IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. SALVADOR GOMEZ REBOLLAR, Appellant.	No. 39216-0-II UNPUBLISHED OPINION

Van Deren, C.J. — Salvador Gomez Rebollar appeals his conviction for violating a no contact order protecting his wife, Josie Gomez, arguing that (1) the prosecutor committed misconduct, (2) he received ineffective assistance of counsel, and (3) the evidence was insufficient to support his conviction. We affirm.

FACTS

On January 2, 2009, Thurston County Deputy Sheriff Malcolm McIver stopped a car because its license number indicated that the registered owner had a suspended driver's license. McIver identified the driver as Salvador Gomez Rebollar. McIver observed that there was "an adult female and several children" in the car. Report of Proceedings (RP) at 18. He identified the woman as Josie Gomez. McIver arrested Rebollar for driving on a suspended license and placed him in his patrol car.

McIver reviewed the information he received when he checked the license number and observed that Rebollar was subject to a no contact order protecting Gomez. Rebollar told McIver that he was aware of the no contact order but that he had to "provide for his family" and that they were "just coming back from . . . Costco." RP at 23. McIver spoke to Gomez again and confirmed her identity through her driver's license and Washington State identification card. Because she had a valid driver's license, McIver told her that she could drive the car away. McIver arrested Rebollar for violating the no contact order.

On January 6, 2009, the State charged Rebollar with one count of violating the no contact order. At trial, the State admitted a Department of Licensing photograph of Josie Gomez, who McIver identified as the woman present in the car on the day of Rebollar's arrest.

Rebollar, with the assistance of an interpreter, testified that he was aware of the no contact order, but denied that he was with Gomez when McIver arrested him. He stated that he was with his girl friend, Jenny Sanchez, Sanchez's child and his three children with Gomez. Rebollar admitted that there was "confusion" and "misunderstanding" when McIver asked him whether the woman in the car was Gomez, but added that he did not tell McIver that Gomez was the woman in the car. RP at 45-46. He stated that he speaks "some English" and that he "struggle[s] with it," but that he understood English well enough to have a conversation with McIver.

In rebutting Rebollar's closing argument, the State argued the following:

> [Defense counsel] is absolutely correct that he does not have to prove anything; that the defendant did not have to take the stand; that the burden is solely mine.
>
> When you look at the State's evidence, what we have is Deputy McIver saying that he identified that female, and that she stated her name was Josie Gomez and gave her date of birth and then he checked out her identification, not because she was a suspect in any way, but in order to let someone drive the car home he

> has to make sure they have a valid license and that was his purpose in doing that. She wasn't a suspect. In his mind, what he told you, there was no need to gather her physicals, put them in the report because she wasn't a suspect. She was the alleged victim. That's what he testified to.
>
> There is no evidence that the children in the car were anyone besides Josie and the defendant's. The only person who testified to that was the defendant. No one else has testified today that a child belonged to Jenny. No one named Jenny has testified today saying she was in the car, solely based on what the defendant told you.

RP at 80-81. The defense did not object to this argument. The jury found Rebollar guilty of violating the no contact order. The court sentenced Rebollar to 12 months plus one day of confinement.

ANALYSIS

I. Prosecutorial Misconduct

Rebollar argues that the State committed prosecutorial misconduct when, in closing, it improperly shifted the burden of proof to Rebollar. Specifically, he contends that when the prosecutor commented that "[n]o one named Jenny has testified today saying that she was in the car," RP at 81, it improperly "impl[ied] that the defense has a duty to present evidence." Br. of Appellant at 7 (underline omitted). We hold that this argument does not constitute prosecutorial misconduct.

A. Standard of Review

Prosecutorial misconduct is grounds for reversal only when the conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial." *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Misconduct is "prejudicial" only if there is a substantial likelihood that it affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing both that the conduct was

improper and that it caused prejudice. *Hughes*, 118 Wn. App. at 727.

When the defendant fails to object to a comment in the prosecutor's closing argument, we do not review the alleged misconduct unless the comment is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Otherwise, a defendant's failure to object waives the error. *Stenson*, 132 Wn.2d at 719. We analyze prejudice in the context of the total argument, the issues, the evidence and the instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

B. No Misconduct

Because Rebollar did not object to the prosecutor's comments at trial, we review the alleged misconduct under the "enduring and resulting prejudice" standard.[1] *Stenson*, 132 Wn.2d

[1] Our analysis in *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009) illustrates the high burden that Rebollar faces in showing misconduct.

In *Anderson*, we held that the prosecutor's statement that "'in order to find the defendant not guilty, you have to say "I don't believe the defendant is guilty" because, and then you have to fill in the blank,'" improperly implied that the jury had an initial affirmative duty to convict, thus undermining the presumption of innocence. 153 Wn. App. at 431 (quoting Anderson 4 Report of Proceedings at 327-28). We also held it improper that the prosecutor's comments discussed the reasonable doubt standard in the context of everyday decision making because these comments minimized the importance of the reasonable doubt standard and the jury's role in determining whether the State has met its burden. *Anderson*, 153 Wn. App. at 431. Finally, we held that the prosecutor improperly discussed common decisions in which one might choose to act or refrain from acting, focusing on the degree of certainty the jurors would have to be willing to act, rather than that which would cause them to hesitate to act, thus essentially inviting the jury to render a decision based on a standard less than what is constitutionally required. *Anderson*, 153 Wn. App. at 432.

Despite these improper comments, we still held that there was no prosecutorial conduct because the defendant "failed to object below and . . . failed to demonstrate that these comments were so flagrant or ill intentioned that an instruction could not have cured the prejudice." *Anderson*, 153 Wn. App. at 432.

at 719. A prosecutor commits misconduct by misstating the law[2] regarding the burden of proof. *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). But it is not misconduct to argue that the evidence does not support the defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). During closing arguments, we accord the prosecutor wide latitude in making arguments and drawing reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). This is especially so where the prosecutor is rebutting an issue the defendant raised in his closing argument. *State v. Jones*, 71 Wn. App. 798, 809, 863 P.2d 85 (1993).

The only comment that Rebollar points to as grounds for misconduct is the State's closing argument that "[n]o one named Jenny has testified today saying that she was in the car." RP at 81. Rebollar claims that this comment "impl[ies]" that the burden improperly shifted to him. Br. of Appellant at 7 (underline omitted). As Rebollar acknowledges, the identity of the woman in the car is an "essential fact," that he raised in his closing argument. Br. of Appellant at 8. The prosecutor, in rebuttal, made this comment in the context of arguing that, in light of McIver's testimony, the evidence does not support the defense theory that the woman was not Gomez. S*ee Jones*, 71 Wn. App. at 809; *see also Russell*, 125 Wn.2d at 87. Further the prosecutor made this comment soon after he stated, "[Defense counsel] is absolutely correct that he does not have to prove anything; that the defendant did not have to take the stand; that the burden is solely mine." RP at 80-81. Thus, the isolated comment that Jenny Sanchez did not testify does not constitute a

[2] A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

misstatement of the burden of proof.[3] *Fleming*, 83 Wn. App. at 213-14. In the context of the total argument, we hold that this comment does not create "enduring and resulting prejudice" against Rebollar and, therefore, Rebollar cannot show prosecutorial misconduct. *Stenson*, 132 Wn.2d at 719; *Warren*, 165 Wn.2d at 28.

II. Ineffective Assistance

Rebollar argues that his counsel's failure to object to the prosecutor's comment constitutes ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Because we hold that the prosecutor did not misstate the law in his comment and merely argued that the evidence did not support the defense theory, defense counsel's failure to object was not deficient performance and Rebollar's argument fails.

III. Sufficiency of the Evidence

Rebollar argues that there was insufficient evidence to find that the woman in the car was Gomez, which was "[t]he sole issue in dispute." Br. of Appellant at 13. We review a challenge to the sufficiency of the evidence in the light most favorable to the State to determine whether any

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[3] Washington courts have found prosecutorial misconduct in the following instances when the prosecutor improperly shifted the burden of proof: (1) In *Fleming*, when the prosecutor argued that the jury could acquit defendants accused of rape only if it found that the alleged victim lied or was confused thus, infringing on defendants' right to remain silent, 83 Wn. App. at 213-14, and (2) when the jury could find a defendant accused of delivering a controlled substance not guilty only if they believed his evidence, thus presenting the jury with a "false choice." *State v. Miles*, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007). Here, the prosecutor's isolated statement that Sanchez did not testify does not rise to the level of impropriety of the prosecutors' comments in *Fleming* and *Miles*.

rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Substantial evidence 'is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'" *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

Rebollar's testimony that the woman was Sanchez directly contradicts McIver's testimony that the woman was Gomez. We defer to the fact finder on issues of conflicting testimony and, thus, do not reach this issue. *Walton*, 64 Wn. App. at 415-16. Based on the evidence at trial, we hold that any rational person could have found Rebollar guilty of violating the no contact order.

We affirm.

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

Van Deren, J.

We concur:

Bridgewater, J.

Hunt, J.