IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO.: 502017AP000006AXXXMB
L.T. NO.: 502016MM012431AXXXMB

JOHN PAUL BAKER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed:

Appeal from the County Court in and for Palm Beach County,
Judge Debra Moses Stephens.

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PER CURIAM.

Appellant John Baker appeals his conviction for "Battery (Domestic)." Appellant argues the trial court abused its discretion by (1) permitting the State to argue during closing that Appellant's wrestling training allowed him to grab the victim's throat without leaving any marks; and (2) permitting the State to question the victim's daughter about having met with defense counsel prior to trial and then argue during closing that defense counsel coached her into changing her testimony. We find error with regard to both issues—the latter, reversible.

The facts of this case arise from an altercation that took place one morning between Appellant and his girlfriend, M.L., as she was getting her kids ready for school. Appellant lived in M.L.'s house with M.L. and her six children. Appellant is not the biological father of M.L.'s children, though Appellant is acquainted with their father and has, at times, communicated with him. According to M.L.'s testimony, the incident began when she first heard Appellant scream from the master bedroom upstairs, "Where the F is my phone?" M.L. testified that she walked over to the stairs where Appellant was then standing and he told her that she had ten seconds to give him his phone or he was going to start "tearing up [the] place." As everyone began looking for the phone, Appellant became very upset, kicking a hole in one of the bedroom doors and throwing laundry from one floor of the house to the other. When Appellant finally located his phone, he picked up his keys and walked out of the house towards his vehicle.

After Appellant exited the house, M.L. returned to the master bedroom upstairs where she discovered Appellant's wallet. Looking inside, she found what she described as an "excessive amount of cash." She then heard Appellant re-enter the house and begin climbing the stairs. M.L. attempted to exit the bedroom but was confronted by an "irate" Appellant in the doorway. When she asked Appellant why he had so much money, Appellant responded, "Why are you looking through my F'ing stuff?" and began pushing her back into the bedroom. According to M.L., when she tried to get by Appellant to exit the bedroom, Appellant put his hands around her neck and pushed her back onto the bed, falling on top of her. M.L. yelled for the children to call the police, but she was ultimately able to free herself from Appellant, after which she ran downstairs and called the police herself.

Appellant was charged with one count of "Battery (Domestic)." At trial, M.L. testified that while she took a picture of the injuries around her neck, the police did not take any photographs

because by the time they arrived, the red marks on her neck "maybe had subsided." Over defense counsel's relevance objection, the prosecutor then asked M.L. if Appellant had any training in wrestling. M.L. answered in the affirmative, stating that Appellant had told her he was a state champion wrestler and that "he had won."

One of M.L.'s daughters, D.C., testified on behalf of Appellant. D.C. testified that when the altercation took place, she was tending to some of the other kids who were crying, but that she was able to see down the hall into the master bedroom. According to D.C., her mother confronted Appellant about the wallet, waiving it in the air, and when Appellant reached out to grab it, both Appellant and M.L. fell onto the bed together, with Appellant landing on top of M.L. She further testified that while Appellant thus was on top of M.L., he got right up, after which M.L. ran downstairs to call the police. D.C. also testified that she did not see any marks or injuries on M.L.'s neck following the incident.

On cross-examination, the State attempted to impeach D.C. with her deposition testimony during which she indicated that she did not see the entire incident because she was dealing with the other children. D.C. also acknowledged that while she has a good relationship with her biological father, she does not have a good relationship with her mother, M.L.

I.

Turning to the issues on appeal, Appellant first alleges the trial court erred in permitting the State to argue during closing argument that Appellant was able to hold M.L. down by her throat without leaving any marks because he is trained to do so, an apparent reference to Appellant's wrestling training. A trial court has broad discretion in controlling comments made during closing arguments, and a trial court's ruling in that regard will not be disturbed absent an abuse of discretion. *Rivera v. State*, 840 So. 2d 284, 286 (Fla. 5th DCA 2003). Closing arguments allow "the State and defense to review the evidence and to explicate those inferences that may reasonably

be drawn from the evidence." *Patrick v. State*, 104 So. 3d 1046, 1065 (Fla. 2012) (citing *Dessaure v. State*, 891 So. 2d 455, 468 (Fla. 2004)). Thus, wide latitude generally is given to attorneys during closing argument. *Rivera*, 840 So. 2d at 286. However, "counsel may not urge the jury to consider facts not in evidence." *Patrick*, 104 So. 3d at 1065 (citing *Jackson v. State*, 522 So. 2d 802, 808 (Fla. 1988)).

During closing arguments, when addressing the lack of visible injuries to M.L., the State argued M.L. had testified that Appellant was able to hold her down by her throat "without causing injury to her because he's a guy that's trained to hold people down without causing injuries to them." The trial court overruled Appellant's facts-not-in-evidence objection, but the record clearly shows that M.L. made no such statement. Rather, she merely testified that Appellant was trained in wrestling and was at some point a state champion wrestler; she did not testify that Appellant was trained in choke holds or methods of grabbing one's throat that do not cause visible injuries, nor is such a conclusion logically drawn from one merely being a champion wrestler. Accordingly, we find the trial court abused its discretion by permitting the State to argue such facts not in evidence. *Patrick*, 104 So. 3d at 1065.

