IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LUIE ZUNIGA, Appellant.	No. 39449-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Luie Zuniga guilty of residential burglary (domestic violence) and violation of a post-conviction no-contact order (domestic violence). Zuniga appeals, arguing that the trial court incorrectly instructed the jury, that his counsel was ineffective for proposing a defective elements instruction, that the prosecuting attorney committed misconduct during closing argument, and that the evidence was insufficient to support his conviction for violating the no-contact order. As none of these claims have merit, we affirm.

Facts

A post-conviction no-contact order was entered on March 3, 2009, prohibiting Zuniga from "[e]ntering or knowingly coming within or knowingly remaining within 1000 (distance) of the protected person(s)'s" residence, school or workplace. Ex. 1. The protected party was Zuniga's wife, Sandra Hodge, who had filed for divorce.

On March 4, 2009, a neighbor noticed Zuniga standing near Hodge's garage in the early morning. When Hodge's daughter drove to her mother's house in the afternoon, she saw Zuniga, her stepfather, walking away with a backpack. When Hodge returned home from work, she saw that several items in her house and the attached garage were missing or in disarray, and it looked as though the door that led from the garage into the kitchen had been removed by its hinges and replaced. Hodge and her daughter looked around the property and found Zuniga asleep in Hodge's car, which was under a cover and parked within a foot of the garage. He was using his backpack as a pillow. Several items in the backpack belonged to Hodge and had been taken from her residence without her permission.

The State charged Zuniga by amended information with residential burglary and violation of a post-conviction no-contact order. Hodge and her daughter testified at his trial, as did Hodge's neighbors and several officers. Zuniga rested without presenting evidence, and the jury found him guilty as charged. He now appeals both of his convictions.

Discussion

Residential Burglary—Uncharged Alternative Means

Zuniga argues initially that the trial court erred in instructing the jury on an uncharged alternative means of committing residential burglary. He points out that the amended information alleged that he entered or remained unlawfully in a dwelling "with intent to commit a crime against Sandra L. Hodge, a family or household member." Clerk's Papers (CP) at 10. The "to-convict" instruction, which informed the jury of the elements necessary to convict Zuniga of residential burglary, stated that the jury had to find that "the entering or remaining was with intent to commit a crime against a person or property therein." CP at 41. According to Zuniga, the

words "or property" in the instruction added an uncharged alternative means of committing residential burglary and constituted error. *See State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003) (where information alleges one statutory alternative means of committing a crime, it is error for trial court to instruct jury on uncharged alternatives).

As the State points out, however, Zuniga proposed the to-convict instruction that the trial court used. Consequently, he cannot now complain that the instruction was erroneous. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *see also State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (invited error doctrine precludes review of any instructional error where the challenged instruction was proposed by the defendant).

Anticipating this result, Zuniga argues in the alternative that he received ineffective assistance of counsel when his attorney proposed the allegedly erroneous instruction. Invited error is not a bar to review of a claim of ineffective assistance of counsel. *Doogan*, 82 Wn. App. at 188.

To prevail on such a claim, Zuniga must show that his counsel's conduct was deficient and that the deficiency resulted in actual prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Stenson*, 132 Wn.2d at 705-06. We presume that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Zuniga cites no direct support for the proposition that a defendant charged with entering

or remaining unlawfully in a dwelling "with intent to commit a crime against a person or property therein" has been charged with two alternative means of committing residential burglary. *See* RCW 9A.52.025(1). Residential burglary has two elements: intent to commit a crime against a person or property therein, and the person enters or remains unlawfully in a dwelling other than a vehicle. *State v. Stinton*, 121 Wn. App. 569, 576, 89 P.3d 717 (2004). The intent required for a burglary conviction is simply the intent to commit a crime against a person *or* property; the specific crime intended is not an element. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). Zuniga cannot show deficient performance because he cannot show that the to-convict instruction allowed his conviction on an uncharged alternative means of committing residential burglary.

Nor can he show any prejudice from the allegedly erroneous instruction. Zuniga contends that if his attorney had objected, the trial court would have withdrawn the to-convict instruction and he would not have been convicted of residential burglary. A more likely scenario, however, would have been modification of the instruction to conform to the language of the amended information. The evidence was more than sufficient to show that Zuniga entered his wife's residence with the intent to commit a crime against her, i.e., violation of the no-contact order issued to protect her. *See Stinton*, 121 Wn. App. at 576 (violation of protection order can serve as predicate crime for residential burglary). Thus, he cannot show that but for his attorney's failure to object to the to-convict instruction, the result of the trial would have differed. Zuniga's claim of ineffective assistance of counsel fails.

