throwing his hat into the air." Id. at 185. That the courts in those cases found the spectator conduct to be improper and prejudicial has little bearing on the facts of the present case; they do not support Johnson's assertion that his wife's outburst constituted a prejudicial irregularity

of constitutional magnitude.

We hold that Johnson waived this issue by failing to request any form of relief at the time of trial.

IV. Special Verdict

Johnson argues in the alternative that even if his conviction is affirmed, the special verdicts of the domestic violence aggravating factor should be vacated because the trial court gave an erroneous unanimity instruction under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

While unanimity is required to find the presence of a special finding, it is not required to find the absence of such a special finding. Id. at 147. In State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011), a panel of this court applied Bashaw, and found that a special verdict instruction that was essentially identical to the one given in Johnson's case, was erroneous. In both Ryan and in this case, that instruction read, in relevant part:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Ryan, 160 Wn. App. at 947 (footnote omitted). The State does not dispute that this instruction was error. Instead, the State argues that Johnson's claim is barred under the invited error doctrine. Johnson does not address this argument.

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the requested instruction was given. State v. Boyer, 91 Wn.2d

342, 345, 588 P.2d 1151 (1979). This doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

Here, the erroneous instruction was provided by the State, not by Johnson. But, Johnson's trial counsel reviewed the proposed instructions and signed them to indicate assent between the parties. Those actions were not akin to mere silence in the face of error. His counsel indicated affirmative agreement to the instructions by signing them, more akin to jointly proposing them. We hold that this is invited error and that Johnson's claim is barred.

V. Offender Score

Johnson argues the trial court erroneously calculated his offender score during sentencing by including his federal bank fraud conviction. He contends the State failed to prove that the conviction was comparable to a Washington felony. But, the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, provides that any federal felony is included in a defendant's offender score whether it is comparable to a Washington felony or not. The SRA provides, in relevant part:

> Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). As the State points out, this provision makes plain that a prior federal felony conviction counts as at least one point, regardless of whether it is comparable to a Washington felony.

The prosecutor provided a certified copy of Johnson's federal judgment and sentence, as well as a copy of the federal bank fraud statute. The judgment and sentence reflect that Johnson was sentenced to a term of 24 months in custody and five years of supervised release after that, and was ordered to pay $47,028 in restitution. Bank fraud is a felony, and under RCW 9.94A.525(3), this conviction was properly included as a point in Johnson's offender score. We reject Johnson's argument. A comparability analysis was not required

VI. Cumulative Error

Lastly, Johnson argues the aggregate effect of the errors he raises above denied him a fair trial and merit reversal. Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Because his above arguments fail, we hold that there was no cumulative error.

We affirm the conviction and the special verdict domestic violence sentencing enhancements.

Appelwick, J.

WE CONCUR:

Cox, J.