IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41744

STATE OF IDAHO,	)	**2015 Unpublished Opinion No. 431**
	)	
Plaintiff-Respondent,	)	**Filed: March 24, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LEIGH BROOKS ANDERES,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Lynn G. Norton, District Judge.

Judgment of conviction and order of restitution, affirmed.

Sara B. Thomas, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Leigh Brooks Anderes was convicted of battery of a parole officer and three drug offenses. On appeal, she argues that the prosecutor made improper comments during closing argument and that the district court erred when awarding restitution.

I.
BACKGROUND

Anderes was charged with battery of a parole officer, Idaho Code § 18-915(2); possession of drug paraphernalia, I.C. § 37-2734A; and two counts of possession of a controlled substance, I.C. § 37-2732(c). The State also filed an Information Part II, alleging that Anderes was a persistent violator of the law.

At trial, the State presented evidence showing that Anderes went to the probation and parole office in Boise and met with her parole officer, Martinez. Once there, the officer found drugs and drug paraphernalia in Anderes' purse. Martinez asked officer Kightlinger to assist him in serving an agent's warrant. The officers then told Anderes that she was going to be arrested. Martinez left the office to get a car to transport Anderes to jail, leaving Kightlinger and Anderes alone in the office. At that point, Anderes began gathering up her personal property, but Kightlinger instructed her to put the items back down and to turn and face the office wall. She initially complied with the order and turned, but shortly thereafter she grabbed her purse and charged at Kightlinger. Kightlinger grabbed Anderes, and both of them fell to the ground outside of the office. They struggled for some time before other officers arrived and got physical control of Anderes. In the struggle, Kightlinger's finger, leg, and shoulder were injured.

Anderes admitted that she attempted to run away from Kightlinger, but she denied charging him. She testified that Kightlinger grabbed her as she was running away. Anderes pointed out that Kightlinger was a large man and that she was a smaller woman. In closing argument, counsel argued that the jury should find Anderes' story credible because charging the much larger person would have been futile, and running away would have been marginally more likely to succeed.

After closing argument, the jury returned a guilty verdict on each of the charges, and Anderes admitted that she was a persistent violator.

On appeal, Anderes argues that the prosecutor committed misconduct during closing argument and that the district court erred in awarding restitution for certain medical expenses incurred by Kightlinger.

II.
ANALYSIS

A. Prosecutorial Misconduct

Anderes argues that certain statements made by the prosecutor at closing argument amounted to misconduct. She contends that the prosecutor vouched for the credibility of witnesses and impermissibly described Anderes as a liar.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence.

Id.; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. However, closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases "I think" and "I believe" altogether. *Id.*

Anderes concedes that she made no contemporaneous objection to the prosecutor's closing argument at trial. Consequently, we will reverse only if Anderes demonstrates that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

1. The prosecutor's statements concerning credibility did not amount to impermissible vouching

Anderes argues that numerous comments by the prosecutor in closing and rebuttal amounted to impermissible vouching. The State argues that these comments were proper inferences from the record.

Given the testimony adduced at trial, closing argument focused on the difference between Kightlinger's testimony, in which he said that Anderes charged him, and Anderes' testimony, in which she said that she tried to run and was grabbed by Kightlinger. Consistent with this approach, the prosecutor began by explaining that the jury could review the evidence and conclude that a witness was more credible or less credible and give more weight to the more credible testimony.

Although Anderes cites numerous allegedly improper statements, we need not discuss each of them because a few examples are sufficient to demonstrate the general nature of the arguments made in closing. In each portion of the argument that Anderes describes as misconduct, the prosecutor combined an argument explaining why the jury should conclude that a particular witness was credible with an unqualified statement that Kightlinger was credible. For example, the prosecutor argued that because one witness was unfamiliar with the other witnesses he had no discernable bias or incentive to lie. In the next sentence, the prosecutor stated that the witness was "very credible." In another passage the prosecutor asked a rhetorical question, "Is Robert Kightlinger credible?" and answered her question by saying "Absolutely." She then gave several reasons for that conclusion: his testimony was corroborated by other witnesses, his demeanor and other nonverbal communications did not indicate deceit, and he had no preexisting bias or motive to lie.

