IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KIMBERLY KENYATA CLARK, Appellant.	No. 41297-7-II UNPUBLISHED OPINION

Hunt, P.J. — kimberly Kenyata Clark appeals her jury trial conviction for second degree assault (domestic violence). She argues that (1) the prosecutor committed misconduct by repeatedly misstating and minimizing the State's burden of proof in closing argument, and (2) her trial counsel provided ineffective assistance in failing to object to this misconduct. We affirm.

FACTS

I. Assault

Around 2:50 am on August 22, 2009, Pierce County Deputy Sheriffs Robert Shaw and Michael Cooke responded to a 911 call reporting a domestic violence assault and found Undra Edwards sitting in the kitchen in his underwear. Edwards appeared to be "in obvious pain," with burns to his right arm, right torso, and right leg; he did not appear intoxicated. 1 Verbatim

Report of Proceedings (VRP) at 131. He told the deputies and the paramedic that his wife, Kimberly Kenyata Clark, had "thrown a pot of boiling water on him" following an argument. 1 VRP at 136. Edwards told the deputies that he did not think that Clark had been cooking at the time of the incident, and he did not say that his burns were accidental.

Neither deputy noticed any water or potatoes on the kitchen floor. But Cooke noticed that a bed in a nearby bedroom was "sopping wet" with water, which he believed was "significantly" more than the "typical amount of water that would be on [Edwards'] body . . . if he had taken a shower."[1] 2 VRP at 237. The deputies did not take photographs of the kitchen or the bedrooms. Edwards did not provide a handwritten statement because he was in pain.

Clark telephoned Edwards while the deputies were at the house. Edwards gave the phone to Shaw, but Clark refused to return home to talk about the incident and hung up when Shaw asked where she was.

Paramedics transported Edwards to the hospital, where doctors treated him for second degree burns to his right arm, right leg, and torso. Edwards told the emergency room doctor that Clark "threw hot water on him"; again, Edwards did not say that the incident was accidental. 2 VRP at 196.

In an interview three days later, Edwards told Pierce County Deputy Sheriff Curtis Seevers that he (Edwards) and Clark had been arguing in the bedroom when Clark left the bedroom, returned, and "threw" boiling water on him. 3 VRP at 277. Edwards did not suggest

[1] At trial, Cooke admitted that he did not tell Shaw about the wet bed and that the incident report did not include any information about the wet bed.

that the incident had been accidental. Edwards agreed to provide a handwritten statement, but he said that it would take time because his injuries made it difficult to write. Seevers agreed to return later to pick up Edwards' statement; but when Seevers called later that day, Edwards asked "if the charges could be dropped against Ms. Clark." 3 VRP at 279. Seevers never obtained a handwritten statement from Edwards.

II. Procedure

The State charged Clark with second degree assault (domestic violence). The case proceeded to a jury trial.

A. Trial Testimony

Most of the State's witnesses[2] testified as described above. But Edwards, whom the State also called, testified that Clark had "accidentally" spilled boiling water on him when he surprised her while she was cooking. 1 VRP at 92. Edwards also testified that (1) he and Clark had been fighting earlier that evening because Clark had seen him in a car with another woman and had accused him of cheating on her; (2) Clark had eventually called the police, who had come to the residence and told him to leave; (3) he had left the residence, had some beer at a nearby pub, and then returned to the residence, intending to apologize to Clark; (4) when he came around the corner into the kitchen and grabbed Clark's arm, he had "surprised her" and "she spilled water on" him as she was lifting a pot of potatoes that she was boiling for potato salad[3]; (5) he had

[2] These witnesses included: Deputies Shaw, Cooke, and Seevers; a LESA tape research analyst; the deputy who had arrested Clark; the paramedic; and the emergency room doctor.

[3] 1 VRP at 92.

reacted by "swearing" and "cursing" at Clark[4]; (6) she became "hysterical"[5]; (7) when he refused her apology, she had left the residence; and (8) he had run into their bedroom looking for something to put on the burns and had accidentally run hot, rather than cold, water over the burns. Edwards related that, although the burns were "a little painful," he did not feel too much pain at first because he "was a little intoxicated"[6]; but when the burns started to hurt, about five to fifteen minutes later, he had called 911. According to Edwards, when the deputies arrived, water and potatoes were on the kitchen floor.

At various points during his testimony, Edwards admitted that he had not told the deputies or any medical personnel that his injuries were accidental and that, instead, he had told them Clark had "thrown" the boiling water on him. He asserted that he had not mentioned that his injuries were accidental because he was "upset" with Clark. 1 VRP at 114. But he contradicted this testimony when he claimed that he had told one or more deputies and the medical personnel that Clark had "accidentally burned" him or "accidentally spilled some water on" him while she was cooking potatoes. 1 VRP at 115, 116. Edwards admitted, however, that (1) he had told the 911 operator that Clark had "thr[own] hot boiling water on [him]";[7] (2) he had responded to the 911 operator's questions about Clark and the car she was driving, wanting the police to find her because he "was being a little spiteful toward her"; and (3) he had told the operator he had not been drinking. 1 VRP at 156. Edwards also testified that Clark had driven him home from the

[4] 1 VRP at 108.
[5] 1 VRP at 108.

[6] 1 VRP at 110.

[7] 1 VRP at 151.

hospital and that he stayed with her while his burns were healing.

Clark was the only other defense witness. Like Edwards, she testified that she had accidentally spilled boiling water on him in the kitchen when he startled her while she was cooking potatoes. She also asserted that (1) because Edwards had been angry with her, she had not known how badly Edwards had been burned until after she had spoken to her son and had left the residence; (2) she had been caring for Edwards since he was released from the hospital; and (3) he had been coming to court every day to support her during the trial.

B. Jury Instructions

Clark proposed and the trial court gave the following "reasonable doubt" jury instruction:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. 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 as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 83 (Jury Instruction 3); *see also* CP at 53 (Defendant's proposed instruction 3). The trial court also instructed the jury that (1) "[t]he law is contained in [the court's] instructions to [the jury]";[8] and (2) it "must disregard any remark, statement, or argument that is not supported by the evidence or the law in [the court's] instructions." CP at 80

[8] CP at 80 (Jury Instruction 1).

(Jury Instruction 1).

C. Closing Arguments

1. State

In closing, the State argued that the jury's focus should be on whether Clark intentionally or unintentionally burned Edwards and emphasized that this determination came down to credibility issues. In discussing credibility, the State argued (1) it was likely that Edwards had been "truthful" during the 911 call because he was seeking help[9]; (2) in contrast, Edwards' trial testimony was less credible because he was living with Clark "on her dime," she had been caring for him since the accident, and he had forgiven her[10]; (3) although Edwards testified that he had told the deputies and medical personnel that his burns were accidental, none of those individuals recalled Edwards having said anything to them about his burns being accidental; (4) Cooke's testimony that he had seen a considerable amount of water in the bedroom supported Edwards' earlier statements that Clark had actively thrown the boiling water on him in the bedroom; and (5) the jury's credibility determinations ultimately depended on "the reasonableness of the testimony in the context of the evidence." 3 VRP at 354. The State repeatedly argued that Edwards' and Clark's trial version of the incident was not "reasonable" and, therefore, not credible, in light of the other evidence, and that the circumstances the couple described would have required a "colossal coincidence." 3 VRP at 360.

The State also explained the second degree assault elements and emphasized that the State has the burden of proving each element beyond a reasonable doubt, stating that Jury Instruction

[9] 3 VRP at 341.

[10] 3 VRP at 342.

10 "tells you if the state [sic] has proved those elements beyond a reasonable doubt, you must return a verdict of guilty." 3 VRP at 344. The State closed by asserting that the evidence supported the State's theory, that the State's theory was "a reasonable explanation," and that Clark's version of the events was "not reasonable." 3 VRP at 360. Clark did not object to any of the State's closing argument.

