IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64708-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ROBERT JOSEPH LUMPKIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 25, 2011
	)	
	)	

Cox, J. — To prevail on a claim of prosecutorial misconduct one must show that the prosecutor's conduct was both improper and prejudicial.[1] Robert Lumpkin fails to demonstrate that the prosecutor's actions prejudiced him and none of his arguments in the statement of additional grounds for review merit reversal. We affirm.

In June 2009, Danielle Williams and her fiancé, Kerry Smith, observed Lumpkin come out of N.F.'s residence. Lumpkin was subject to two court orders prohibiting him from being at N.F.'s residence, school, or workplace. One of the orders prohibited Lumpkin from coming within 1,000 feet of those locations. Williams called 911. Police arrested Lumpkin at a bus stop approximately 1,100 feet from N.F.'s residence.

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[1] State v. Monday, No. 82736-2, 2011 WL 2277151, at *4 (Wash. June 9, 2011) (quoting State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006))).

The State charged Lumpkin with domestic violence felony violation of a court order. At trial, both Williams and Smith testified that they saw Lumpkin at N.F.'s residence. The jury convicted Lumpkin as charged.

Lumpkin appeals.

PROSECUTORIAL MISCONDUCT

Lumpkin argues that the prosecutor committed misconduct by arguing that he had not "learned his lesson" following his two prior convictions for violation of a court order. We disagree.

"Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial."[2] We evaluate a prosecutor's conduct by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.[3] A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.[4] The defendant bears the burden of showing both prongs of prosecutorial misconduct.[5]

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[2] Monday, 2011 WL 2277151, at *4 (internal quotation marks and citations omitted).

[3] Id. (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997))).

[4] Id. (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561))).

[5] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

Here, Lumpkin was charged with domestic violence felony violation of a court order. This required the State to prove that he violated a court order and that he had at least two previous convictions for violating the provisions of an order.[6] Lumpkin and the State stipulated in a statement given to the jury that Lumpkin was twice previously convicted for violating the provisions of a no-contact order.

During opening statements, the prosecutor stated:

> [Prosecutor]: . . . Ladies and gentleman [sic] this is a case about a man who has not yet learned his lesson. It's about the defendant's repeated and blatant defiance for a domestic violence no contact order.
>
> [Defense Counsel]: Your Honor, I'm going to object at this point. This is not an opening statement. This is argument and its [sic] prejudicial.
>
> Judge: Sustained. Let's proceed.[7]

After opening statements, defense counsel moved for a mistrial on the basis of the prosecutor's remarks. He claimed that the prosecutor improperly argued that Lumpkin's repeated convictions for violating a no contact order implied that he had a propensity to commit the offense at issue.

The trial court denied the motion, but gave the jury a curative instruction that defense counsel proposed:

> . . . Before we get started I wanted to give you an instruction relating to an objection that occurred during the State's opening statement. You may recall that at the very beginning of the State's

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[6] RCW 26.50.110.

[7] Report of Proceedings (Dec. 1, 2009) at 38.

> opening statement [defense counsel] objected. I sustained the objection and I am going to instruct you to disregard the statements that were made by [the prosecutor], in the opening statement that were subject to that objection and with that let's proceed.[8]

During closing arguments, defense counsel again objected to statements by the prosecutor:

> [Prosecutor]: . . . Now folks some of you might have been thinking this whole time why should we really care about this? Nobody got hurt. Nothing was taken. Maybe this really wasn't that big of a deal. Sure we believe [Smith] and [Williams]. Okay yes he was there but why do I really care about it? Well maybe she, [N.F.] wasn't even there. Is this really that big of a deal. Folks keep in mind that domestic violence no contact orders are put in place for a reason. This is a man.
>
> [Defense Counsel]: Your honor I am going to object at this point.
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> [Judge]: Sustained.
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> [Defense Counsel]: Move to strike.
>
> [Judge]: Stricken.
>
> [Prosecutor]: This is a man who has prior convictions for violating no contact orders.
>
> [Defense Counsel]: Objection Your Honor move to strike. This is an improper use of that fact.
>
> [Judge]: Why don't you rephrase.[9]

Assuming for purposes of argument only that these statements were improper, they do not warrant reversal under the facts of this case because

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[8] Report of Proceedings (Dec. 2, 2009) at 2.

[9] Id. at 91.

Lumpkin cannot show that he was prejudiced by them. After the opening statements, the trial court instructed the jury to disregard the prosecutor's remarks to which defense counsel objected. The trial court also struck the prosecutor's statements during closing argument.

Jury instruction 1 states:

> . . . If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.
> . . . .
> . . . If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.[10]

Instruction 10 states:

> Evidence has been introduced by means of a stipulation that the defendant has twice previously been convicted for violating the provisions of a no-contact order. You are to consider that evidence solely for the purpose of deciding whether the state has proven the element of the charged offense that the defendant has twice been previously convicted for violating the provisions of a court order. You may not consider that evidence for any other purpose.[11]

We presume that the jury followed the trial court's instructions.[12] These instructions prohibit the jury from considering Lumpkin's prior convictions as evidence of his propensity to violate the court orders at issue here. Given the instructions, including the curative instruction, there is not a substantial

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[10] Clerk's Papers at 130-31.

