IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65934-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
SHAWN A. REID,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: March 12, 2012
_____	)	

Becker, J. — Shawn Reid appeals his convictions for attempted first degree rape, second degree assault with a sexual motivation, and unlawful imprisonment, as well as certain conditions of his sentence. He contends he was denied a fair trial by the prosecutor's misstatement of the presumption of innocence during closing argument and by the jury's consideration of two jurors' specialized knowledge of the effects of alcohol abuse. We conclude reversal is not required. Reid did not show a substantial likelihood that the prosecutor's misstatement had affected the verdict, and the jurors' remarks inhered in the verdict. The convictions are affirmed.

According to testimony at trial, on the evening of July 14, 2009, Reid was drinking and socializing with MB, a social and professional acquaintance in the real estate business. He later invited MB to stay the night in his motel room

because she needed a place to stay and he did not plan to sleep there that night. Later that night, MB was seen running through the motel complex and screaming. She was mostly naked and bleeding from her face, with one eye swollen shut. She had bruising and scratches on other areas of her body. Residents of neighboring rooms assisted her, and the police were called. She informed police that Reid had beaten her and tried to rape her. Reid was located and arrested in a nearby town early the following morning.

The State charged Reid with single counts of attempted first degree rape, second degree assault with a sexual motivation, and unlawful imprisonment. The trial lasted 8 days and included testimony by 22 witnesses.

In his closing and final rebuttal arguments on the final day of trial, the prosecuting attorney accurately described the State's burden of proof beyond a reasonable doubt on four separate occasions. In the last minute of his remarks, he stated, "The presumption of innocence ends after my argument." Defense counsel objected, "That's not the law," and the objection was sustained.

The jury convicted Reid on all three counts and answered "yes" to the special interrogatory on the assault charge.

After the trial concluded, the presiding juror remained and spoke to both counsel and the detective who served as the State's managing witness. The juror described the jury's thought processes concerning several aspects of the evidence presented, including the role that Reid's drinking earlier in the evening may have played in making Reid more aggressive at the time the attack was

alleged. The presiding juror disclosed that he was a recovering alcoholic and knew how coming down off of alcohol can affect one's moods. A second juror, a former bartender, had observed customers become aggressive in such a state. The two jurors had shared their experiences and opinions during deliberations.

Reid brought a motion for a new trial. He alleged juror misconduct on a theory that the two jurors' remarks concerning their personal experiences with alcohol amounted to the jury's consideration of extrinsic evidence. The State countered that the jurors' comments inhered in the verdict and could not be considered to impeach the verdict. The trial court denied Reid's motion.

At sentencing, the State asserted, and defense counsel and the court agreed, that the charge of second degree assault merged into the charge of attempted first degree rape, and that the remaining counts of attempted first degree rape and unlawful imprisonment comprised the same conduct. Reid was sentenced within the standard range. As part of his sentence, the court imposed community custody, with a list of 24 conditions.

MISSTATEMENT OF BURDEN OF PROOF

Reid seeks reversal of his convictions on a theory that the prosecutor's misstatement of the State's burden of proof violated his Fourteenth Amendment right to due process and his Sixth Amendment right to an impartial jury. He submits the misstatement was intentionally designed to mislead the jury and lessen the State's burden of proof. The State concedes the statement was improper and an inaccurate statement of law but contends the error was

unintentional and harmless in light of the full proceedings.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing both improper conduct and resulting prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Comments made by a prosecuting attorney during closing argument may constitute improper misconduct entitling a petitioner to a new trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To establish prejudice, the defendant must show 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), cert. denied, 518 U.S. 1026 (1996). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" McKenzie, 157 Wn.2d at 52, quoting Brown, 132 Wn.2d at 561.

Viewing the single misstatement by the prosecutor in the context of the full trial, we conclude it was not prejudicial. The prosecutor accurately described the burden of proof on no fewer than four occasions in his closing and rebuttal arguments before he made the objectionable comment. On one such occasion, within the first minutes of his closing argument, he stated:

> The State is the plaintiff and the State has the burden of proving each element of the crime to you beyond a reasonable doubt. That is the burden that the State of Washington is charged with. That is

the burden that has been assigned to prove to you.

