

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62435-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
JO WAYNE AARHUS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: November 30, 2009
_____)	

AGID, J.—A jury found Jo Wayne Aarhus guilty of assault in the second degree (domestic violence), three counts of tampering with a witness, and four counts of domestic violence misdemeanor violation of a court order. On appeal, Aarhus asserts that his three convictions for tampering with a witness violate double jeopardy or, in the alternative, the three convictions should have been considered the same criminal conduct in determining his offender score. Aarhus also contends that the prosecutor committed misconduct by disparaging defense counsel in closing argument. Finding no error, we affirm.

FACTS

Nineteen-year-old Jessica Kim and 21-year-old Jo Wayne Aarhus dated for four

years and have a son together. On May 6, 2008, when Kim returned to her apartment with her friend Cindy, Aarhus was outside having a barbeque with some of his friends. Kim was upset that Aarhus had gone into her apartment and was using her things. Kim told Aarhus to leave, and the two began to argue. Kim threw some of Aarhus's things out of the apartment. Aarhus was angry and pushed her. Kim pushed him back and continued to throw his things out of the apartment.

Kim went into her bedroom and tried to keep Aarhus from coming in by blocking the door with her body. Aarhus opened the door with force, and Kim pointed a screwdriver at him to protect herself. Aarhus put his hands on Kim's throat, lifted her, and choked her against the wall. Kim testified that she could not breathe and she "kind of" blacked out. When Aarhus let go of Kim, she fell to the floor, then started hitting him.

Kim tried to call the police but had to hang up when Aarhus came back into the apartment and he took the phone away from her. Aarhus attacked Kim again and started choking her with one hand until her friend Cindy intervened. Aarhus hit Cindy and ran out of the apartment.

After his arrest, Aarhus called Kim eight times between 9:00 and 11:00 a.m. on May 11. Four of the calls were completed at 9:52 a.m., 10:13 a.m., 10:48 a.m., and 10:56 a.m. In these calls, Aarhus told Kim that he loved her and repeatedly asked Kim to testify that what she said to the police was a lie so he could get out of jail.

The State charged Aarhus with assault in the second degree (domestic violence), three counts of tampering with a witness, based on May 11 telephone

conversations, and four counts of domestic violence misdemeanor violation of a court order.

At trial, Kim and Cindy testified about the fight between Kim and Aarhus. They both said that Aarhus choked Kim twice, though Cindy said that Kim did not pass out. Deputy James Nelson testified that when he arrived at Kim's apartment, Kim was crying and had scratches on the side of her face and her chest and small bruises on her collarbone. He took pictures of Kim's injuries. Sergeant Barclay Pierson testified about the phone calls between Aarhus and Kim, and the jury heard recordings of those calls.

The defense theory at trial was that Aarhus acted in self-defense. Aarhus did not testify or call any witnesses.

The jury found Aarhus guilty as charged. With an offender score of three, the court sentenced Aarhus to concurrent sentences of 16 months for the assault in the second degree and 12 months for each of the counts of tampering with a witness.

Aarhus appeals.

DISCUSSION

Double Jeopardy

Aarhus asserts that his three convictions for tampering with a witness violate double jeopardy because the underlying conduct formed only one, not three, units of prosecution. We recently addressed the same argument in State v. Hall.¹ We held that “the unit of prosecution for tampering with a witness is any one instance of attempting to induce a witness or a person to do any of the actions set forth in RCW 9A.72.120.”²

¹ 147 Wn. App. 485, 196 P.3d 151 (2008), review granted, 166 Wn.2d 1005 (2009).

² Id. at 490.

Under Hall, Aarhus's actions constitute three units of prosecution. Consequently, his convictions do not violate double jeopardy.³

Same Criminal Conduct

Aarhus contends that the trial court abused its discretion in determining his offender score because the phone calls were part of the same criminal conduct. Accordingly, Aarhus asserts that the three charges for tampering with a witness should have been counted as one point in his offender score.

“The SRA creates a grid of standard sentencing ranges factored by the defendant's ‘offender score’ and the ‘seriousness level’ of the current offense.”⁴ “‘Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.”⁵ “The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next.”⁶ We review the trial court's determination of what constitutes the same criminal conduct for abuse of discretion.⁷

The State asserts that because Aarhus did not make this argument below, he has waived it on appeal.⁸ Aarhus relies on State v. Mendoza to argue that the State

³ We reject Aarhus's argument that we must reconsider the holding in Hall based on the Supreme Court's decision in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). In Sutherby, the court stated that under RCW 9.68A.070, “the proscribed conduct is the *possession* of child pornography.” Id. at 879. By contrast, in Hall, we determined that under RCW 9A.72.120 “[t]he focus is upon the *attempt* to induce, not on the specific identity of the person or proceeding.” Hall, 147 Wn. App. at 489 (emphasis added).

