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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	No. 30491-4-III
)	
Respondent,)	
)	
v.)	
)	
LAMAR BARNES,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Kulik, J. — Lamar Barnes argued with several persons at a bar in Pierce County. The bartender asked Mr. Barnes to leave. He left but returned several hours later. Using a knife, he then fought with a bar employee and, later, a bar patron. A jury convicted Mr. Barnes of third degree assault, third degree assault with a deadly weapon, and unlawful display of a weapon. Mr. Barnes contends that the State failed to present sufficient evidence to support both alternative means of committing third degree assault and that the prosecutor made prejudicial remarks in her opening statement and closing argument. We conclude the State presented substantial evidence to prove both alternative

means—substantial pain and use of a weapon. And we reject Mr. Barnes’s contentions that any prosecutorial remarks were flagrant, ill-intentioned, or caused prejudice.

Therefore, we affirm the convictions.

FACTS

Mr. Barnes got into a fight with Charles Parrez and Robert Ransom at a bar in Pierce County. Witnesses’ accounts of the fight differed from Mr. Barnes’s account.

Witnesses’ Accounts. Several witnesses testified that on July 10, 2008, Mr. Barnes arrived at Galloping Gertie’s bar and grill at about 9:00 p.m. Before entering the bar, Mr. Barnes argued with Charles “Hook” Ford and a woman named Angel.¹ The argument continued inside, and the bartender asked Mr. Barnes to leave. Bar employees Charles Parrez and Heliodoro “John” Marshall physically escorted Mr. Barnes from the premises.

Mr. Barnes returned to Galloping Gertie’s several hours later and asked to speak with Mr. Parrez. As Mr. Parrez followed Mr. Barnes into the parking lot, Mr. Barnes abruptly hit Mr. Parrez. The contact fractured Mr. Parrez’s jaw and dislocated several of his teeth. Mr. Parrez went back inside the bar to assess his injuries.

Meanwhile, a bar patron named Robert Ransom left the bar. As he stepped through the door leading to the parking lot, Mr. Barnes punched him twice in the face,

¹ Angel’s last name does not appear in the record.

knocking Mr. Ransom down. Mr. Barnes then lunged toward Mr. Ransom with a serrated knife. The knife sliced upward through Mr. Ransom's shirt and cut his face and ear.

The struggle prompted Steve Hebert and several other people to help Mr. Ransom gain control of Mr. Barnes's knife. The men struggled as Mr. Barnes yelled that he was going to kill them. Mr. Hebert touched Mr. Barnes with an activated taser, and Mr. Barnes dropped the knife.

The police arrived and took Mr. Barnes into custody. Mr. Ransom suffered a bloody nose, swollen left eye, and lacerated face as a result of the conflict. Mr. Ransom testified that his face remained swollen for three days.

Mr. Barnes's Account. Mr. Barnes recalled the event differently. He stated that after the altercation with Mr. Ford and Angel, he went inside the bar. At the doorway, Mr. Parrez pushed Mr. Barnes and someone else jumped him. Mr. Barnes then tried to order a drink but was refused. He left the bar. Mr. Barnes testified that he was never told to leave the bar for the night.

Later that evening, Mr. Barnes returned to the bar. Mr. Barnes went inside and asked to talk to Mr. Parrez. Mr. Parrez and Mr. Barnes went outside to a private area to talk. Mr. Barnes told Mr. Parrez that he was going to complain to the owner of the bar about being treated badly. The discussion became heated. Mr. Parrez took a bar towel he

was carrying and wrapped it around his hand. Mr. Parrez brought his hand up as if to fight. Mr. Barnes blocked the punch and hit Mr. Parrez in the mouth. Mr. Parrez retreated inside the bar.

Mr. Ransom went outside the bar and tried to grab Mr. Barnes. In response, Mr. Barnes punched Mr. Ransom twice. Two other men held Mr. Ransom to keep him from attacking Mr. Barnes. Mr. Ransom broke loose and charged Mr. Barnes. Mr. Hebert approached Mr. Barnes with a taser.