After the court sustained defense counsel's objection to his misstatement, the prosecutor properly restated the burden a fifth time, urging the jurors to determine whether "the State has proved beyond a reasonable doubt all the elements" of each charge. The record does not reflect that the State was pursuing a deliberate or pervasive strategy of misleading the jury.

Moreover, the court cured the improper remark by immediately sustaining defense counsel's objection and by instructing the jury accurately as to the State's burden of proof.[1] See State v. Yates, 161 Wn.2d 714, 780-81, 168 P.3d 359 (2007) (The trial court's "unequivocal response to defense counsel's objection cured the improper remark" by the prosecutor.), cert. denied, 554 U.S. 922 (2008); State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (On appeal, the reviewing court presumes that jurors followed the trial court's instructions, absent evidence proving the contrary.).

Finally, the State's evidence to support Reid's conviction was abundant. Over the course of the eight day trial, the State presented proof that on the night of the alleged attack, MB was found screaming, mostly naked, bleeding, and looked "beat up." She had defecated in her underpants and had sustained multiple injuries. The defendant's DNA (deoxyribonucleic acid) was found on her ear, where she said he had licked her during his attempt to rape her. The State

[1] "Instruction No. 6 . . . The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists."

also presented proof that the defendant was observed running away from the motel complex in his stocking feet, and had told false stories to the trucker and cabdriver who drove him away from town that night.

These combined factors prevent us from finding a "substantial likelihood" that the prosecutor's single misstatement affected the jury's conclusions. Pirtle, 127 Wn.2d at 672. The prosecutor's misstatement does not warrant reversal.

JUROR COMMENTS DURING DELIBERATIONS

Reid assigns error to the court's denial of his motion for a new trial. He contends the two jurors' specialized knowledge and experience of alcohol abuse amounted to extrinsic expert opinions. The jury's consideration of those opinions violated his constitutional rights, he argues, including his right to a fair and impartial jury, his right to counsel, and his right to confront and cross-examine witnesses against him.

The right of trial by jury includes "the right to have each juror reach [a] verdict uninfluenced by factors outside the evidence." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). Accordingly, the consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial if there are reasonable grounds to believe the party has been prejudiced. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); CrR 7.5(a)(2). A jury, "in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations." State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989), citing United States v.

Howard, 506 F.2d 865, 867 (5th Cir. 1975). Extrinsic evidence, by contrast, includes "highly specialized" information that is "outside the realm of a typical juror's general life experience." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 274, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991).

However, a strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury. Richards, 59 Wn. App. at 271-72. In evaluating a claim of juror misconduct, the court may not consider matters which inhere in the verdict, including the effect of or weight accorded to the evidence by individual jurors or the jurors' intentions or beliefs. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989). The mental processes, both individual and collective, by which jurors reach their conclusions are all factors inhering in the verdict. Jackman, 113 Wn.2d at 777-78.

Here, the trial court found the jurors' comments relating to alcohol were within the common knowledge of jurors and inhered in the verdict. Even though both counsel gave differing accounts of how the presiding juror described the comments, the court concluded that "the subject matter . . . taken in its totality inheres in the verdict." The court explained:

> This is not a matter in which the juror brought in extrinsic experiments or precise experiences to rebut testimony. This was a juror who was just relating the fact that he and another juror were used to people drinking . . . Certainly one could draw a conclusion that by the time the event occurred, there was enough alcohol in the defendant's system that would affect his behavior.

Finding no misconduct in the jurors' comments, the court denied Reid's motion

for a new trial.

A trial court's ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion. State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). We find no abuse of discretion in the court's denial of Reid's motion. Experience with alcoholism and heavy drinkers is well within the common experience of jurors. The comments inhere in the verdict.