2. Clark's argument

After acknowledging that the ultimate issue was whether the incident was accidental or intentional, Clark reminded the jury of the presumption of innocence and the State's burden:

> In a criminal case like this, Ms. Clark is presumed innocent and it's the state's [sic] burden to prove each and every element of the crime charged beyond a reasonable doubt. We have no burden. I don't have the burden to present you with a reasonable doubt. We have no burden at all.

3 VRP at 361. Clark then argued that (1) when Edwards contacted the deputies and medical personnel, he may have told "untruths" because he was "reacting out of emotion," pain, or anger; and (2) even if Edwards may have first believed that Clark had intentionally burned him, this was not proof "beyond a reasonable doubt" that Clark had in fact acted intentionally when she spilled the boiling water on him. 3 VRP at 362.

After referring to the State's argument about "reasonability, reasonableness," Clark argued that some of the State's witnesses' actions, such as Cooke's not telling Shaw about the water in the bedroom or including this information in any report, were "unreasonable." 3 VRP at 367. Clark then argued that Edwards' and Clark's version of the events was not "unreasonable" and stated:

> And I guess when you have two reasonable, plausible explanations for an incident,

> that isn't proof beyond a reasonable doubt, and that is what the state's [sic] burden is. Each and every element proved beyond a reasonable doubt.

3 VRP at 371.

3. State's rebuttal

In rebuttal, the State continued to focus on credibility issues,[11] which witnesses had more motivation to tell the truth, and which version of the events was more "reasonable" given the evidence. 3 VRP at 377. After describing the evidence, the State argued,

> The reason I say this is credibility. You have to look at the credibility of these people. I mean, the fact of the matter is that [Edwards] said one thing to those deputies and he said something else here, right? So am I asking you if it's more reasonable to believe that what he told the deputies was the truth, what he said to 911 was the truth? Yes, that's what I'm asking you to believe. That's what's reasonable based on this evidence.

3 VRP at 377. It also argued that was "reasonable" to believe that Edwards' cheating was the "last straw" and that Clark had reacted by intentionally throwing hot water on Edwards. 3 VRP at 379.

The State then focused on reasonable doubt:

> [Defense counsel] talked a little bit about reasonable doubt, so let's talk about that. You look in your jury instructions, okay, and your jury instructions say that reasonable doubt—you know, it defines reasonable doubt for you. There is a last sentence on your jury instructions. And it says if you have an abiding belief in the truth of the charge, then you are convinced beyond a reasonable doubt. If you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt. What that means is when you go back into that jury room and you talk about the evidence, you consider the evidence, you look at the evidence, and you say to yourselves, you know what, she threw that water on him, that's an abiding belief. You believe it, and you say to yourself that's what happened.
>
> *Now,* [defense counsel] *says if there is another possible story out there,*

[11] Clark made one unsuccessful objection during the State's rebuttal argument. That objection is not relevant to the issues on appeal.

> *then that's reasonable doubt. That's not a reasonable doubt. Because you have to look and say is that other story reasonable in light of all the evidence? Just the fact that you can come up with another story that kind of fits the evidence or kind of fits in, that doesn't mean that it's reasonable. What's more reasonable, right?* Is it reasonable that she got mad, she threw this water on him, that he told the police that she threw water on him, that he told 911 that she threw water on him? Three days later he is talking to a deputy saying, Yeah, she threw water on me. Is that the reasonable thing that happened? Or is it more reasonable to believe that there was an accident in the kitchen, but nobody saw the potatoes, nobody saw any food on the floor, right, that she wanted to help her husband, but she didn't because he was yelling at her, so she split, right? But she really wanted to help him, right. That's what she is telling me. Oh, I really wanted to help him. I just did nothing to help him, right?

3 VRP at 381-82 (emphasis added). The State discussed whether other portions of Clark's testimony were "reasonable" and whether the behavior she described was similar to how "a reasonable person" would have behaved. 3 VRP at 382-3.