In rebuttal, the prosecutor said, "[Kightlinger] swore to tell the truth and he did. And, like it or not, this is how it happened." That statement was followed by an argument supporting that view. Earlier, Anderes had argued that Kightlinger was not credible because a prudent person would not charge a parole officer who is much larger than herself and presumably trained to resist force. The prosecutor responded by arguing that Kightlinger's version was credible because a large officer, who has been trained to resist force, would be reluctant to admit that he had been "beat up" by a much smaller woman.

As stated above, closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. In particular, a prosecutor should not imply that he or she has access to "information corroborating the [witness's] testimony that was unknown to the jury" or "personally vouch[] for the credibility" of a witness. *State v. Timmons*, 145 Idaho 279, 289, 178 P.3d 644, 654 (Ct. App. 2007). Conversely, it is proper for a prosecutor to argue that a person is credible or not credible when that argument "is based solely on inferences from evidence presented at trial." *Sheahan*, 139 Idaho at 280, 77 P.3d at 969. In cases distinguishing impermissible vouching from proper comments on the evidence, we have held that the phrases "I think" and "I believe" are disfavored and we have encouraged prosecutors to "explicitly state that the opinion [regarding credibility] is based solely on inferences from evidence presented at trial." *Timmons*, 145 Idaho at 288-89, 178 P.3d at 653-54; *see also State v. Wheeler*, 149 Idaho

364, 369, 233 P.3d 1286, 1291 (Ct. App. 2010) ("A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial.").[1]

In this case, the prosecutor never implied that she had access to information that was unknown to the jury, nor did she imply that she, personally, would vouch for a witness's veracity. Instead, each statement regarding credibility was connected to evidence for the jury's consideration. In our view, the statements regarding credibility were thesis statements in larger arguments that were proper when considered as a whole. Therefore, although the prosecutor could have made the connection more plain, we conclude that she was not expressing her opinion regarding credibility, but was asking the jury to draw a conclusion regarding credibility from the evidence adduced at trial. Accordingly, we conclude that Anderes has failed to meet the first prong of *Perry* because she has not shown a violation of a constitutional right.

2. Comments describing Anderes' testimony as "lies" did not amount to fundamental error

In several portions of the prosecutor's closing remarks, she argued that Anderes was not credible or had "lied." Anderes argues that it is generally impermissible to call a defendant a liar and that these comments were improper personal statements of the prosecutor's belief.

"Generally, it may be improper to label the defendant as a 'liar'" because "excessive labeling of the defendant as a 'liar' could be viewed as an improper attempt to obtain a finding of guilt by disparaging the defendant before the jury." *State v. Gross*, 146 Idaho 15, 18-19, 189 P.3d 477, 480-81 (Ct. App. 2008). Conversely, we have upheld, as permissible, comments in which the prosecutor argues that the defendant had lied. *See State v. Kuhn*, 139 Idaho 710, 716, 85 P.3d 1109, 1115 (Ct. App. 2003). The distinction was especially clear in *Kuhn*, where this Court compared various statements, made by the State, each of which described the defendant's alleged dishonesty:

---

[1] As *Timmons* shows, neither the use of the disfavored phrases or the failure to use this Court's suggested style will automatically result in reversal. *State v. Timmons*, 145 Idaho 279, 289, 178 P.3d 644, 654 (Ct. App. 2007). Nevertheless, the style suggested by the Court is a means by which prosecutors can reduce the risk that their statements will be viewed as vouching on appeal.

> The prosecutor permissibly argued that the jury should believe the state's side of the story over Kuhn's because his story was inconsistent when compared with his prior testimony. The prosecutor also permissibly argued that the reason there were inconsistencies in Kuhn's testimony was because he had lied under oath and that this was not the first time Kuhn had committed dishonest acts. However, the prosecutor crossed the line of propriety when he called Kuhn "a liar and a thief" and expressly accused him of committing perjury, an independent felony.