Reid contends that this case is factually similar to State v. Briggs, 55 Wn. App. 44, 59, 776 P.2d 1347 (1989), where this court did find misconduct requiring a new trial after a juror related to fellow jurors his personal experience of learning to control his stutter-like speech disorder. In Briggs, the defendant suffered from a profound stutter, but none of the victims of a string of robberies, assaults, and attempted rapes reported that their assailant had stuttered. The central issue in the case was whether a stutterer could control his speech impediment. Prospective jurors were asked during voir dire whether they had any experience with speech disorders. The juror in question had not disclosed his own speech impediment. On appeal, this court found prejudicial misconduct in the juror's withholding of material information during voir dire and in his sharing of his "highly specialized" knowledge with the jury on a topic addressed by expert witness testimony during trial. Briggs, 55 Wn. App. at 58.

This case is distinct from Briggs in several respects, most notably in regard to the Briggs juror's material withholding of his personal expertise despite

direct inquiries by counsel on voir dire. Here, defense counsel made no inquiry of members of the venire concerning experiences with alcohol abuse. The trial court observed:

> The fact that this particular juror said he was an ex-alcoholic, obviously that could have been explored on voir dire by either side. It wasn't. There wasn't anything that this juror did to hide any of this from anybody. He was simply relating his observation from his point of view. Nothing untoward in that.

Counsel had access to the jurors' biographical forms, on which Juror 5 admitted a prior DUI (driving under the influence of an intoxicant) and Juror 9 disclosed that she was a server at the Olive Garden. Where a prospective juror's specialized background is known to the parties who nonetheless allow the juror to serve, that juror's introduction of specialized information in evaluating the evidence during deliberation is not misconduct. See Richards, 59 Wn. App. at 273-74.

Sentencing conditions

Reid requests that we strike six of the conditions of community custody imposed by the court as part of its discretionary sentence. He assigns error to conditions 6, 7, and 8 (relating to possession of sexually explicit materials), and conditions 12, 13, and 14 (relating to drug use).

Reid was sentenced under RCW 9.94A.507(1)(a)(iii) (indeterminate sentence for attempted first degree rape). Sentencing under this statute includes a term of community custody. "Discretionary" conditions of community custody include "any crime-related prohibitions." RCW 9.94A.703(3)(f). The

statute defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Such conditions are usually upheld if reasonably crime-related. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). Sentencing conditions are reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

The court did not abuse its discretion in imposing conditions 6, 7, and 8, prohibiting Reid from possessing or accessing sexually explicit materials (condition 6); frequenting establishments whose primary business pertains to sexually explicit or erotic material (condition 7); and possessing or controlling sexual stimulus material, except as provided by a therapist for therapeutic purposes (condition 8). Reid was convicted of two sex offenses. See RCW 9.94A.030(46)(a)(iv) (attempted rape) and RCW 9.94A.030(46)(c) (felony with sexual motivation).[2] Conditions 6 through 8 are reasonably crime-related.

Conditions 12, 13, and 14, however, bear no apparent link to the crimes involved here. These conditions prohibit Reid from associating with known users or sellers of illegal drugs (condition 12) or possessing drug paraphernalia (condition 13) and require him to stay out of "drug areas" (condition 14). There

[2] In its brief, the State mistakenly cites the Sentencing Reform Act's definitions of "serious violent offense" in subsection (45) instead of the definitions of "sex offense" in subsection (46). See Brief of Respondent at 33, citing RCW 9.94A.030(45)(a)(iv) ("serious violent offense" includes manslaughter in the first degree) and RCW 9.94A.030(45)(c) (nonexistent). We have corrected this error in our discussion.

was no evidence presented at trial that Reid was involved in any illegal drug use or that such drug use fueled his commission of the crimes. On appeal, the State concedes that "drugs were not a factor in these crimes." Brief of Respondent at 32. The State provided proof of Reid's alcohol use in relation to the crimes but provided no proof of drug use. Reid does not challenge the conditions of his community custody that prohibit him from possessing or consuming alcohol and frequenting liquor stores or those that require him to engage in substance abuse treatment and counseling concerning his alcohol use.

We conclude the three conditions relating to drug use were not reasonably crime-related. Conditions 6, 7, and 8 are affirmed. Conditions 12, 13, and 14 are to be removed on remand.

The convictions are affirmed. The case is remanded for modification of the community custody conditions.

Becker, J.

WE CONCUR: