IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SANDY S. SCHOEPFLIN, Appellant.	No. 40675-6-II UNPUBLISHED OPINION

Armstrong, P.J. – Sandy Scott Schoepflin appeals his conviction of violating a domestic violence court order, arguing that the prosecuting attorney's misconduct during closing argument deprived him of a fair trial and, in the alternative, that defense counsel represented him ineffectively by failing to object. Finding no error, we affirm.

Facts

On September 17, 2007, Officer Corina Curtis responded to a report of a no-contact order violation. Holly Williams told the officer that Schoepflin had called her several times over a two-day period in violation of a no-contact order. Officer Curtis confirmed that the order existed but did not check Williams's phone records.

The following day, Officer Patrick Patterson responded to another 911 call from Williams that reported additional phone calls from Schoepflin in violation of the no-contact order. Patterson did not examine Williams's phone records.

The State charged Schoepflin with violating a domestic violence court order and alleged that he had two prior convictions for violating orders, which increased the crime's classification. At his trial, Williams and the officers testified for the State. Williams said that she and Schoepflin

became romantically involved after he moved next door in 2004. In early 2006, however, she obtained a no-contact order against him. She said Schoepflin went to jail in 2006 for 14 violations of that order. The order remained in effect in September 2007 when Schoepflin called her at home and on her cell phone, sent her text messages, and drove by her home yelling profanities. Williams claimed that she provided the police with records of the phone calls and text messages. She admitted attempting to terminate the order at the end of 2007 or the beginning of 2008.

Schoepflin testified that he lived with Williams for about a year. He knew the trial court issued an order on September 14, 2006, prohibiting him from contacting her, and he acknowledged signing it. He further acknowledged pleading guilty to violating the order on four different occasions in 2006, but he stated that he never again contacted Williams after serving jail time for those violations.

During closing argument, the prosecutor went through the evidence supporting the elements of the offense and argued that the jury should believe Williams and find Schoepflin guilty:

> Looking at all the evidence, looking at the context of this case, he just couldn't stay away. The court ordered him to have zero contact, but he couldn't do it. So ladies and gentlemen, do your duty. Go back into that jury room and find him guilty.

Report of Proceedings (RP) at 111.

The defense responded that there was a reasonable doubt concerning Schoepflin's guilt given his testimony and the lack of evidence corroborating Williams's complaints. On rebuttal, the prosecutor responded that the evidence supported only one result: "You are going to get two

verdict forms. One of them says, We, the jury, find the defendant, and it has a blank for guilty or not guilty.[1] And you are going to write guilty. Go back and talk about the evidence." RP at 116. The prosecutor ended his rebuttal argument with this statement:

> That's it. You go back to that jury room, and you say, What's been proved? Who do I believe? Whose story, whose testimony is more reasonable in light of all this evidence? Is it more reasonable that she made it up for no reason, or is it more reasonable that you have a guy who has got orders to stay away, orders to not contact, who has got orders to desist, and he just couldn't? Do your duty, ladies and gentlemen. Find the defendant guilty.

RP at 117. The jury found Schoepflin guilty as charged.

ANALYSIS

I. Prosecutorial Misconduct

Schoepflin argues that the prosecuting attorney committed misconduct that deprived him of a fair trial when he urged the jury to do its duty and find Schoepflin guilty. A defendant claiming prosecutorial misconduct "'bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Comments are deemed prejudicial only where there is a substantial likelihood that they affected the verdict. *McKenzie*, 157 Wn.2d at 52. "A prosecuting attorney's allegedly improper remarks must be reviewed 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." *Brown*, 132 Wn.2d at 561. When the defense fails to object to an improper comment, the error is considered waived "unless

[1] The other form asked whether Williams and Schoepflin were members of the same family or household. Schoepflin acknowledged that they were members of the same household when he testified that they had lived together.

the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *Brown*, 132 Wn.2d at 561.

Schoepflin contends that the prosecuting attorney's admonition to the jury to do its duty was flagrant error because it has been so characterized in previous appellate opinions. *See State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (improper closing argument made more than two years after published opinion condemned it was "flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial"). He supports this claim of error by citing *State v. Coleman*, 74 Wn. App. 835, 876 P.2d 458 (1994).

In *Coleman*, 74 Wn. App. at 838, the prosecuting attorney argued during closing that to accept the defense theory, the jury would have to do two things: "[O]ne is to ignore the actual evidence in front of you, and the second is thereby to violate your [oa]th as jurors." Division One of this court concluded that these comments were improper because they could be construed as telling the jury it would violate its oath if it disagreed with the State's theory of the evidence. *Coleman*, 74 Wn. App. at 839. In deciding whether reversal was required, the court examined cases from other jurisdictions. *Coleman*, 74 Wn. App. at 839-40 (citing *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *State v. Acker*, 265 N.J. Super. 351, 627 A.2d 170 (1993); *Williams v. State*, 789 P.2d 365 (Alaska Ct. App. 1990); and *Noel v. State*, 754 P.2d 280 (Alaska Ct. App. 1988)).