⁴ State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

⁵ RCW 9.94A.589(1)(a).

⁶ State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

⁷ State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993).

⁸ In re Pers. Restraint of Shale, 160 Wn.2d 489, 495-96, 158 P.3d 588 (2007) (If the defendant does not argue that the offenses were the same criminal conduct below, that

had the burden of proving the acts were not the same criminal conduct and that a defendant's failure to object to a prosecutor's calculation of the offender score does not constitute affirmative acknowledgement of the criminal history or standard range.⁹

Aarhus's reliance on Mendoza is misplaced. The issue in Mendoza was whether the State had proved Mendoza's prior criminal history, not whether the actions were the same criminal conduct. We agree with the State that Aarhus waived the argument that his actions were the same criminal conduct by failing to raise it below.

Even if Aarhus had not waived the argument, the record is clear that he had time "to pause and reflect upon his actions." State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). During the phone calls, he and Kim talked about a variety of unrelated topics, and Aarhus made a call to another person during the sequence of calls to Kim. The calls were discrete, and his efforts to persuade Kim on his behalf were separate.

Prosecutorial Misconduct

Aarhus asserts that the prosecutor committed misconduct by disparaging the role of defense counsel in closing argument when she said defense counsel was trying to "play a game of semantics" and throwing out "red herrings."

To establish prosecutorial misconduct, the defendant "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect."¹⁰ The prosecutor has latitude in closing argument to draw and express reasonable inferences from the evidence.¹¹ "We review allegedly improper

argument is waived on appeal.).

⁹ 165 Wn.2d 913, 205 P.3d 113 (2009).

¹⁰ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

¹¹ State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d

comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given.”¹²

We agree with the State that in the context of the argument, the prosecutor’s reference to a “game of semantics” correctly anticipated the defense argument that in the phone calls, Aarhus never directly told Kim to lie.

[Prosecutor]: This phone call is probably the most telling call because this is the phone call where the defendant tells Jessica to tell the story about her and Cindy setting the defendant up. He tells Jessica to say that she slapped herself a couple of times and that Cindy scratched her and that’s how she got the mark on her forehead. That’s how we know, aside from whatever a game of semantics defense is going to try to play, you never in here in the phone calls hear the defendant --

[Defense]: Objection, Your Honor. Disparaging the role of defense counsel.

The Court: Overruled.

[Prosecutor]: You never hear in the phone calls to say come to court and lie

In closing, the defense argued that Kim was not a credible witness. The defense attorney also stated, “You never heard Jo tell Jessica to lie. You did hear Jessica called a liar. He never told her to come to court and testify falsely.” In the context of the argument, the comment was not improper.

In rebuttal, the prosecutor used the term “red herring” to argue that the defense was trying to distract the jury by focusing on irrelevant facts.

[Prosecutor]: The defense in this case is a shotgun one. Throw as many red herrings out there as possible to confuse the jury and --

[Defense]: Objection, Your Honor, burden shifting, disparaging defense counsel.

The Court: Overruled.

[Prosecutor]: Throw as many red herring out there as possible to confuse the jury. He’s not giving you enough credit. You can see right

1008 (1983).

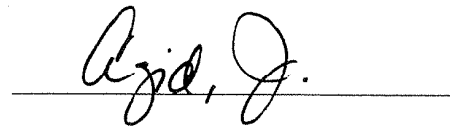
¹² State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017 (1999).

through how ridiculous his claim of self-defense is.

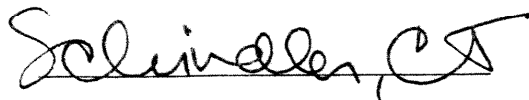
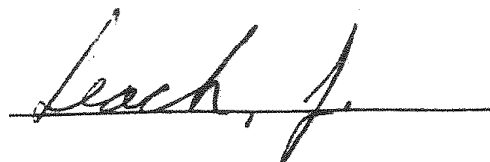
The prosecutor was responding to defense counsel's focus on the lack of petechiae on Kim's neck, and the defense attorney's arguably inconsistent arguments that Aarhus either acted in self-defense or constituted only assault in the fourth degree. In the context of the argument, the statements were proper.

In addition, the court instructed the jury to "disregard any remark, statement, or argument that is not supported by the evidence or the law" Even if the remarks were improper, we presume the jury followed the court's instructions.¹³ We conclude Aarhus failed to establish prosecutorial misconduct.

We affirm.



WE CONCUR:



¹³ State v. Guizzotti, 60 Wn. App. 289, 298, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991).