IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL EUGENE COCHRAN, Appellant.	No. 39893-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Michael Cochran appeals his Cowlitz County conviction of felony violation of a domestic violence no-contact order, asserting prosecutorial misconduct and ineffective representation. He contends that the prosecutor improperly argued that the jury could convict him even if it did not find that he knowingly violated the no-contact order. He also argues that trial counsel should have objected when the State elicited testimony about his arrest. We affirm.[1]

FACTS

The subject of the no-contact order was Tara Davis, Cochran's former girl friend. He had known her for seven years and had fathered three children with her. On August 27, 2008, the

[1] A commissioner of this court reviewed this matter pursuant to RAP 18.14 and referred it to a panel of judges.

Longview Municipal Court entered an order prohibiting Cochran from having any contact with Davis. Cochran violated that order on three separate occasions. On April 2, 2009, following his guilty pleas to those offenses, the Cowlitz County District Court issued a new order. In addition to the previous restraints, the new order also prohibited Cochran from going within 100 feet of 336 Shamrock Rd. in Longview, Davis's residence. Cochran was in the Cowlitz County jail at the time and he appeared in court via closed circuit television. He signed the new order at the jail and was given a copy.

On April 17, Cochran took a taxi to Davis's residence. He was still in the taxi when Davis and a friend drove up. Davis went inside to call 911 and her friend told Cochran that he needed to leave, which he did.

Cowlitz County Sheriff's Deputy Todd McDaniel took written statements from Davis, her friend, and the taxi driver. At trial, McDaniel testified that he had contacted Wahkiakum County officers and requested assistance in finding Cochran. The Wahkiakum officers located Cochran, took him into custody, and transferred him to McDaniel who took him to the Cowlitz County jail. Cochran's counsel did not object to this testimony and did not cross-examine McDaniel.

Cochran testified that he had gone to Davis's house because his sister-in-law told him that his daughter was sick and that Davis was not going to be there. He admitted that he had received a copy of the protection order, but he asserted that he had not read it, believing that it had the same restrictions as the last one. A jury found him guilty as charged, and this appeal followed.

ANALYSIS

Cochran asserts prosecutorial misconduct on the basis of the following remarks made during closing arguments,

> It's—it is kind of the "ostrich defense". I stick my head in the sand. I don't know anything so you can't hold me accountable.
>
> But, that's not the law. The law says if a person—this is the instruction about knowledge—"if a person has information, which would lead a reasonable person in the same situation", you are then allowed to infer that the Defendant has knowledge. Well, here he signs the order, he gets a copy, he has the knowledge. He has the information right there in his hand. *Even if you believe his claim that he never read it*, once he gets the order, would a reasonable person in his situation read that order? Of course, they would. Absolutely. And, now he comes in and says, I never looked at it. It wasn't important. Let me go. Let me get out of it. I just—that's just not a claim that can be taken seriously.

Report of Proceedings (RP) at 130-31 (emphasis added).

Cochran's attorney made no objections. The prosecutor finished his closing argument, saying, "I would ask you to find him guilty. To find that he knew what he was doing. He knew about the order. He just didn't care. So, hold him accountable for that." RP at 131.

In order to establish that prosecutorial misconduct warrants a new trial, Cochran must show both that the conduct was improper and that it prejudiced his right to a fair trial. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Jones*, 144 Wn. App. at 290. Moreover, a defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "'flagrant and ill intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied.'" *Jones*, 144 Wn. App. at 290 (internal quotation marks omitted) (quoting *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005)).

Cochran focuses on the italicized language, arguing that it impermissibly removed the State's burden of proving actual knowledge of the restriction. What is required is proof that the defendant knows of the order and knowingly violates it. Former RCW 26.50.110(1)(a) (2007);

State v. Sisemore, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002). The defendant knows of the order if he has been served with a copy. He knowingly violates it if his contact was not inadvertent, i.e., he intended the act that was restricted. *Id.*

Cochran argues that even if the prosecutor's statement was generally a correct statement of the law, it was erroneous in this case because it was contrary to the court's instructions, which are the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Instruction 7 advised the jury in pertinent part,

> A person commits the crime of Violation of a No-Contact Order when he knows of the existence of a no-contact order issued pursuant to RCW 10.99, and knowingly violates the restraint provisions of the order that prohibit contact with another person or prohibit the person from knowingly coming or remaining within a specified distance of a location.

Clerk's Papers at 54. This instruction is consistent with the definition of "knowingly" in *Sisemore* and the prosecutor's argument is consistent with the instruction. The prosecutor specifically prefaced the challenged portion of the closing argument with a reference to the jury instructions regarding knowledge and was not improper. In addition, another of the court's instructions advised the jury that it must disregard any remark, statement, or argument that was not supported by the law as stated in the instructions. A jury is presumed to follow the court's instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008).

Cochran's challenge to trial counsel's representation also fails. To establish ineffective representation, the defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 335. To prove prejudice, the defendant must establish that there is a

reasonable probability that, but for the counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). If either element of the test is not satisfied, the inquiry ends. *Kyllo*, 166 Wn.2d at 862.

To establish his ineffective assistance claim that his counsel failed to object to the arrest testimony, Cochran must show that such conduct was deficient and that it prejudiced the outcome. Cochran cannot meet his burden to show prejudice. He stipulated to the admission of a tape of a phone call he made from the jail while trial was pending and agreed that he made the phone call from the jail. The jury clearly knew he had been arrested. The absence of Deputy McDaniel's testimony about the arrest would not have changed the verdict and its admission did not prejudice him.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

WORSWICK, A.C.J.