In *Young*, 470 U.S. at 4, the prosecutor responded to defense counsel's charge that the government did not believe its case by asserting that he believed the defendant was guilty and that

if the jurors felt they should acquit, "I don't think you're doing your job." The prosecutor erred in trying to exhort the jury to do its job; "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice." *Young*, 470 U.S. at 18. In *Acker*, 627 A.2d at 173, the defendant was charged with abusing children, and the prosecuting attorney argued that it was the jury's function to protect young victims of alleged sexual offenses as a group. This argument erroneously conveyed the message that unless the jurors convicted, they would violate their oaths. *Acker*, 627 A.2d at 173. "Warnings to a jury about not doing its job [are] considered to be among the most egregious forms of prosecutorial misconduct." *Acker*, 627 A.2d at 173.

In *Williams*, 789 P.2d at 369, the prosecutor instructed the jury to "go back to the jury room and look at the evidence, and talk about the testimony, and do your job and return guilty verdicts in this case." Insofar as this comment implied it was the jury's job to return a guilty verdict, it was improper. *Williams*, 789 P.2d at 369. Finally, the prosecutor in *Noel* told the jury that the crime charged was "the charge that you're here to enforce." *Noel*, 754 P.2d at 282. The court concluded that this comment improperly exhorted the jury to "do its job." *Noel*, 754 P.2d at 283.

Other jurisdictions have examined similar "do your duty" comments. The Ninth Circuit found misconduct in this closing argument statement:

> And I would ask your consideration, as every jury has done, and that is that after the marshal's service has done their duty and the court has done its duty and lawyers on both sides have done their duty, that you as jurors do your duty and well consider this matter and find these defendants guilty.

United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999). The court explained that this

argument crossed the line between proper and improper "do your duty" arguments.

> It is probably appropriate for a prosecutor to argue to the jury that "if you find that every element of the crime has been proved beyond a reasonable doubt, then, in accord with your sworn duty to follow the law and apply it to the evidence, you are obligated to convict, regardless of sympathy or other sentiments that might incline you otherwise." Here, however, the prosecutor did not tell the jury that it had a duty to find the defendant guilty only if every element of the crime had been proven beyond a reasonable doubt. Nor did he remind the jury that it had the duty to acquit Sanchez if it had a reasonable doubt regarding his guilt.

Sanchez, 176 F.3d at 1225.

The Wyoming Supreme Court recognized a similar distinction between proper and improper "do your duty" arguments in *Lafond v. State*, 89 P.3d 324, 332 (Wyo. 2004) (internal quotations and citations omitted):

> Generally, an exhortation to the jury to "do the right thing," to "do your job" or to "do your duty" is error if it implies that, in order to do so, it can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law. Such a statement may also run afoul of the admonition against injecting issues broader than the guilt or innocence of the accused.

The prosecutor in *Lafond* asked the jury to do its duty and find the defendant guilty, but this request followed a review of the law and evidence. *Lafond*, 89 P.3d at 332-33. Taken in context, the prosecutor's request did not ask the jury to convict without weighing the evidence. *Lafond*, 89 P.3d at 333.

Viewing the statements at issue here in context, as we must, we conclude that they were made with reference to the jury's duty to weigh the evidence rather than as a simple directive to convict. *See Brown*, 132 Wn.2d at 561. Before making the initial "do your duty" comment, the prosecutor referred to the "to convict" instruction, which contained the elements of the offense and the statement that it was the jury's duty to return a guilty verdict if it found the elements

proved beyond a reasonable doubt. As the prosecutor explained,

> It's like a checklist. You go down this checklist, and as you check elements, as you say the state has proved that beyond a reasonable doubt, you check these elements off. And when you get to the end, if you have checked them all off, it is your duty to return a verdict of guilty. That's the way this works.

RP at 106.

The prosecutor then referred to the instruction describing the jury as the sole judge of witness credibility, and he argued that if the jury believed Williams, it had to find Schoepflin guilty:

> Looking at all the evidence, looking at the context of this case, he just couldn't stay away. The court ordered him to have zero contact, but he couldn't do it. So ladies and gentlemen, do your duty. Go back into that jury room and find him guilty.

RP at 111.

On rebuttal, the prosecutor urged the jury to write "guilty" on the verdict form, and he again referred to the issue of witness credibility and the jury's need to consider whose testimony was reasonable before urging the jury to do its duty and find the defendant guilty.

We find these "do your duty" arguments distinguishable from the arguments in *Coleman*, *Young*, *Acker*, *Williams*, and *Noel*. In those cases, the prosecutor expressly or implicitly exhorted the jury to do its job without reference to its need to consider and weigh the evidence. Here, by contrast, the prosecutor did not instruct the jury to reach a guilty verdict regardless of the evidence and the court's instructions.

In so holding, we note that we do not condone "do your duty" arguments because of the strong possibility of error. *See Lafond*, 89 P.3d at 333 (court found prosecutors' continued use

of "do your duty" statements problematic). Finding no error in this instance, however, we reject Schoepflin's claim of prosecutorial misconduct as well as his alternative claim that his attorney represented him ineffectively by failing to object to the comments at issue. *See State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (to prevail on ineffective assistance of counsel claim, defendant must show both deficient performance and resulting prejudice).

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.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.