Prosecutorial Misconduct

Zuniga argues here that the prosecuting attorney committed misconduct when she made

the following statements during her rebuttal argument:

> As the [S]tate I must prove my case beyond a reasonable doubt. . . .
>
> So if you believe Sandra Hodge, then I have proven this case beyond a reasonable doubt. If you believe [her daughter], I have proven this case beyond a reasonable doubt.

2 Report of Proceedings at 211. Zuniga claims that these statements shifted the burden of proof to him and presented the jury with a false choice, i.e., that it could find him not guilty only if it did not believe the State's witnesses.

Where prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Absent a proper objection and a request for a curative instruction, the issue of misconduct is waived unless the comment was so flagrant or ill-intentioned that the prejudice could not have been cured by an instruction. *State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). In determining whether prosecutorial misconduct has occurred, the reviewing court first evaluates whether the prosecutor's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper, the court considers whether there was a substantial likelihood that they affected the jury. *Reed*, 102 Wn.2d at 145.

Zuniga contends that the comments at issue are similar to those condemned in *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007). In *Miles*, a confidential informant testified

about the controlled buy he allegedly made from the defendant, and the defendant testified that there was no way in which he could have participated in that buy. 139 Wn. App. at 882. In closing, the prosecutor told the jury that it had heard mutually exclusive versions of the facts and that if the State's witnesses were correct, the defendant's witnesses could not be and vice versa. The prosecutor added that one set of witnesses was not being candid. *Miles*, 139 Wn. App. at 889-90.

We observed that when the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable. *Miles*, 139 Wn. App. at 890. But to the extent that the prosecutor's argument presented the jury with a false choice, i.e., that it could find the defendant not guilty only if it believed his evidence, the argument was misconduct. *Miles*, 139 Wn. App. at 890. The jury was entitled to conclude that even if it did not believe the defense witnesses, it was not satisfied beyond a reasonable doubt that the defendant was the person who sold the drugs. *Miles*, 139 Wn. App. at 890.

Here, the State's comments did not force the jury to choose between two versions of the events because the defense presented no evidence. Rather, the defense simply required the State to prove the elements of each crime charged beyond a reasonable doubt. The State was entitled to argue that if the jury believed its witnesses, the State had proved its case, and this argument did not present the jury with a false choice or shift the burden of proof. Moreover, Zuniga did not object to the argument in question. Because any impropriety could have been cured with a reminder to follow the jury instructions, we do not address the issue further.

Sufficiency of the Evidence

Finally, Zuniga argues that the evidence was insufficient to support his conviction of

violating a post-conviction no-contact order because the State failed to prove that he was the restrained party named in the order.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). 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, *review denied*, 119 Wn.2d 1011 (1992).

Although defense counsel conceded during closing argument that Zuniga had signed the no-contact order, that concession does not bar his sufficiency challenge because the court instructed the jury that it should disregard any of the lawyers' statements that were not supported by the evidence. Moreover, as Zuniga contends, it was not enough to admit the no-contact order at issue; the State had to prove by independent supporting evidence that the person named therein was the defendant. *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005).

Where the charge was attempted first degree escape, the State introduced certified judgments and sentences to prove that the defendant was being detained in jail pursuant to a felony conviction, which is an essential element of the crime charged. *State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981) (citing RCW 9A.76.110). A probation officer's testimony about the defendant's incarceration history provided sufficient independent evidence that the

defendant was the person named in those judgments and sentences. *Hunter*, 29 Wn. App. at 221-22.

Here, the State introduced the no-contact order that named Zuniga as the restrained party. Hodge testified that she was married to Zuniga, that a no-contact order prohibited him from living at her home on March 4, 2009, and that Zuniga was the defendant named in the order. Her daughter testified that Zuniga did not have permission to be at her mother's home on March 4, 2009, because of a no-contact order; the arresting officer testified that he was sent to the Hodge residence because of a reported no-contact order violation where the suspect was on the scene; and a neighbor testified that he saw Zuniga by the house on March 4, even though Zuniga was not supposed to be there. Another officer testified that after Hodge's daughter reported seeing her stepfather walking near her mother's home despite a protection order against him, the officer confirmed that Hodge had a protection order against her husband. This evidence is more than sufficient to show that the defendant at trial was the defendant named in the no-contact order, and Zuniga's sufficiency argument fails.

Affirmed.

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.

QUINN-BRINTNALL, J.

We concur:

No. 39449-9-II

BRIDGEWATER, P.J.

SERKO, J.P.T.