Nonetheless, we find the trial court's error was harmless because there is no "reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Specifically, the State was not required to prove that the victim suffered any injury or that Appellant's actions left visible marks on M.L.'s throat. The State simply needed to prove Appellant intentionally touched or struck the victim against her will. § 784.03 (1)(a)1., Fla. Stat. (2016). As M.L.'s testimony otherwise supports such a finding, we find the prosecutor's improper comment harmless.

II.

Appellant additionally argues that the trial court erred by admitting evidence that D.C. met with defense counsel prior to trial and then by permitting the State to use such evidence during closing arguments to imply that defense counsel coached D.C. to change her testimony for trial.[1] A trial court "has broad discretion in determining limitations to be placed on cross-examination," *Eliakim v. State*, 884 So. 2d 57, 60 (Fla. 4th DCA 2004), as does a trial court in the regulation of closing argument, *Rivera*, 840 So. 2d at 286.

In *Penalver v. State*, 926 So. 2d 1118, 1128-29 (Fla. 2006), the defendant was charged with first-degree murder. Prior to trial, after viewing videotape footage, an eyewitness identified the defendant as the suspected murderer. *Id.* At trial, however, the witness testified that the videotape quality was too poor to state definitively that the defendant was the murderer. *Id.* Over defense counsel's objection, the State questioned the witness as to whether she had pre-trial conversations with defense counsel. *Id.* at 1129. The witness responded that she had, and indicated they were "about general information regarding the case." *Id.* Then, during closing arguments, the State "implied that defense counsel improperly influenced [the witness's] testimony" because the witness's testimony at trial was different from her pre-trial identification of the defendant. *Id.*

The Florida Supreme Court held that the trial court erred in admitting the testimony regarding the witness's meetings with defense counsel and in permitting the State to imply that defense counsel improperly influenced her testimony. *Id.* at 1130. The court ruled that the

[1] Despite the State's contention, we find this issue is preserved for appellate review because the State's argument was the result of the trial court overruling Appellant's objections to the relevant line of questioning during the State's cross-examination. *See Gosciminski v. State*, 994 So. 2d 1018, 1025 (Fla. 2008) (finding claim regarding improper closing argument was preserved for appellate review, despite no contemporaneous objection during closing argument, because the "statements were a result of the trial court overruling the defense's objection to the State's . . . cross-examination").

evidence about the witness speaking with defense counsel was "irrelevant because standing alone it does not support the argument that [the witness] changed her testimony at trial based on these conversations." *Id.* The court further reasoned, "If the prosecutor is allowed to imply that counsel's interviews with the witness are improper, the defense's right to interview the witness becomes illusory." *Id.*

Similarly, in *Tindal v. State*, 803 So. 2d 806, 807 (Fla. 4th DCA 2001), the investigating officer took statements from multiple witnesses prior to trial identifying the defendant as the murder suspect. *Id.* Then, at trial, when one of the witnesses failed to testify, the State argued it was the result of someone threatening the witness on behalf of the defense. *Id.* at 807–08. The State provided no evidence, however, to support its claim that the witness failed to testify because of threats to her safety. *Id.* at 810. The Fourth District Court of Appeal held that the State's comments were improper because "it is impermissible for the state to suggest, without evidentiary support, that the defense has 'gotten to' and changed a witness's testimony or that a witness has not testified out of fear." *Id.* at 810.

Here, during the State's questioning on cross-examination, D.C. acknowledged that she met with and provided a statement to defense counsel prior to trial. Then, during closing argument, the State implied that D.C.'s trial testimony differed from her pretrial deposition testimony because defense counsel, among others, convinced her to change her story for trial. As in *Penalver* and *Tindal*, the State provided no evidentiary support for its implication that defense counsel improperly influenced D.C.'s testimony. We therefore find the trial court abused its discretion by admitting evidence that D.C. met with defense counsel prior to trial and then permitting the State to argue defense counsel may have improperly influenced D.C.'s testimony. *Penalver*, 926 So. 2d at 1130; *Tindal*, 803 So. 2d at 810. Further, because the State's prosecution heavily relied upon

establishing M.L.'s credibility and impeaching that of D.C., we find "there is a reasonable possibility that the error contributed to the conviction," and cannot be considered harmless. *DiGuilio*, 491 So. 2d at 1135.

Appellant's conviction is therefore **REVERSED** and this case is **REMANDED** for a new trial.[2]

KASTRENAKES, FEUER, and KELLEY, JJ., concur.

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[2] In accordance with this Court's recent Opinion in *Narinesingh v. State*, 502017AP000118AXXXMB, *5–6 (Fla. 15th Cir. Ct. Apr. 22, 2019), we note that should Appellant be convicted again following remand, his judgment of conviction and sentencing orders should reflect the charge of battery rather than "Battery (Domestic)," which we reiterate is not a crime separately set forth by statute in the State of Florida. *See also Jeanbart v. State*, 502015AP900008AXXXMB, *2 n.1 (Fla. 15th Cir. Ct. May 31, 2016).