IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN JAY FOSTER, Appellant.	)	No. 65726-7-I DIVISION ONE UNPUBLISHED OPINION FILED: November 7, 2011

Appelwick, J. — John Foster appeals his conviction of violation of a no-contact order. He argues he was prejudiced by prosecutorial misconduct. He also argues that the trial court did not have authority to impose a domestic violence penalty, or to impose discretionary costs and fees without substantial evidence that he had the ability or likely future ability to pay. We strike the finding that John had the ability to pay the costs imposed; it was premature. We affirm.

FACTS

After 11 years of marriage, John and Mary Foster filed for divorce.[1] John moved into the Queen Anne motel and the district court entered a no-contact order prohibiting him from contact with Mary.

While the no-contact order was in effect, Mary went to John's motel room to pick up some divorce paperwork. When Mary arrived at John's room, she knocked on his door. John looked through his window, saw it was Mary, and let her in. Their interaction quickly turned into an argument regarding John's alleged infidelity. The argument escalated into a physical altercation. The precise facts surrounding the fight were disputed at trial, but at some point Mary bruised and cut her knee on the bed frame. During the struggle, Mary yelled for someone to call 911. Eventually, someone did call 911 and the police responded. When questioned by the responding officer, John denied that he assaulted Mary. He admitted he let Mary into his room.

John was charged with violation of a no-contact order by assault. Mary testified that she "was in the wrong," that she "had no right being in his home," and that she pushed John. She also testified that John would not let her get up from the chair she was sitting in. When Mary managed to get up, John would not let her leave and threw her on the bed. The jury found John guilty as charged.

John asserted at sentencing that he has a substance abuse problem. There was no evidence presented that John was employed or employable. Nevertheless, the trial court found that John had an ability to pay legal financial obligations. Further, it ordered John to pay various discretionary costs and penalties, including a $100

[1] Because John and Mary share the same last name, we will refer to them by their first names. No disrespect is intended.

domestic violence assessment. John appeals.

DISCUSSION

I. Prosecutorial Misconduct

In its closing argument, the prosecutor rhetorically asked: "When are we responsible for our own behaviors? When do we stop blaming the victim?" In rebuttal, the prosecutor further argued:

> It's Mary's fault. Hasn't it always been Mary's fault. It was Mary's fault. He opened the door. It was Mary's fault that John Foster got mad. It was Mary's fault. Let's talk about responsibility, shall we.
>
> Mary. Mary the victim. She says, well, I just don't think I'm supposed to be here. She thinks it's her fault, too. Isn't that kind of normal in these situations? She might have been wrong, but she wasn't breaking the law, and that's what we're here to talk about, and that's why he's guilty. He broke the law. She didn't break a law. She made a mistake, which everybody acknowledges.

John argues the prosecutor attempted to appeal to the passion and prejudice of the jurors by referring to domestic violence themes even though there was no testimony concerning a history of domestic violence. He also argues the prosecutor impermissibly invited the jurors to consider matters outside the record by asking them what is normal in these situations.

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. 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. Further, the prosecutor may not make heated partisan comments which appeal to the passions of the jury. In re Pers. Restraint of Davis, 152 Wn.2d 647, 716, 101 P.3d 1 (2004).

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), cert. denied Warren v. Washington, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Prejudice is only established when there is a substantial likelihood the prosecutor's comments affected the verdict. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003).

John's argument relies on his assertions that Mary acknowledged she initiated contact, that Mary acknowledged she made a mistake by going to John's motel room, and that domestic violence was not an issue in this case. His argument is unpersuasive.

The jury was instructed that it is not a defense to a charge of violation of a court order that a protected person invited or consented to the conduct. The jury was further instructed that an act is not an assault if done with the consent of the person alleged to be assaulted. Defense counsel attempted to portray Mary as the instigator in both its cross-examination of Mary and in its closing argument. Mary's conduct was directly at

issue and whether her actions could be used to justify John's violation was directly addressed in the jury instructions. In this context, it was not improper for the prosecutor to ask in the state's closing argument "[w]hen do we stop blaming the victim?"

Likewise, it was not improper for the prosecutor to offer further argument regarding Mary's conduct after defense counsel argued in its closing argument that it was Mary's fault. Again, her conduct was directly at issue. The prosecutor's inquiry into what is "normal in these situations" was a rhetorical statement that did not rise to the level of being improper, let alone flagrant and ill-intentioned.

The prosecutor's statements were not prejudicial. To convict, the jury had to find that a no-contact order existed, that John knew of the order, that he violated a provision of the order, and that his conduct was an assault. It was undisputed that there was a valid no-contact order in place and that John knew of the order. The allegedly improper remarks concerned only whether Mary consented to or invited the violation. The jury instructions clearly indicated that Mary's consent or invitation was not a valid defense. RCW 26.50.035(1)(c); State v. Shuffelen, 150 Wn. App. 244, 259, 208 P.3d 1167, review denied, 167 Wn.2d 1008, 220 P.3d 210 (2009). The evidence of the violation is clear. We cannot conclude there was a substantial likelihood the prosecutor's comments affected the jury's decision.

II. Domestic Violence Assessment

At sentencing, the trial court found that John's crime was a domestic violence crime. It ordered John to pay a $100 domestic violence assessment pursuant to RCW 10.99.080. John argues that, because the jury did not specifically find that he committed a domestic violence offense, the trial court's finding cannot constitutionally

be used to increase his punishment. John relies on Blakely v. Washington for this assertion. 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 851 (2004). In Blakely, the sentencing court found that the defendant acted with deliberate cruelty. Id. at 303. The facts supporting the finding were neither admitted by the defendant nor found by a jury. Id. The court used the aggravating factor to justify a sentence 37 months beyond the standard range. See Id. at 303-04.

The trial court "may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence." RCW 10.99.080(1). The statutory definition of "domestic violence" includes any violation of a restraining order or no-contact order by one family or household member against another. RCW 10.99.020(5)(r). It was not disputed that Mary was John's spouse and the jury found he violated a no-contact order involving her. That crime is, by definition, a domestic violence crime. In determining the penalty, the trial court correctly applied the law to the facts that were found by the jury. It did not violate John's rights under the Sixth or Fourteenth Amendments.

Further, the domestic violence assessment does not implicate Blakely because it does not exceed the statutory maximum based on the facts the jury found. State v. Winston, 135 Wn. App. 400, 410, 144 P.3d 363 (2006). Violation of a no-contact order by assault is a class C felony. RCW 26.50.110(4). The maximum fine the trial court can impose for a class C felony is $10,000. RCW 9A.20.021(1)(c).

III. Discretionary Costs and Penalties

The trial court also made a finding that John had the ability or likely future ability to pay legal financial obligations. It imposed several discretionary costs and penalties.

John argues there is not substantial evidence to support the court's finding that he has the ability or likely future ability to pay legal financial obligations. Specifically, John argues it was known to the trial court that he was indigent and that he had a substance abuse problem. Further, he asserts that the trial court did not have any specific knowledge of Foster's employment history or future employability.

But, the trial court is not required to enter formal, specific findings regarding a defendant's ability to pay before it orders the defendant to pay costs. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The proper time to consider the defendant's ability to pay "is the point of collection and when sanctions are sought for nonpayment." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). There is no evidence that the state has attempted to collect the costs. The finding was unnecessary. We strike the finding that John has the ability or likely future ability to pay legal financial obligations.

We affirm.

Appelwick, J.

WE CONCUR:

Spearman, J.

Becker, J.