[11] Id. at 142.

[12] State v. Copeland, 130 Wn.2d 244, 285, 922 P.2d 1304 (1996).

likelihood that the prosecutor's statements affected the jury's verdict. Therefore, Lumpkin fails in his burden to show that the prosecutor's comments prejudiced him.

For the same reason, the trial court did not abuse its discretion in denying Lumpkin's motion for a mistrial based upon the claim of prosecutorial misconduct.[13]

Lumpkin claims that State v. Ra[14] and State v. Fisher[15] support his argument that the prosecutor's conduct here was improper. Each of those cases analyzed whether a prosecutor improperly used evidence to show the defendant's propensity to commit the crime charged.[16] But Lumpkin fails to show that the prosecutor's comments prejudiced him. Thus, we need not decide whether the statements were improper.

Lumpkin also argues that the trial court abused its discretion by denying his motion for a mistrial because it believed that propensity was an element of the charged offense. He is correct that propensity is not an element of violation

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[13] See State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) ("A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion . . . [and] should be overturned only when there is a substantial likelihood that the prejudice affected the verdict.") (citing State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006); State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000)).

[14] 144 Wn. App. 688, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008).

[15] 165 Wn.2d 727, 202 P.3d 937 (2009).

[16] Ra, 144 Wn. App. at 702; Fisher, 165 Wn.2d at 746-49.

of a no contact order.[17] But by giving the jury the curative instruction, the trial court cured any prejudice suffered by the prosecutor's opening statement. Lumpkin argues, without citation to authority, that "no instruction could cure the prejudicial impact of the prosecutor's repeated propensity arguments." We will not review an issue unsupported by authority or persuasive argument.[18] Lumpkin's argument is, therefore, unpersuasive.

Finally, Lumpkin argues that one of the jury's questions during deliberations shows that they did not find Smith and Williams credible and implies that they convicted Lumpkin based on his propensity to commit the crime. But, as discussed above, we presume that the jury followed the trial court's instructions—including the instruction not to use the evidence of Lumpkin's prior offenses other than to establish the prior offense element of the crime.[19] Therefore, this argument is not persuasive.

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds for review, Lumpkin presents several arguments why his convictions must be reversed. None are persuasive.

First, Lumpkin argues that his right to a speedy trial was violated under Criminal Rules (CrR) 3.3 and 4.1. A violation of either rule is not a constitutional violation in and of itself absent a showing that the defendant suffered some

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[17] See RCW 26.50.110.

[18] See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

[19] See Copeland, 130 Wn.2d at 285.

prejudice as a result of the delay.[20] Because Lumpkin offers no substantive argument that he was prejudiced, he fails to show that his constitutional rights were violated.

Second, Lumpkin claims that in order to find him guilty of domestic violence felony violation of a court order, the jury had to find that he had willful contact with N.F. He argues that the trial court's failure to instruct the jury on this element requires reversal. Willful contact with the subject of the court order is not an element of the crime and the court was not required to instruct the jury that it was.[21] Therefore, this argument is not persuasive.

Third, Lumpkin claims that he was arrested over 1,000 feet away from N.F.'s residence and that Smith and Williams lied about seeing him at N.F.'s residence. This is a challenge to the sufficiency of the evidence. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant committed the crime.[22] The appellate court defers to the trier of fact to assess the credibility of the witnesses.[23] Here, both Smith and

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[20] State v. Wieman, 19 Wn. App. 641, 645, 577 P.2d 154 (1978) (the accused must proffer a showing of prejudice in order to show a violation of CrR 3.3 denied his or her right to a speedy trial); State v. Hodges, 28 Wn. App. 902, 904, 626 P.2d 1025 (1981) ("A delay between arrest and arraignment which is deemed 'not prompt' in violation of CrR 4.1(a) is not reversible error absent prejudice of a constitutional nature.") (citing State v. McFarland, 15 Wn. App. 220, 548 P.2d 569 (1976)).

[21] See RCW 26.50.110.

[22] State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

Williams testified that Lumpkin was at N.F.'s residence. Viewed in a light most favorable to the State, the jury was entitled to find that Lumpkin violated the court orders.

Fourth, Lumpkin argues that one of the no contact orders he was charged with violating was not valid. But, the collateral bar rule prohibits a party from challenging the validity of a court order in a proceeding for the violation of that order.[24] Therefore, this argument is not persuasive.

Finally, Lumpkin argues that he was denied his right to counsel at all critical stages of this proceeding. He offers no substantive argument in support of this claim. Accordingly, we need not review it.[25]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Becker, J.

[23] State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998).

[24] City of Seattle v. May, No. 83677-9, 2011 WL 2474216, at *2 (Wash. June 23, 2011).

[25] See Johnson, 119 Wn.2d at 171.