IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67137-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
GARY BERNARD CLARK,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 8, 2011

SPEARMAN, J. — Gary Bernard Clark argues the evidence is insufficient to support seven of his eight convictions for violation of a court order. He contends that for all five of the text messages and two of the voicemails introduced by the State, there is no evidence identifying the year those messages were sent, and as such, the State failed to prove Clark sent the messages on the dates specified in the to-convict instructions. He also argues that the prosecutor impermissibly shifted the burden of proof in closing argument, and that the special verdict finding that he and the victim were members of the same family or household must be reversed. We reject his arguments and affirm.

FACTS

In September 2006, Deanna Reed obtained an order of protection prohibiting her boyfriend Gary Clark from contacting her. Reed and Clark continued to date, however. In September 2008, Reed obtained a second order of protection. Clark continued to contact Reed despite the order of protection, sending her five text messages and leaving her three voice mails from September 2008 to January 2009. At trial, the State introduced photographs of Reed's cell phone showing the text messages. The text messages identified the month, date, and day of the week they were sent, but not the year. One of the three voicemails, sent on December 24, indicated the year it was left: 2008. The other two voicemails, however, did not indicate the year, but instead only indicated the month, date, and day of the week. The following is a summary of the evidence admitted at trial as to the dates when the messages were sent:

- Friday, September 5 – text message
- Tuesday, November 11 – text message
- Tuesday, December 16 – text message
- Tuesday, December 23 – test message
- Wednesday, December 24, 2008 – voicemail
- Sunday, January 4 – voicemail
- Wednesday, January 7 – voicemail
- Saturday, January 24 – text message

During closing argument, defense counsel argued the State failed to prove

beyond a reasonable doubt the year that seven of the eight messages were left. In rebuttal, the State used a calendar that was never admitted into evidence when discussing the messages. Defense counsel objected to the use of this calendar, but was overruled. The jury convicted Clark of eight counts of domestic violence violation of a court order, and entered a domestic violence special verdict finding. Clark appeals.

DISCUSSION

Use of Calendar During Rebuttal Argument

Clark argues the evidence is insufficient to support seven of his eight convictions for violation of a court order. He contends that for all five of the text messages and two of the voicemails introduced by the State, there is no evidence identifying the year those messages were sent, and as such, the State failed to prove Clark sent the messages on the dates specified in the to-convict instructions. In a related argument, Clark claims the only evidence heard by the jury regarding the year in which these seven messages were sent came during rebuttal closing argument when the State improperly showed the jury a calendar that was never admitted into evidence.

We review a prosecutor'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. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such

inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor, may not, however, make statements that are unsupported by the evidence. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). "To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial." State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

Here, the prosecutor clearly committed misconduct by showing the jury a calendar that was not even marked as a demonstrative exhibit, let alone admitted into evidence. The questions that remain, however, are whether this caused any prejudice to Clark, and whether the evidence is nevertheless sufficient to support his convictions absent the calendar. For the reasons described herein, we conclude Clark was not prejudiced and the evidence is sufficient to support his convictions.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Here, the five text messages and two of the voicemails did not indicate the year in which they were sent. The voice message left on December 24, however, did indicate the year 2008. Although the prosecutor did show the jury a calendar, his argument to the jury regarding the sufficiency of the evidence was not dependent upon and did not rely primarily upon this calendar. Instead, the prosecutor

used the calendar as a starting point to describe to the jury how, in light of the December 24 message for which the year was identified, and in light of the fact the other messages did identify the day of the week, those other messages must have been left by Clark in the years charged in the information and to-convict instructions:

> [MR. PETERS:] Counsel wants to apparently get into an argument about calendars. So be it. I do have one that indicates a year. I do have one that tells you a year, and that's the very first one. But in addition to the year, now, in addition to December 24th, 2008, they tell you one piece of great information, Wednesday. Wednesday, December 24th, 2008. Well, the way our calendar works is that from year to year - Look at this 2000 calendar.
>
> MR. RENDA: Objection, Your Honor, not admitted into evidence.
>
> MR. PETERS: Common sense, Your Honor.
>
> THE COURT: I'll overrule the objection.
>
> MR. PETERS: Today is February 22nd. Today is a Monday. Last year February 22nd did not fall on a Monday, okay. What we know is that on 2008, from the tape, Wednesday fell December 24th.
>
> Let's take a real good look at these, and let's start with Exhibit 8, which is the 23rd. Well, if Wednesday is the 24th in 2008, the day before has got to be Tuesday. Oh, geez. It says it on there: Tuesday, December 23rd. Well, we can't be talking about 2007, we can't be talking about 2006. We can't be talking about 2009 because it wouldn't have fell on a Tuesday. And counsel wants to argue dates, okay. That's not really what I wanted to do is go through the whole calendar, but I'll do it. That's Tuesday.
>
> Well, by gosh, that means it's 2008. Well, let's see. The 16th, that would have been a week prior. Well, if we are in 2008, Tuesday. Yep. Exhibit 7 says it: Tuesday. Still in 2008.
>
> When you go though each of these, you can count back using common sense. All of these correspond to the correct dates. . . .

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the State proved beyond a reasonable doubt the year of

the disputed messages, simply by considering the year of the December 24 voicemail, and counting backward or forward to the dates of the other messages. As such, the evidence was sufficient to prove the year of the disputed messages. Green, 94 Wn.2d at 221. Likewise, we conclude Clark suffered no prejudice from the prosecutor's use of the calendar. Again, the year of the disputed messages was discernable to the jury from the evidence that had already been admitted, and the prosecutor's argument focused largely on describing that evidence to the jury. In addition, the calendar to which the prosecutor referred was for the year 2008 and of minimal relevance to the allegations in this case. We reject Clark's arguments on this issue.