Id. Likewise, it is proper to explain how the evidence adduced at trial affects the credibility of various witnesses, including the defendant. *State v. Moses*, 156 Idaho 855, 873, 332 P.3d 767, 785 (2014).

In this case, the prosecutor never called Anderes a liar, but did say that Anderes "has lied" and that "[m]aybe some of [Anderes' averments] aren't lies." These statements were not repeated so frequently that they became excessive. Rather, like the statements discussed above, these statements were connected to larger arguments wherein the prosecutor argued that the jury could determine which witnesses were credible using the evidence admitted at trial. Although the prosecutor's statements could have been more precise or artful, we conclude that the statements were not improper.[2]

B. Restitution

The State sought restitution, the greatest part of which was to reimburse Kightlinger's medical expenses. On appeal, Anderes challenges the restitution as it relates to these medical expenses and to a pair of broken sunglasses.

Idaho Code section 19-5304(2) authorizes a sentencing court to order a defendant to pay restitution for economic loss to the victim of a crime. Whether to order restitution, and in what amount, is within the discretion of a trial court, guided by consideration of the factors set forth in I.C. § 19-5304(7) and by the policy favoring full compensation to crime victims who suffer economic loss. *State v. Richmond*, 137 Idaho 35, 37, 43 P.3d 794, 796 (Ct. App. 2002); *State v. Bybee*, 115 Idaho 541, 543, 768 P.2d 804, 806 (Ct. App. 1989). Thus, we will not overturn an order of restitution unless an abuse of discretion is shown. *Richmond*, 137 Idaho at 37, 43 P.3d at 796. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such

[2] As guidance, we note that a prosecutor referring to a defendant as "not credible" is considerably less disparaging than calling a defendant a liar.

discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

To satisfy the second and third requirements of this analysis, the trial court must base the amount of restitution upon the preponderance of evidence submitted by the prosecutor, defendant, victim, or presentence investigator. I.C. § 19-5304(6); *State v. Lombard*, 149 Idaho 819, 822, 242 P.3d 189, 192 (Ct. App. 2010). Thus, the State must prove, by a preponderance of the evidence, a causal relationship between the defendant's criminal conduct and the damages suffered by the victim. I.C. § 19-5304(7); *State v. Corbus*, 150 Idaho 599, 602, 249 P.3d 398, 401 (2011); *State v. Hill*, 154 Idaho 206, 212, 296 P.3d 412, 418 (Ct. App. 2012). Causation consists of actual cause and true proximate cause. *Corbus*, 150 Idaho at 602, 249 P.3d at 401; *State v. Lampien*, 148 Idaho 367, 374, 223 P.3d 750, 757 (2009). Actual cause refers to whether a particular event produced a particular consequence. *Corbus*, 150 Idaho at 602, 249 P.3d at 401; *Lampien*, 148 Idaho at 374, 223 P.3d at 757. Proximate cause focuses on the foreseeability of the injury, requiring us to determine whether the injury and manner of occurrence were so highly unusual that we can say, as a matter of law, that a reasonable person, making an inventory of the possibilities of harm that his or her conduct might produce, would not have reasonably expected the injury to occur. *Corbus*, 150 Idaho at 602, 249 P.3d at 401; *Lampien*, 148 Idaho at 374, 223 P.3d at 757; *State v. Houser*, 155 Idaho 521, 525, 314 P.3d 203, 207 (Ct. App. 2013).

The determination of the amount of restitution, which includes the issue of causation, is a question of fact for the trial court. *Corbus*, 150 Idaho at 602, 249 P.3d at 401; *State v. Hamilton*, 129 Idaho 938, 943, 935 P.2d 201, 206 (Ct. App. 1997). The district court's factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence. *Corbus*, 150 Idaho at 602, 249 P.3d at 401; *Lombard*, 149 Idaho at 822, 242 P.3d at 192. Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *State v. Straub*, 153 Idaho 882, 885, 292 P.3d 273, 276 (2013).