As the men advanced, Mr. Barnes took out a knife and threatened to use it if Mr. Hebert touched him with the taser. Mr. Ransom charged Mr. Barnes and another man, Ted Vigil, ran after Mr. Ransom to stop the fight. Mr. Barnes pointed his knife away from the men to avoid stabbing them. Upon impact, Mr. Ransom, Mr. Barnes, and Mr. Vigil were thrown against a car. The fight stopped. When the police arrived, Mr. Barnes went to the hospital for injuries to his hand.

The State charged Mr. Barnes with the following: count I, second degree assault, victim: Charles Parrez; count II, second degree assault with a deadly weapon enhancement, victim: Robert Ransom; and count III, second degree assault with a deadly weapon enhancement, victim: Steve Hebert. At trial, Mr. Barnes contended that he was acting in self-defense. At the State's request, the trial court instructed the jury on second

degree assault by alternative means for count II. The jury found Mr. Barnes guilty of third degree assault for count I, third degree assault with a deadly weapon enhancement for count II, and unlawful display of a deadly weapon.

Mr. Barnes appeals. He contends that the State failed to present sufficient evidence to support both alternative means of third degree assault for count II, based on his altercation with Mr. Ransom. He also contends that the State made prejudicial remarks in its opening statement and closing rebuttal argument.

ANALYSIS

Sufficient Evidence—Alternative Means

In reviewing the sufficiency of the evidence in an alternative means case where a single offense could be committed in more than one way, “the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt.” *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The court views the evidence in the light most favorable to the prosecution. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 597. Direct and circumstantial evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility

issues are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Based on RCW 9A.36.031(d), (f), the trial court instructed the jury on two alternative means of committing assault in the third degree against Robert Ransom:

- (2)(a) That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering; or
- (b) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm.

Clerk's Papers at 167.

In an alternative means case, unanimity is required as to guilt, but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means charged. *Kitchen*, 110 Wn.2d at 410-11.

Mr. Barnes hit Mr. Ransom three times, with the first punch or two coming unexpectedly and with force. The State presented pictures at trial that showed Mr. Ransom's injuries after the altercation. These pictures supported the testimony that Mr. Ransom suffered from a swollen eye, bloody nose, and lacerated face. Mr. Ransom also testified that the swelling lasted for three days. Although Mr. Ransom never used the word "pain" in his testimony, a reasonable juror could infer that the extent of Mr. Ransom's injuries caused him considerable suffering.

Additionally, the testimony that Mr. Barnes nicked Mr. Ransom's ear with a knife and the pictures of the injury presented at trial are sufficient proof for a juror to conclude that Mr. Barnes used a knife to inflict physical injury to Mr. Ransom. The State presented sufficient evidence to prove both alternative means of third degree assault.

Prosecutorial Misconduct

A. Opening Statement. "Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A trial court's decision is an abuse of its discretion when it is manifestly unreasonable or based on untenable grounds or untenable reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "In making such a challenge the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial." *Finch*, 137 Wn.2d at 839. "If the prosecutor's conduct is improper it does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Id.*

Where the defendant objects or moves for a mistrial on the basis of alleged prosecutorial misconduct, the appellate court gives deference to the trial court's ruling because the trial court is in the best position to determine prejudice. *Stenson*, 132 Wn.2d

at 719 (quoting *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

“A prosecutor’s opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom.” *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.2d 929 (1984). A prosecutor may anticipate testimony if counsel has a good faith belief that such testimony will be produced at trial. *Id.* at 16.

Here, the prosecutor concluded her opening statements with the following remarks, “Fortunately nobody was killed. Nobody was gravely injured.” Report of Proceedings (RP) (May 10, 2010) at 13. Mr. Barnes objected and asked for a mistrial, stating that the case did not involve allegations of attempted murder. The State contended that the remark referred to testimony that would be presented. Mr. Barnes did not request a curative instruction.

