IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67016-6-I
Respondent,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
GILBERTO MARTINEZ-VAZQUEZ,	)	
Appellant.	)	FILED: July 23, 2012

GROSSE, J. — A prosecutor's remarks highlighting the absence of evidence contradicting the State's case, without mentioning the defendant's case or decision not to testify, does not improperly shift the State's burden of proof or amount to a comment on the defendant's right to be silent. Further, a trial court does not err in denying challenges to jurors who indicated they could apply the law as instructed, after equivocally indicating that the defendant's prior no-contact order violations made them more likely to believe the charged violation occurred. We affirm Gilberto Martinez-Vazquez's conviction for felony violation of a no-contact order.[1]

FACTS

On May 9, 2010, Martinez-Vazquez banged on the apartment door of Margaret Gomez, whom he had dated for a short time before she ended the relationship. The next day, Gomez obtained a temporary protection order. Martinez-Vazquez was waiting outside her building when she returned from court. Gomez's building manager then served Martinez-Vazquez with the order.

[1] RCW 26.50.110(1),(5).

Two days later, Martinez-Vazquez approached Gomez outside her apartment building. Gomez told him that she was going to call the police. He walked away. A few hours later, he knocked on Gomez's door. Gomez told him to go away and called 911. Seattle Police Officer Anna Green and another officer arrived and searched for Martinez-Vazquez. They could not find him. An hour and a half later, Gomez heard a knock on her window. When she looked outside, she saw Martinez-Vazquez across the street rubbing his groin area.

The State charged Martinez-Vazquez with felony violation of a court order. At trial, the State called Gomez and Officer Green as witnesses. Martinez-Vazquez did not testify. He stipulated that he had two prior convictions for violating court orders. The jury found Martinez-Vazquez guilty as charged. The trial court imposed a standard range sentence.

Martinez-Vazquez appeals.

ANALYSIS

Martinez-Vazquez's contention that the prosecutor improperly shifted the burden of proof during Officer Green's testimony and again in closing argument has no merit.

The prosecutor asked Officer Green about her experience investigating violations of no-contact orders. Officer Green testified that out of 100 investigations she conducted, the suspects were only present in about 10 cases. The prosecutor asked whether she usually gathered evidence. Officer Green answered, "There generally is not any other evidence for a simple reporting of a violation." Defense counsel objected. The trial court overruled the objection, concluding that the

prosecutor was "just trying to educate the jury as to how these types of cases are typically investigated."

In closing argument, the prosecutor said, "There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez on May 12th." Defense counsel objected that the prosecutor was "shifting the burden." The trial court noted the objection, but did not rule that the argument was improper. The prosecutor later repeated, "There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez any way you look at it."

Because the defense has no duty to present evidence, it is misconduct for a prosecutor to comment on the lack of defense evidence.[2] However, "[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense."[3] A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case.[4] We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.[5]

Second, in closing argument, the prosecutor did not imply that Martinez-Vazquez was required to provide evidence, or that the jury should find him guilty based on his decision not to present witnesses. The prosecutor simply pointed out that there was no

[2] State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006); State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).
[3] State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009).
[4] State v. Killingsworth, 166 Wn. App. 283, 290-92, 269 P.3d 1064 (2012).
[5] State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

evidence contradicting the State's evidence. This does not constitute misconduct.[6] Moreover, the jury was properly instructed that the prosecution had the entire "burden of proving each element of the crime beyond a reasonable doubt." We presume that the jury followed this instruction.[7] There was no error.

Martinez-Vazquez next asserts that the prosecutor improperly commented on his right to remain silent during closing argument. He is incorrect.

A defendant's right to remain silent is not infringed unless "the jury would 'naturally and necessarily accept [the challenged remark] as a comment on the defendant's failure to testify.'"[8] "A prosecutor may state that certain testimony is not denied, without reference to who could have denied it."[9]

Here, the prosecutor stated that no evidence contradicted the State's evidence. The comment did not mention Martinez-Vazquez's defense or the absence of his testimony. The jury would not naturally or necessarily perceive the remark as a comment on his failure to testify. Martinez-Vazquez has not shown that the prosecutor commented on his right to remain silent.[1]

Martinez-Vazquez also contends that the prosecutor misstated the evidence in closing argument. While he is correct, he has not shown a substantial likelihood that the prosecutor's misstatement affected the verdict.

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[6] Killingsworth, 166 Wn. App. at 291-92; Jackson, 150 Wn. App. at 885-86.
[7] State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).
[8] State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (quoting State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)).
[9] State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009).
[1] Moreover, the trial court specifically instructed the jury that "[t]he defendant is not required to testify" and that "[y]ou may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way."