1. Kightlinger's medical expenses

At the restitution hearing, Kightlinger testified that he was physically well and had full use of his arm when he went to work on the day of the attack by Anderes. The State did not call a medical expert to testify but did submit certain medical records. In those records, Kightlinger reported that he had felt immediate pain during the altercation with Anderes and then later felt a

"popping and grinding feeling in his shoulder." When examined, the treating doctor believed that the pain was located in a joint between Kightlinger's clavicle and his scapula. An X-ray showed "a prominent bone" in the area of that joint "where there have been chronic calcifications from previous injuries." The doctor ordered an MRI to get more information. In a later visit, the doctor reviewed the MRI, which showed a labral tear and signs of impingement. The doctor also indicated that Kightlinger had arthritis in the joint between his scapula and clavicle. He opined that the labral tear caused the "mechanical symptoms" and recommended a surgical procedure to repair that tear. The doctor also recommended a procedure or procedures involving the clavicle and the scapula-clavicle joint.

Consistent with the doctor's recommendation, Kightlinger was seen by a surgeon. He diagnosed Kightlinger with a "labral tear," "shoulder impingement," and "joint arthritis." He then performed three procedures. The first was a "labral repair" wherein the surgeon reattached the labrum. The second and third procedures were "subacromial decompression" and "distal clavicle excision." These procedures involved the removal of bursal inflammation and of some portion of Kightlinger's clavicle.

In lieu of a medical expert, the State called a claims examiner at the Idaho State Insurance Fund. She testified that the insurance fund paid the victim's medical bills as part of his worker's compensation because they were "related to his May 6 work-related injury."

At the restitution hearing, the parties disputed the meaning and import of these reports. Anderes argued that the State failed to show that she was the cause of all of the injuries necessitating the surgery. In her view, the surgery was primarily done to address bone spurs, a condition that the doctor describe as resulting from prior injury. She argued that while she may have irritated the preexisting injury, she did not cause the underlying injury that necessitated that portion of the surgery. It appears that she was arguing that her conduct resulted in pain that led to doctors discovering an underlying medical condition, but did not cause that underlying medical condition. Conversely, the State argued that the arthritis and calcifications were "not the symptomatic features, nor the cause of the surgeries as described in the medical records."

The district court, after hearing argument, found that the "treatment is for an injury that was resulting from the defendant's criminal conduct. Had she not impacted him, that surgery would not have been necessary."

On appeal, Anderes argues that Kightlinger suffered from two or more unrelated medical conditions and that he was surgically treated for all of these conditions despite the fact that Anderes only caused some of them. She argues that "Mr. Kightlinger's shoulder surgery was completed to address arthritis issues including calcification and bone spurring," but her battery "was not the actual or proximate cause of Mr. Kightlinger's shoulder issues related arthritis, bone spurring or calcification."

As stated above, an award of restitution is proper only when the economic loss suffered by the victim has been caused by the defendant's criminal conduct. In restitution cases, Idaho Courts "apply principles from the common law of torts" when addressing questions of causality. *Houser*, 155 Idaho at 525, 314 P.3d at 207. For over a century, Idaho law has held that prior injuries do not preclude civil recovery. *See Jones v. City of Caldwell*, 20 Idaho 5, 13, 116 P. 110, 113 (1911) *overruled on other grounds by Labonte v. Davidson*, 31 Idaho 644, 175 P. 588, 590 (1918). Under current law:

> [O]ne injured by the tortious act of another may recover damages for the aggravation of a pre-existing disability. A defendant in a personal injury action takes the plaintiff as he finds him.

Browning v. Ringel, 134 Idaho 6, 13, 995 P.2d 351, 358 (2000) (quoting *Blaine v. Byers*, 91 Idaho 665, 673, 429 P.2d 397, 405 (1967)); *see also Henry v. Dep't of Corr.*, 154 Idaho 143, 144, 295 P.3d 528, 529 (2013) (quoting *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985) (an employee may recover workmen's compensation when the work "causes an accident which aggravates or accelerates a previous disease condition of the employee").

In accord with these general rules, this Court has upheld restitution awards where a victim's preexisting condition is aggravated by a defendant's criminal conduct. *State v. Cottrell*, 152 Idaho 387, 392-93, 271 P.3d 1243, 1248-49 (Ct. App. 2012). In *Cottrell*, an officer had swelling and discomfort in his right knee and had previously undergone surgery on that knee. In the course of his duties, the officer attempted to gain physical control over a defendant. In so doing, he twisted his knee. At the restitution hearing, the State adduced a medical report wherein an independent medical evaluator opined that the officer tore his lateral meniscus as a result of the twisting injury and that the "tear [was] the specific injury that caused the need for the surgical intervention." *Id.* at 392-93, 271 P.3d at 1248-49.

The medical reports admitted in this case are distinguishable from the records admitted in *Cottrell*. There is no medical opinion stating that the "joint arthritis" or "chronic calcifications" were either caused or exacerbated by Anderes' conduct. Rather, the medical reports tend to show that those conditions resulted from "previous injuries." Additionally, there is no medical testimony explaining the link between the surgical procedures, e.g., that repairing the labrum tear without performing the other surgeries would have been futile.

However, there was other evidence relating to causality, the testimony of the claims examiner and of Kightlinger. As stated above, the claims examiner testified that the State Insurance Fund had paid Kightlinger's medical expenses and opined that all of the expenses "related to [Kightlinger's] May 6 work-related injury." She said that one of her job functions was to "review the medical records to make a determination whether or not the treatment that was provided was related to the specific accident of May 6." When asked whether she "read those medical reports with an eye for whether it was a work-related injury that required the treatment," she answered "yes." The admissibility and reliability of this testimony was not challenged below, nor does Anderes challenge it on appeal.[3] Accordingly, it constitutes some evidence regarding causality. Kightlinger's testimony also tends to show that the need for surgery for conditions in addition to the labrum tear was caused by Anderes' assault, for he said that prior to her attack, he was well and had full use of his arm. From this it can be inferred that no surgery would have been needed at that time if Anderes' attack had not occurred. We therefore conclude that the trial court's award of restitution to the Insurance Fund for the challenged medical expenses is supported by substantial evidence.

2. Kightlinger's sunglasses

Kightlinger testified that he had been injured "during the incident with Ms. Anderes." Thereafter, the prosecutor asked, "have you incurred costs for travel to and from those appointments in relationship to treatments for that injury?" Immediately following that testimony concerning travel, the prosecutor asked Kightlinger about a pair of sunglasses:

> Q. And, then, in addition to costs associated with your travel, did you also have a financial loss based on the loss of a pair of Oakley sunglasses?
> A. Yes.
> Q. And did you know the market cost of those sunglasses when they were damaged?

[3] Accordingly, our decision should not be viewed as holding that a claims examiner may render an opinion as a medical expert.

A. Yes.
Q. And what was that?
A. I think it was $180.

Anderes argues that the State failed to prove that "the sunglasses were lost or damaged as a result of Ms. Anderes' actions." She also argues that the State failed to provide substantial evidence regarding the cost of the sunglasses.

Although the State's evidence could have been better presented, from the context of the testimony, the judge sitting as the factfinder could reasonably infer that the cause of the "loss" was "the incident with Ms. Anderes." Reading the exchange in context, the testimony shows that (1) Kightlinger was injured by Anderes' criminal conduct, (2) as a result Kightlinger suffered losses including travel expenses, and (3) his sunglasses were damaged "in addition" to these other losses. One can infer that a set of losses that are incurred "in addition" to the first set of losses share a similar cause.

Kightlinger's statement regarding the price of the sunglasses provided a sufficient basis for the trial court to determine the value of the sunglasses. This Court reviews a cold record, wherein the phrase "I think" can often indicate hedging or uncertainty. But, the phrase is not always used that way and the district court, not this Court, is best positioned to make that determination. We have no basis to conclude that the district court abused its discretion.

III.

CONCLUSION

Anderes having shown no error, her judgment of conviction and the restitution order are affirmed.

Judge GUTIERREZ and Judge GRATTON **CONCUR.**