

Case Summary

Charles Summers appeals his convictions for Class D felony strangulation and Class A misdemeanor battery. We affirm in part, reverse in part, and remand.

Issues

Summers raises two issues, which we restate as:

- I. whether the prosecutor committed misconduct during closing argument; and
- II. whether his convictions for strangulation and battery violate double jeopardy.

Facts

Summers and Jessie Daniels were neighbors in a duplex apartment in Indianapolis. During the early morning hours of January 9, 2010, Summers knocked on Daniels's bedroom window and door. Daniels opened the door. Summers asked if Daniels's girlfriend, Jana White, was there. Daniels lied and said she was not there. Summers then asked to borrow a lighter. At some point, Summers stuck his head inside Daniels's apartment and yelled for White. Summers and Daniels started fighting. During the fight Daniels's shoulder was injured, and Summers grabbed Daniels by the neck. White eventually intervened, Summers left, and the incident was reported to the police. Summers was arrested shortly thereafter.

The State charged Summers with Class D felony residential entry, Class D felony strangulation, and Class A misdemeanor battery. A jury found Summers not guilty of the residential entry charge and guilty of the strangulation and battery charges. The trial court entered convictions on both the strangulation and battery counts. The trial court

sentenced Summers to 545 days executed on the strangulation conviction. The trial court does not appear to have imposed a sentence on the battery conviction. Summers now appeals.

Analysis

I. Prosecutorial Misconduct

Summers argues that the prosecutor committed misconduct during her closing argument. In reviewing claims of prosecutorial misconduct, we first consider whether the prosecutor committed misconduct and then whether the alleged misconduct placed the defendant in grave peril. Delarosa v. State, 938 N.E.2d 690, 696 (Ind. 2010). The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury’s decision, not the degree of the impropriety of the conduct. Id. “To preserve a claim of prosecutorial misconduct, a defendant must object and request an admonishment.” Id. “If the defendant is not satisfied with the admonishment, the defendant must move for a new trial.” Id. “Failure to comply waives the prosecutorial misconduct claim.” Id.

During her closing argument, the prosecutor referenced Summers’s two reasons for going to Daniels’s apartment—to check on White and to borrow a lighter. The prosecutor argued that Summers was telling two different stories “because one is the truth, and one was . . . manufactured” Tr. p. 227. Summers objected to this argument. Agreeing with Summers, the trial court admonished the jury to disregard the prosecutor’s statement alleging Summers lied. Summers made no further objection and did not request a mistrial. Summers claims that his request for an admonishment alone

was sufficient to preserve this error. To the contrary, we presume that a timely and accurate admonishment by the trial court will cure any defect. Green v. State, 587 N.E.2d 1314, 1317 (Ind. 1992). If Summers was dissatisfied with the admonishment, he was required to move for a mistrial, which he did not do. See Delarosa, 938 N.E.2d at 696. Any error is waived.

Summers goes on to argue, however, that the cumulative effect of this alleged error along with another statement by the prosecutor during her closing argument deprived him of a fair trial. Summers points to the prosecutor's argument referencing a booking photograph of Summers with a black eye taken the day of the incident. In arguing that Summers did not get the black eye during the incident she stated:

This photo defense is trying to use to show you that he was hit that night. Many of you said you have children. All of you have seen someone injured. That is not a bruise from one day. That's not something that has just occurred. That's black.

We even saw or heard the officers testify that Jessie's wounds were not black yet the night of the occurrence. He said they were just red. Later they got the purpleness. You all know that from your common sense, and your everyday life. Injuries show up later.

Tr. pp. 226-27.

Summers, however, did not object to this argument. In the absence of an objection, let alone a request for an admonishment or a mistrial, he has failed to preserve the issue. See Delarosa, 938 N.E.2d at 696. This issue is waived, and Summers has not established that he was denied a fair trial.

II. Double Jeopardy

Summers asserts the convictions for strangulation and battery violate double jeopardy because they were based on one incident with one victim. He argues that the battery convictions should be vacated. The State points out that, although the trial court did not impose any sentence on the battery conviction, it did enter a judgment of conviction on both counts. The State concedes that the trial court should vacate the conviction for Class A misdemeanor battery. We agree and reverse and remand with instructions to vacate the battery conviction.

Conclusion

Summers has not established that the prosecutor's closing arguments amounted to misconduct. Because the convictions for strangulation and battery violate double jeopardy, we reverse and remand for the trial court to vacate the battery conviction. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

BAKER, J., and VAIDIK, J., concur.