In closing argument, defense counsel challenged Gomez's testimony by emphasizing that Officer Green testified that she had responded at 5:30 p.m., while Gomez claimed it was at 8:00 p.m. In rebuttal, the prosecutor argued, "Counsel talks a lot about the 8:00 p.m. contact . . . . They already admitted themselves there was 8:00 p.m. contact." Defense counsel objected, arguing that the prosecutor mischaracterized his argument. The trial court gave the following instruction: "The jury will have to use their collective memory about what the evidence was during the trial."

A misstatement of the evidence by the prosecutor may be prosecutorial misconduct.[11] The trial court may mitigate potential prejudice by providing curative instructions to the jury that the prosecutor's statements are not evidence, and should not be so considered.[12]

We are satisfied, after reviewing the entire argument, that the prosecutor's statement did not affect the verdict. Even if the evidence did not support the statement, the trial court mitigated any prejudice by immediately instructing the jury to use their collective memory to ascertain what evidence was presented at trial. The jury was also properly instructed that the attorney's remarks were not evidence. We conclude that the trial court's instructions cured any prejudice the lone remark may have caused.

Martinez-Vazquez asserts that the trial court erred by denying his challenges for cause of three jurors. He fails to demonstrate any abuse of discretion by the trial court.

During voir dire, the trial court read the information to the venire, including the allegation that Martinez-Vazquez had at least two prior convictions for violating a court

[11] State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991).
[12] Grisby, 97 Wn.2d at 499; Guizzotti, 60 Wn. App. at 296.

order. The parties stipulated that this fact was admissible at trial. Defense counsel asked whether knowledge of the two prior convictions made jurors more likely to believe that he committed the charged violation. Some responded in the affirmative. Juror 3 stated:

> It depends. First, how do you feel? You feel that he might have. Yeah, my gut instinct is that if you do it twice you're more likely to do it a third time. Do I believe? I don't know if I have a belief.

Defense counsel inquired, "And . . . if I say that's wrong for you to feel that way, is that going to change your mind?" Juror 3 answered, "No, but if you showed me evidence to the contrary." Defense counsel then asked if more jurors felt the same way. Jurors 16 and 24 responded, "Yes." Defense counsel later interposed for-cause challenges to 15 jurors, including jurors 3, 16, and 24.

The court instructed the venire that "the standard here is not that he more likely than not committed the third offense. The standard is did the State prove beyond a reasonable doubt that he committed this offense." The court also instructed the venire that "[t]he State . . . has to prove that he has committed two prior offenses. Keeping those things in mind . . . would you be able to follow the law regarding presumption of innocence and burden of proof?" The judge asked each challenged juror: (1) whether they could follow the law, and (2) whether they had any doubt about their ability to do so. Juror 3 responded, "Yes" and "no." Juror 16 answered, "Yes" and "no." Juror 24 answered, "Yes." The trial court rejected the for-cause challenges to jurors 3, 16, and 24.

Martinez-Vazquez used only four of his seven preemptory challenges, and opted

not to use his remaining three to remove jurors 3, 16, or 24. All three were members of the jury that convicted him.

A criminal defendant has the right to a trial by an impartial jury, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution.[13] A juror must be excused for cause if "the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging."[14] The critical inquiry is whether a juror with preconceived ideas can set them aside and decide the case on an impartial basis.[15] The trial court is in the best position to address this question because it has the ability to evaluate factors outside the written record, such as a juror's demeanor and conduct.[16] An appellate court therefore reviews the decision for a manifest abuse of discretion.[17]

Martinez-Vazquez fails to demonstrate that the trial court abused its discretion in denying the challenges for cause to jurors 3, 16, and 24. The trial court's questioning of each challenged juror established that the jurors believed themselves to be able to apply the law, including the State's burden of proof beyond a reasonable doubt. The trial court was present and able to gauge the credibility of the jurors' replies to his questions. Martinez-Vazquez fails to demonstrate, in these circumstances, that the trial court manifestly abused its discretion in determining that the jurors were credible when they affirmed that they could apply the law to the facts.

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[13] State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995).
[14] RCW 4.44.170(2).
[15] State v. Wilson, 141 Wn. App. 597, 606-08, 171 P.3d 501 (2007).
[16] State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 109 (1991).
[17] State v. Perez, 166 Wn. App. 55, 67, 269 P.3d 372 (2012).

Moreover, juror 3's statements were equivocal and did not establish that he had preconceived ideas he was unable to set aside or that he was unable to decide the case impartially. Jurors 16 and 24, by agreeing with juror 3's sentiments, likewise did not reveal bias that would require their removal, especially given their answers to the trial court's questions.

There was no abuse of discretion.

Affirmed.

Grosse, J

WE CONCUR:

Leach, C.J.

Schindler, J