IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GILBERTO MARTINEZ-VAZQUEZ, Appellant.	)	No. 67017-4-I DIVISION ONE UNPUBLISHED OPINION FILED: September 24, 2012

Appelwick, J. — Gilberto Martinez-Vazquez appeals his convictions for one count of second degree burglary and one count of second degree theft, alleging he was denied a fair trial due to multiple instances of prosecutorial misconduct. We conclude no misconduct was committed. Accordingly, we affirm.

FACTS

On March 17, 2010, Gilberto Martinez-Vazquez was issued a warning that he was banned from the Nordstrom department store in downtown Seattle. Martinez-Vazquez was taken to a detention room in the store with video and audio recording equipment, where he was videotaped being read a form explaining that he was not permitted to return to the store for two years.

On August 26, 2010, Martinez-Vazquez was observed entering the store by a Nordstrom loss prevention officer. He was captured on security camera taking an entire stack of men's designer jeans, worth a total of $1,414, concealing them in a bag, and leaving the store. Martinez-Vazquez was immediately detained by other loss prevention officers outside the store.

In her opening statement, the prosecutor described the facts of the case to the jury, highlighting that the entire crime was captured on video and it was a case of "what you see is what you get." She concluded, "This is really just a case of the defendant wanting the [S]tate to prove the case and that is what I intend to do for you today." Martinez-Vazquez did not object to the prosecutor's opening statement nor make an opening statement of his own.

The State called two witnesses, both loss prevention officers at Nordstrom. Emily Powell testified that she was working at Nordstrom on March 17, 2010, when she "trespassed" Martinez-Vazquez from the store for two years by informing him that he was not permitted to return. A video recording of Martinez-Vazquez being informed of the ban and acknowledging that he understood was admitted into evidence. Brian Edwards testified that on August 26, 2010, Martinez-Vazquez returned to Nordstrom, where he took several pairs of men's designer jeans off a shelf, concealed them in a bag, and left the store without paying. This was also captured on video, which was admitted into evidence. Martinez-Vazquez asked only one question of the State's witnesses[1] and put on no evidence of his own.

In closing argument, the prosecutor reiterated the simplicity of the case and the fact that the jury had seen the crime captured on video. She stated:

> You know, there are a lot of different trials you could get assigned to as jurors, as one juror mentioned, that can take weeks and weeks with very complicated testimony and expert witnesses. This is not one of those cases. There are trials that you can get assigned to where you deliberate

[1] Q: So this video represents everything you saw?
A: Yes.

> for multiple days and agonize over your decision. This should not be one of those cases. This is the simplest of cases when this comes to applying the undisputed facts to the law.

The prosecutor then discussed the jury instructions and applied the facts of the case to the law. The prosecutor concluded:

> So, again, undisputed facts, simple law, this is not a complex mental task for you. As I said at the outset, this is a situation of the defendant just wanting to make me do my job. And so that's what I'm asking you to do now. I did my job, and now you do your job. I ask that you find Mr. Martinez guilty of these crimes. Thank you.

Martinez-Vazquez did not object to any part of the prosecutor's closing argument. In his own closing argument, Martinez-Vazquez admitted that the crime was accurately captured on video, stating: "I'm not going to tell you not to believe your eyes. You saw the video; pretty clear what happened." Martinez-Vazquez's sole argument was that the Nordstrom loss prevention officers should have turned him away once they saw him in the store. The jury found Martinez-Vazquez guilty of one count of second degree burglary and one count of second degree theft.

DECISION

Martinez-Vazquez argues that the prosecutor committed misconduct by commenting on his right to trial, disparaging defense counsel, expressing a personal opinion about the simplicity of the case, and misstating the jury's role. He argues that the cumulative effect of the prosecutor's misconduct denied him the right to a fair trial.

We review alleged misconduct in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To prevail on a claim

of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). If a defendant establishes that the State made inappropriate statements, then we review whether those statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). When the defendant has preserved the issue by objecting at trial, we evaluate whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury. Id. But if the defendant failed to object, move for mistrial, or request a curative instruction, appellate review is only appropriate if the prosecutorial misconduct is so "flagrant and ill intentioned" that no curative instruction could have obviated the prejudice engendered by the misconduct. Emery, 174 Wn.2d at 761–62. In conducting this analysis, we focus less on the State's misconduct itself and more on whether the prejudice resulting from the conduct could have been cured. Emery, 174 Wn.2d at 763.

1. Right to Trial

Martinez-Vazquez first claims the prosecutor committed misconduct by commenting on his decision to exercise his right to a jury trial. Martinez-Vazquez argues that the prosecutor's statements "[t]his is really just a case of the defendant wanting the [S]tate to prove the case" and "this is a situation of the defendant just wanting to make me do my job" were improper because they implied Martinez-Vazquez should be penalized for going to trial. It is improper for a prosecutor to ask the jury to draw a negative inference from the defendant's exercise of a constitutional right. State

v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006).