Rebuttal Argument Regarding Text Messages

Clark also argues the prosecutor committed misconduct when he discussed during rebuttal argument the nature of the evidence proving that Clark was the person who sent the text messages. Specifically, Clark claims the prosecutor "fault[ed] Clark for failing to present evidence to rebut the State's case, thus improperly shifting a burden to Clark[.]" We disagree. The prosecutor was simply responding to closing argument by counsel for Clark, who implied that although Reed testified the text messages came from Clark's number, the State was required to provide some additional evidence that (1) the phone number was actually his and (2) it was not some other person who had taken Clark's phone and sent her the texts:

> That's the number that I recognize as belonging to Mr. Clark. Ms. Reed testified to that. Did we see a telephone record? Did we see a utility bill? Did we see something that said that that phone

> number, in fact, belonged to Mr. Clark? It's one thing to simply say, I recognize the number. I know who it belongs to. It's quite another thing to have a document from a disinterested Verizon or T-Mobile or some provider cell phone service saying this number is registered to the following person. Did we see that? We did not.
>
> . . .
>
> The evidence that you see or heard that if in fact this number is associated with Mr. Clark in some fashion, that it's Mr. Clark who is the one punching the numbers on the phone. You have been invited to speculate that it was or to assume that it was. You have been invited to say, Well, it must have been. How or why must it have been? If my daughter uses my phone and texts her friend, am I communicating with her friend or is my daughter simply using my phone? Has anything been proved to you beyond a reasonable doubt of who was on the other side of the phone? No. Speculation, conjecture. . . .

In response to this argument, the prosecutor simply pointed out what the evidence actually was, and clarified the standard was beyond a "reasonable" doubt as opposed to beyond "any" doubt:

> What I like is defense counsel saying, Well, the state could have gotten the phone records.
>
> MR. RENDA: Objection. Evidence that was adduced at trial, nothing to do with the –
>
> MR. PETERS: I'm responding to counsel's statements.
>
> THE COURT: Overruled.
>
> MR. PETERS: Counsel says we could have gotten phone records. I don't know what phone he has. Do you want me to trace down every phone provider known to man? I don't even know how many that is any more. Used to be fine when it was only Ma Bell, but we are way past that day.
>
> What I have presented to you, and there hasn't been contradiction, is that the defendant [sic] came from these phone numbers. It's his phone number, the defendant's phone number, and the messages came from there. Counsel says, Well, it could have been unbeknownst to him. Someone could have magically stolen his phone, texted I love you, and he could have never known about it. I didn't hear that evidence. Counsel wants you to not rely on speculation, but that's all he did up here. The evidence provided in

> front of you is that the defendant was texting the victim repeatedly, numerously, from his phone. In addition, his voice is on tape as him leaving messages, three different occasions.
>
> Defense says, Well, it just says on two of them it's Gary, but the victim called him Rabbit. Yeah, the victim called him Rabbit. He doesn't call himself Rabbit. All of this is proof beyond a reasonable doubt. What counsel is trying to get up here is split hairs, trying to change my burden to something it's not, trying to change my burden to beyond any doubt, ok. He is trying to change it to, if I can think of something the state should have done, then you should acquit. . . .

This argument did not relieve the State of its burden of proof, and did not amount to misconduct.

Special Verdict

Clark next argues his sentence must be reversed because the jury instruction for the special verdict was faulty under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011). We disagree for the reasons stated herein.

The trial court in this case instructed the jury that if it found Clark guilty of the violation of court order charges, it would then fill out a special verdict form. The instruction informed the jury that in order to answer the special verdict form "no," the jury must *unanimously* have a reasonable doubt as to whether Clark and Reed were members of the same household:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

Clark is correct that this is the exact language that we recently held amounted to

constitutional error in Ryan. In that case, the jury convicted Ryan of second degree assault and felony harassment. Relying on the above instruction, the jury also found certain aggravating circumstances. Ryan, 160 Wn. App. at 946. Because aggravating circumstances permit the imposition of a sentence beyond the standard range, they are constitutionally required to be proved to a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Ryan, we held the instruction constituted manifest constitutional error because it relieved the State of its burden to do so. Ryan, 160 Wn. App. at 947.

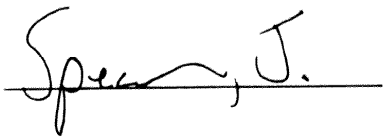
But Ryan is inapplicable to this case because here, the jury was not asked to consider any aggravating circumstances. Rather, the jury was merely asked to determine whether Clark and Reed were members of the same family or household. Although an affirmative answer would result in the crimes being classified as domestic violence offenses, that classification does not permit the imposition of a sentence beyond the standard range. State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006), State v. Felix, 125 Wn. App. 575, 105 P.3d 427 (2005). Thus, it is not a question that is constitutionally required to be decided by a jury, nor proved beyond a reasonable doubt. Id. Accordingly, while the instruction was incorrect, the error was neither manifest nor constitutional and may not be raised for the first time on appeal.

Statement of Additional Grounds

In his RAP 10.10 Statement of Additional Grounds, Clark argues the evidence is insufficient to prove the dates when several of the messages were sent, and that the

prosecutor committed misconduct during rebuttal closing argument, both by using the calendar and by impermissibly shifting the State's burden of proof. These arguments are the same as those raised by counsel, and we addressed them above.

Affirmed.



WE CONCUR: