IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EARL RAY JONES, Appellant.	No. 42399-5-II UNPUBLISHED OPINION

Johanson, A.C.J. — Earl Ray Jones appeals his convictions for unlawful possession of a stolen vehicle and driving under the influence. On appeal, Jones argues that the State committed misconduct by suggesting "to the jury that Mr. Jones had an obligation to call witnesses to corroborate his testimony and refute" the testimony of prosecution witnesses.[1] Br. of Appellant at 2. We affirm because the State did not err in emphasizing weaknesses in Jones's exculpatory theory.

Facts

On December 13, 2010, Bonnetta Barnett reported the theft of her Suzuki sport utility vehicle (SUV) to police. On December 15, 2010, around midnight, Washington State Trooper Joseph McClain observed Jones driving the stolen SUV on Interstate 5 without the headlights on. Jones was swerving into other lanes and leaving his turn signal on for long periods. Jones continued to drive for a long period of time after Trooper McClain attempted to pull him over,

[1] A commissioner of this court initially considered Jones's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

exiting the freeway and going through several intersections before stopping.

Trooper McClain observed that the SUV had a broken driver's side window and that there was shattered glass inside the vehicle. He recovered a key to the vehicle and other personal items belonging to Barnett.

At trial, Jones explained that Barnett and her ex-husband, Ernest Trent, gave him a key to the SUV to "[d]o what you want with it." 2 Report of Proceedings (RP) at 174. Barnett, however, denied knowing Jones, although she admitted that she knew his wife. Barnett, Trooper McClain, and Jones testified at trial; Trent did not.

Jones also introduced evidence showing that at the time Barnett reported the vehicle stolen, she was one month behind on her car payments. The bank eventually repossessed the vehicle.

During closing argument, the State first recognized that it carried the burden of proof beyond a reasonable doubt and that "[t]he defense doesn't have to prove anything. He didn't have to put on a case." 3 RP at 202. After mentioning the burden of proof, the State argued, "[Y]ou've heard two very different versions of events . . . . So it comes down to the credibility of the witnesses. Who do you believe?" 3 RP at 202. The State then said:

> The defendant put on a case. All you heard was his testimony. And as I said, he's not required to call witnesses, but he referenced some other individuals. And there's no other evidence in the record that you've heard during the course of this trial to corroborate what he's told you. Nothing to support it. Just his word.
>
> Both of these versions cannot be true. And I submit to you that the simple story is the truth . . . . Not the convoluted elaborate insurance scheme that the defendant is claiming.
>
> As I said, it comes down to the credibility of the witnesses, so who should be believed.

3 RP at 203. Defense counsel did not object.

Near the end of the State's closing argument, it revisited the issue of witness credibility and corroboration, arguing:

> When you go back into the jury deliberation room I encourage you to consider all of the evidence and look at it critically. You heard from two witnesses from the state; Trooper McClain and Ms. Barnett, and you heard from the defendant, who gave his story with nothing else to corroborate. He referenced other individuals. Those individuals weren't here in court to testify.

3 RP at 213. Jones objected on the ground of burden shifting. The State responded that it was allowed to "point out the evidentiary weaknesses in the defense case." 3 RP at 213. The court overruled the objection and the State added, "We didn't hear from those individuals that could have corroborated the defendant's story." 3 RP at 213.

The trial court instructed the jury that they were the sole judges of credibility; that the State had the burden of proving each element of the crime beyond a reasonable doubt; that Jones had no burden to prove anything; and, that the jury had to decide the matter "solely upon the evidence presented." Clerk's Papers at 8.

The jury convicted Jones of unlawful possession of a stolen vehicle and driving under the influence.

Analysis

Jones argues that prosecutorial misconduct occurred during closing argument because the State improperly suggested that he had an obligation to call witnesses in his defense. But, the State may address weaknesses in a defendant's exculpatory theory.

An appellant claiming prosecutorial misconduct must show both improper conduct and

resulting prejudice. *State v. Emery*, ___ Wn.2d ____, 278 P.3d 653, 661 (2012). If the defendant objected at trial, the defendant suffers prejudice only where there is a substantial likelihood the misconduct affected the jury's verdict. *Emery*, 278 P.3d at 664; *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561.

Generally, a party fails to preserve an error for appeal unless defense counsel makes an adequate and timely objection. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). If counsel fails to object, an appellant must show that the State's argument was flagrant, ill-intentioned and could not have been neutralized by a curative instruction. *Copeland*, 130 Wn.2d at 290. Here, Jones did not initially object when the State first mentioned a lack of corroborating testimony. On appeal, Jones presents no argument that this portion of the closing argument meets the standard set out in *Copeland*, 130 Wn.2d at 290.

Jones, however, later objected based on "burden shifting" when the State argued, "you heard from the defendant, who gave his story with nothing else to corroborate. He referenced other individuals. Those individuals weren't here in court to testify." 3 RP at 213.

While it is improper to imply that the defense has a duty to present evidence, the State may properly comment on the evidence before the jury. *See McKenzie*, 157 Wn.2d at 58-59. Specifically, the State may comment on the absence of certain evidence if persons other than the defendant could have testified regarding that evidence. *State v. Jackson*, 150 Wn. App. 877, 887, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009). Similarly, "a prosecutor can question a

defendant's failure to provide corroborative evidence" if a defendant presents an exculpatory theory that could have been supported by the testimony of an uncalled witness. *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). In *Barrow*, the defendant testified that he took a pipe from his brother but did not know that it contained cocaine residue. *Barrow*, 60 Wn. App. at 871. Barrow's brother did not testify. *See Barrow*, 60 Wn. App. at 871. During closing argument, the State asked, "Where is his brother[?]" *Barrow*, 60 Wn. App. at 871. This circumstance resembles what happened here. Jones was the sole witness for the defense and he presented no testimony or other evidence to corroborate his account that the SUV was a gift from Trent and Barnett. The State may point out this lack of corroboration.

Finally, Jones argues that the State attempted to use the "'missing witness' doctrine" to permit the jury to infer that the absent witnesses testimony would harm his defense. Br. of Appellant at 7. Under this doctrine, the State may argue, and the jury may infer, that an absent witness's testimony is harmful to the defendant. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). The record as a whole, however, demonstrates that the State was not prompting the jury to infer that Trent's testimony would have harmed Jones. Rather, the context of the State's comments show that it was merely explaining to the jury that there was no evidence in the record to corroborate Jones's testimony that the SUV was given to him and not stolen. *See Jackson*, 150 Wn. App. at 887.

In sum, in reviewing the State's closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, we do not find reversible error.

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 in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Van Deren, J.

Penoyar, J.