We disagree that the prosecutor suggested that the jury should hold Martinez-Vazquez's decision to go to trial against him. Instead, we take these remarks as a comment on the strength of the State's case, the absence of any defense, and the burden of proof. The evidence against Martinez-Vazquez was overwhelming. There was a video recording of him being advised he could not return to Nordstrom, and a video recording of him returning and stealing merchandise. Martinez-Vazquez did not cross-examine any witnesses nor put on any evidence of his own. He raised no defense other than to argue that, because he was allowed to enter the store, there was possibly some doubt he was there unlawfully. We see no indication the jury was encouraged to convict Martinez-Vazquez because he was wasting their time by electing to go to trial. Rather, the prosecutor argued that she was held to the burden of proof and she had met that burden.

We conclude that the prosecutor's remarks were not a commentary on Martinez-Vazquez's constitutional right to a jury trial.

2. Disparaging of Defense Counsel

Martinez-Vazquez next claims the prosecutor committed misconduct by disparaging the role of defense counsel. Martinez-Vazquez argues that the prosecutor's comments about wanting "the [S]tate to prove the case" and "to make me do my job" insinuated that counsel for the defense had pushed the case to trial for spurious reasons. Again, the prosecutor's statements were not improper. The prosecutor made no direct reference to defense counsel. If reference to defense

counsel could be inferred, the remarks came within the permissible bounds of a challenge to the quality of a defendant's defense. The examples cited by Martinez-Vazquez, in which a prosecutor commented specifically on defense counsel's tactics, are readily distinguishable. See, e.g., State v. Thorgerson, 172 Wn.2d 438, 450-452, 258 P.3d 43 (2011) (where prosecutor referred to defense counsel's presentation of his case as "bogus," "desperat[e]" and involving "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (improper for prosecutor to describe defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys" and a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing"); State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (remark that defense attorney was "being paid to twist the words of the witnesses" was inappropriate) (emphasis omitted).

3. Personal Opinion

Martinez-Vazquez also claims the prosecutor committed misconduct by interjecting her own opinion during closing argument. He argues that the prosecutor's statements regarding the complexity of the case were not based on the evidence presented at trial but were instead drawn from her own personal experience.

The jury was instructed by the court more than once that they would hear no more than a day's worth of evidence and then begin deliberations. During voir dire, the jury panel was asked about prior jury experience. Several jurors discussed their participation in trials that involved multiple weeks of evidence, complex medical

testimony, or deadlocked jury deliberations.

During closing argument, the prosecutor stated:

> You know, there are a lot of different trials you could get assigned to as jurors, as one juror mentioned, that can take weeks and weeks with very complicated testimony and expert witnesses. This is not one of those cases. There are trials that you can get assigned to where you deliberate for multiple days and agonize over your decision. This should not be one of those cases. This is the simplest of cases when this comes to applying the undisputed facts to the law.

The prosecutor then began discussing the jury instructions.

The prosecutor did not improperly draw on her own experience. Rather, the prosecutor contrasted the case with the jury's own experience, arguing that the case was significantly less complex than the other cases in which they had participated. The prosecutor's argument that Martinez-Vazquez's case was simple was supported by the record given there were only two witnesses and the entire crime was on video. Furthermore, the jury was adequately instructed that their verdict should be based solely on the evidence presented, and to disregard anything said by the attorneys that was not supported by the evidence.

Even if we were to consider the prosecutor's statements improper, Martinez-Vazquez did not object to them at trial. He does not identify any prejudice he suffered from the statements, nor show the statements were so "flagrant and ill intentioned" such that the prejudice would not have been obviated by a curative instruction. As such, they do not warrant reversal.

4. Role of the Jury

Finally, Martinez-Vazquez claims the prosecutor committed misconduct by misleading the jury about their role when she stated:

> So, again, undisputed facts, simple law, this is not a complex mental task for you. As I said at the outset, this is a situation of the defendant just wanting to make me do my job. And so that's what I'm asking you to do now. I did my job, and now you do your job. I ask that you find Mr. Martinez[-Vazquez] guilty of these crimes.

A jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Generally, exhorting the jury to "do its job" is improper if it implies that, in order to do so, it can only reach a certain verdict regardless of its duty to weigh the evidence. Arthur v. State, 575 So.2d 1165, 1185 (Ala. Crim. App. 1990) (citing United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). For this reason, we believe that any exhortation to the jury to "do its job" is inherently dangerous and should be avoided.

However, viewing the statements at issue here in context, we conclude that the prosecutor was not asking the jurors to convict without considering the evidence or implying that the jury could only do its job by finding Martinez-Vazquez guilty. The jury was properly instructed about the presumption of innocence, the State's burden to prove every element of each crime beyond a reasonable doubt, the nature of that burden, the jury's role as the sole judges of credibility, and the fact that counsel's arguments were not evidence. Jurors are presumed to follow the instructions they are given. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). The prosecutor

thoroughly reviewed the evidence during closing argument. The prosecutor's message to the jury was that the evidence in the case compelled a guilty verdict. Again, Martinez-Vazquez did not object to the prosecutor's phrasing. He has not shown the remarks were so prejudicial to the jury that he could not have received a fair trial.

5. Cumulative Misconduct

Finally, Martinez-Vazquez maintains that the cumulative effect of prosecutorial misconduct affected the verdict. Cumulative error may call for reversal, even if each error standing alone would be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). But the cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Weber, 159 Wn.2d at 279. Because Martinez-Vazquez has not established that any errors occurred at trial, we hold the doctrine does not apply

We affirm.

Appelwick, J.

WE CONCUR:

Ellington, J.

Cox, J.