The trial court denied Mr. Barnes’s motion for a mistrial. Instead, the trial court cautioned the State not to talk about killing since the charge against Mr. Barnes was assault.

Deference is given to the trial court’s decision whether to declare a mistrial for

prosecutorial misconduct. *Stenson*, 132 Wn.2d at 719. Based on the circumstances, the trial court did not abuse its discretion in declining to order a mistrial. The State's remark was not prejudicial and did not warrant a mistrial.

B. Closing Argument. As noted, "[t]rial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *Finch*, 137 Wn.2d at 839. A trial court's decision is an abuse of its discretion when it is manifestly unreasonable or based on untenable grounds or untenable reasons. *Stenson*, 132 Wn.2d at 701.

"In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record." *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). A prosecutor may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). "A prosecutor must not, however, express a personal belief as to the credibility of witnesses." *Millante*, 80 Wn. App. at 251.

In his closing argument, Mr. Barnes identified the inconsistent testimony among the State's witnesses and used the inconsistencies as a reason to doubt the State's case.

Mr. Barnes also contrasted his account of the altercation with the testimony of the State's witnesses.

In response, the State asserted in its rebuttal closing argument, "So there's no doubt that there are inconsistencies when you put X number of witnesses on an incident almost two years old. State submits that is actually an indicia of reliability." RP (May 19, 2010) at 773. The trial court sustained Mr. Barnes's objection to this remark. Then, the State further explained that the witnesses' recollections two years after the incident were consistent and logical when compared to Mr. Barnes's recollection, which could not be supported by other testimony.

The State also asserted in rebuttal that "the other point is that the defendant is entitled to give his version of events. Absolutely constitutionally, no argument. But no witness including the defendant is entitled to be absolutely believed, when it flies in the face of common sense and other facts. You are guided specifically in Instruction No. 2 as it relates to beyond a reasonable doubt." RP (May 19, 2010) at 774. Mr. Barnes failed to object to this remark.

The State made this first remark in response to Mr. Barnes's contention that the inconsistent testimony should make the jurors question the credibility of the State's witnesses. The State's remark reflected a reasonable inference of witness credibility

based on the two versions of the attack that were presented at trial. This remark was not a personal opinion from the prosecutor, but rather a calculated opinion from the State why the jury needed to believe the State's witnesses over Mr. Barnes. This first remark was not a statement of the law and there is no evidence that this remark was improper or prejudiced the jury.

For the second remark in dispute, Mr. Barnes contends that the State told the jury that if it possessed any common sense, Mr. Barnes was not to be believed. Based on the entirety of the closing argument, Mr. Barnes mischaracterizes this remark. The State stressed to the jury the importance of weighing the credibility of the witnesses in light of the evidence. The remark did not reflect the personal opinion of the prosecutor as to Mr. Barnes's credibility.

Mr. Barnes fails to show that the second remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. And the State corrected any error when it referenced jury instruction 2. This instruction explained the defendant's presumption of innocence throughout the entire trial and that the jury needed reasonable doubt to overcome the presumption. The jury is presumed to have considered this jury instruction in deliberations.

The trial court also instructed the jurors that they were the sole judges of credibility of each witness and the sole judges of the value or weight to be given to the testimony of each witness. The trial court instructed the jurors that the lawyer's statements were not evidence and that the jury should disregard any remark, statement, or argument that was not supported by the evidence. These instructions further cured any misstatement made by the State in closing argument.

The State's remarks reflect the wide latitude given to the State in drawing and expressing reasonable inferences from the evidence. Mr. Barnes fails to show prejudice from either remark.

We affirm the convictions.

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

No. 30491-4-III
State v. Barnes

Kulik, J.

WE CONCUR:

Brown, J.

Siddoway, A.C.J.