The State further argued that Edwards had time to make up a story, but that story was unreasonable and that the State's theory presented a more "reasonable sequence of events." 3 VRP at 384. During this argument, the State briefly commented on how the reasonableness of the story related to the verdict, suggesting that if Edwards' and Clark's story at trial was not reasonable, then the jury had a "duty" to convict Clark.[12] 3 VRP at 384.

D. Verdict

The jury found Clark guilty of second degree assault with a domestic violence special verdict.[13] Clark appeals.

ANALYSIS

[12] We describe this portion of the State's rebuttal in more detail below.

[13] The judgment and sentence erroneously states that Clark entered a guilty plea.

Clark argues that we should reverse her conviction because at several points in closing argument the State improperly and prejudicially "misstated and minimized" the State's burden of proof and "misstated the jury's function and role" by telling the jury that (1) its role was "simply [to] pick which side gave a more 'reasonable' version of events," and (2) it must find Clark guilty if the State proved all elements of the crime beyond a reasonable doubt. Br. of Appellant at 19. These arguments fail.

I. Standards of Review

The general rule is that, because Clark did not object to any relevant portions of the prosecutor's argument, she waived her prosecutorial misconduct claim unless she can show that the alleged errors were so flagrant and ill-intentioned that a curative instruction could not have cured any potential prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). To establish prejudice, Clark must show, at a minimum, that there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

To establish ineffective assistance of counsel, Clark must show both that (1) her counsel should have objected to the challenged argument; and (2) counsel's failure to object was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs in this context when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have differed. *McFarland*, 127 Wn.2d at 335.

II. No Prejudice Under Either Standard

During closing argument, the State correctly explained to the jury the second degree assault elements, emphasizing the State's burden to prove each element beyond a reasonable doubt. But the State also represented to the jury that Instruction 10[14] "tells you if the state [sic] has proved those elements beyond a reasonable doubt, you *must* return a verdict of guilty";[15] this was an incorrect statement of both the instruction and the law. Nevertheless, in light of Clark's failure to object and the ameliorative effect of the other jury instructions, we cannot say that this misstatement was ill-intentioned or flagrant or that a timely requested instruction could not have cured any potential prejudice. *Belgarde*, 110 Wn.2d at 507.

Most of the State's "reasonableness" arguments, however, related to credibility issues that the jury was responsible for resolving, rather than to the State's burden to prove each element of the offense beyond a reasonable doubt. At Clark's request, the trial court specifically directed the

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[14] Jury Instruction 10 provided:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 22nd day of August 2009, the defendant intentionally assaulted Undra Edwards;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Undra Edwards; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 90 (Jury Instruction 10).

[15] 3 VRP at 344 (emphasis added).

jury to consider the "reasonableness" of a witness's statements in context with the evidence in making credibility determinations;[16] this instruction's incorporation of the "reasonableness" of a witness's statements was not error.[17] *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996) (credibility determinations may rest in part on whether witness's actions were reasonable in light of the circumstances); *see also State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278

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[16] Jury Instruction 1 stated:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. *In considering a witness's testimony, you may consider these things*: the opportunity of the witness to observe or know the things he or she testifies about[;] the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues[;] any bias or prejudice that the witness may have shown; *the reasonableness of the witness's statements in the context of all of the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP at 80 (emphasis added); *see also* CP at 50 (defendant's proposed instruction 1). This instruction was based on Washington Pattern Jury Instruction 1.02,; 11 Washington Pattern Jury Instruction: Criminal 1.02, at 14 (3d ed. 2008).

[17] Clark cites no cases suggesting that any potential err in over-emphasizing the credibility aspect of the case during closing argument is automatic reversible error. Instead, she cites several cases indicating that we must evaluate these types of alleged errors (even when the error is presented in the court's instructions rather than in the State's closing argument) in context to determine whether there was any reasonable probability that the statements were sufficient to mislead the jury as to the proper burden of proof. *See United States v. Gonzales-Balderas*, 11 F.3d 1218, 1223 (5th Cir.), *cert. denied*, 511 U.S. 1129 (1994); *United States v. Pine*, 609 F.2d 106, 108 (3rd Cir. 1979); *United States v. Guest*, 514 F.2d 777, 779-80 (1st Cir. 1975); *see also United States v. Rohrer*, 708 F.2d 429 (9th Cir. 1983).

We recognize that *United States v. Oquendo*, 490 F.2d 161, 165-66 (1974), arguably held that a court's repeated "charge" to the jury, overemphasizing the credibility balance and indicating that the jury "ought to" convict if it believed the government's witness, constitutes reversible error because such instruction is tantamount to a directed verdict once the jury has made its credibility determinations. But *Oquendo* addressed the trial court's repeated "charge" to the jury, not counsel's argument, as is the case here. Thus, *Oquendo* does not apply. Again, we note that it was Clark that requested the jury instruction emphasizing the jury's duty in assessing the witnesses' credibilities.

(2001) ("As we have recognized, it is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses.").

Other portions of the State's rebuttal were clear responses to Clark's closing argument that, when there are two competing versions of incident, there is reasonable doubt. The State was entitled to respond to this argument. And Clark demonstrates no undue prejudice flowing from it.

But we do view as troublesome the following portion of the State's rebuttal argument:

> Look, if you have a lot of time, you can try to come up with a story, okay, if you have got a lot of time. Mr. Edwards had a lot of time, but it's just not reasonable. That's what you are looking at. So when [defense counsel] says, you know, if there is [sic] two stories out there, you have to say there is reasonable doubt, no. That's why we call it reasonable doubt. *If Ms. Clark's testimony is not reasonable, if Mr. Edwards' testimony here on the stand is not reasonable, if it's not reasonable to believe that this was an accident in light of this evidence, then your duty is to return a verdict of guilty.*
>
> This is a reasonable story, that she was angry at her cheating husband, that she was angry he came back. She was angry he tried to hide the affair. She unplugged the phone. She boiled up some water, and she threw boiling water on him, and then she ran away so that she wouldn't be arrested. That's the reasonable sequence of events.

3 VRP at 384 (emphasis added). The italicized portion of this argument was an incorrect statement of the law and the reasonable doubt standard of proof. Taken alone, this comment might have misled the jury to believe that it had a duty to find Clark guilty if it found that Edwards' testimony was unreasonable. As with the State's earlier misstatement about reasonable doubt, this inaccuracy does not appear to have been so ill-intentioned or flagrant that a curative instruction could not have cured any potential prejudice. *Belgarde*, 110 Wn.2d at 507.

We hold that this brief comment did not create a substantial likelihood that the prosecutor's misstatement of the law affected the jury's verdict or a reasonable probability that

the jury's verdict would have been different had defense counsel objected to this argument, in light of the following circumstances: (1) that the parties' closing arguments as a whole primarily discussed the "reasonableness" of the evidence in the credibility context; (2) the State's and Clark's repeated closing argument references to the correct burden of proof; (3) the trial court's correct reasonable doubt instruction; (4) the trial court's instruction telling the jury that counsel's statements were not the law and that the jury should refer to the jury instructions for the law; (5) the jury instructions requiring the State to prove each element beyond a reasonable doubt (6) our presumption that the jury follows the court's instructions;[18] (7) that the bed was wet, the kitchen floor was not wet, and the officers saw no potatoes in the kitchen; and (8) Edwards' repeated reports to the 911 operator, responding police, and treating medical professionals that Clark had thrown the boiling water on him.

[18] *State v. Swan*, 114 Wn.2d 613, 662, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

In sum, the State's closing arguments were not prejudicial under either the prosecutorial misconduct or ineffective assistance of counsel standards.[19] And Clark's prosecutorial misconduct and ineffective assistance of counsel claims fail.

We affirm.

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.

Hunt, P.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.

[19] *See State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239, (1997); *McFarland*, 127 Wn.2d at 334-35.