IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OPINION DEMEKO BRAZILLE HOLLAND, a/k/a DEMEKO BRAZILE HOLLAND, Appellant.	)))))))))))	NO. 62118-1-I DIVISION ONE ORDER CORRECTING

The appellant, Demeko Brazille Holland, a/k/a Demeko Brazile Holland, having brought a motion to correct opinion, and the panel having determined that the opinion should be corrected, it is hereby

ORDERED that the opinion of this court in the above-entitled case filed April 26, 2010, be changed as follows:

On page 1, the first sentence of the opinion shall be corrected to read as follows:

> Demeko Holland appeals his conviction for second degree murder claiming that the trial court erred in admitting into evidence his custodial statements and that prosecutorial misconduct during closing argument deprived him of a fair trial.

The remainder of the opinion shall remain the same.

DATED this _____ day of _____, 2010.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 62118-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DEMEKO BRAZILLE HOLLAND, a/k/a DEMEKO BRAZILE HOLLAND,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	FILED: April 26, 2010

Leach, A.C.J. — Demeko Holland appeals his conviction for first degree murder claiming that the trial court erred in admitting into evidence his custodial statements and that prosecutorial misconduct during closing argument deprived him of a fair trial. Because Holland fails to demonstrate any error, we affirm.

FACTS

On August 18, 2003, at approximately 11:20 a.m., 14-year-old David Chhin was shot to death on a street in West Seattle where he had been riding his bicycle. Witnesses reported to police that the shooter was running through the residential area west of the shooting. At 11:46 a.m., Seattle Police Officer

Richard Heideman stopped Demeko Holland about 10 blocks northwest of the shooting. Holland said, "Why did you stop me? I'm just out jogging." Holland then told Officer Heideman that he had been doing lawn work in the area and was just taking a break and jogging. When additional officers arrived, they arrested Holland. Officer Caryn Lee read Miranda[1] warnings to Holland from a card. In response to the officers' questions, Holland gave a false name and date of birth and offered differing explanations for his actions.

At the police station, Holland made additional statements to two detectives. Holland was disheveled, moody, and sometimes crying. Holland told the detectives that he had smoked "sherm" earlier and had had very little sleep. (Officer Rob Blanco identified "sherm" as "marijuana dipped in a substance, dried and smoked.") After giving various accounts of his whereabouts, Holland eventually stated that he had no memory of the shooting because of the sherm but that "it could have happened" if the police thought he was involved. According to Detective Donna O'Neal, when she suggested that he write a letter to the victim's family to express his remorse, Holland said that "was a good idea, he liked the idea, but he would do it later" because he had given statements on prior occasions and had "been burned by it."

The State charged Holland with murder in the first degree and unlawful possession of a firearm in the first degree. At a CrR 3.5 hearing, Officer Lee

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

testified that she read the Miranda warnings to Holland, that Holland affirmatively indicated that he understood his rights, and that she did not ask Holland the final question printed on the card: "Having these rights in mind, do you wish to talk to us now?" During cross-examination, Officer Lee admitted that Holland's acknowledgment could have been "a simple nod up and down." The trial court ruled that all Holland's statements to police were admissible. The trial court found that although Holland had not been explicitly asked to waive his Miranda rights, he was fully aware of his rights and continued to "speak freely with officers and detectives in the absence of any threats, promises or coercion."

At trial, the State presented testimony from several witnesses who believed they had seen the shooter shortly after the crime, police testimony about Holland's arrest and statements, and physical evidence from the scene and the surrounding neighborhood. In closing argument, defense counsel argued that Holland had a drug addiction and had no memory of the time of the shooting because of his drug use; that the witnesses changed their testimony to make Holland appear guilty; that the police pressured Holland and twisted his statements and did not fully investigate the case; and that the State's evidence did not prove Holland's guilt. In rebuttal, the prosecutor argued:

> [Defense counsel] talked to you about the ugly consequences of addiction and how the defendant can't get up here and tell you what he doesn't remember because of it. Really? Is there any testimony about the defendant's addiction to sherm or any other drug? Is there any testimony at all about the effects of sherm that he smoked that night? Is there any testimony on how it might or might not affect your memory, no.

Holland did not object. The prosecutor later responded to defense counsel's suggestion that Holland could have learned details of the shooting by overhearing a cellular phone conversation between police officers or other State witnesses, by arguing, "By golly, those witnesses were up there. Why didn't she ask them." Defense counsel objected to "burden shifting," but the trial court did not make a ruling, and the prosecutor continued his argument.

The jury found Holland guilty of the lesser-included offense of murder in the second degree and of unlawful possession of a firearm in the first degree. The trial court imposed a standard range sentence. Holland appeals.

CUSTODIAL STATEMENTS

Holland assigns error to the trial court's factual finding that "the defendant stated that he acknowledged and understood" his Miranda rights. Challenged findings of fact are reviewed for substantial evidence, which is enough evidence to persuade a fair-minded, rational person of the truth of the finding.[2] We treat unchallenged findings as verities on appeal.[3]

Officer Lee testified that she "just read [Holland] his rights and asked him if he understood. He said that he did and that was it." When asked about statements Holland made to her, Officer Lee testified, "I asked him his name [and] he gave me his name and the birth date and then I read him his rights. He acknowledged it and then we had no further conversation." Officer Lee also

[2] State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).
[3] State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

testified, "I don't recall his exact words, but he acknowledged his rights to me. So it was affirmative that he understood." Despite Officer's Lee's agreement with defense counsel's suggestion that Holland may have nodded rather than spoken his acknowledgment, Officer Lee's other statements describing her interactions with Holland provide enough evidence to persuade a fair-minded, rational person that Holland "stated that he acknowledged and understood" his rights. Holland fails to demonstrate error.

Holland also contends that the trial court erred when it admitted his custodial statements based on its conclusion that he impliedly waived his Miranda rights. He argues that the totality of the circumstances indicates that he was worn down by lengthy questioning, was impaired by the drugs in his system, and was under the mistaken impression that only written or recorded statements, rather than oral statements, could be used against him.

We review a court's conclusion of law that a criminal defendant has waived his Miranda rights de novo.[4] A criminal defendant may waive his right to remain silent if the waiver is made knowingly, voluntarily, and intelligently.[5] If these elements are met, a defendant's statements are admissible.[6] A valid waiver may be implied from the facts of a custodial interrogation.[7] An implied waiver "has been found where the record reveals that a defendant understood

[4] See State v. Johnson, 94 Wn. App. 882, 897-98, 974 P.2d 855 (1999).
[5] Miranda, 384 U.S. at 444.
[6] Miranda, 384 U.S. at 444.
[7] State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

his rights and volunteered information after reaching such understanding" or that a defendant's answers "were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights."[8]

The trial court found that Holland was advised of his rights, understood them, voluntarily waived them by answering questions posed by the officers and detectives, and never "indicated anything other than a complete willingness to speak with the police." Holland provided a false name and date of birth, asked about the shooting before police told him the reason they stopped him, provided various conflicting details about his activities, and ultimately admitted that he "may have" done the shooting, but claimed that his prior drug use caused a lack of memory during the time of the murder. The trial court also found that "[n]o threats or promises were made to induce [Holland] to speak." Holland does not argue that his responses were coerced, and nothing in the record so suggests. Under these circumstances, the trial court did not err when it concluded that Holland impliedly waived his rights.[9]

PROSECUTORIAL MISCONDUCT

Holland argues that the prosecutor committed misconduct by shifting the burden of proof in his statements regarding Holland's claimed drug addiction and

[8] Terrovona, 105 Wn.2d at 646-47.

[9] See Terrovona, 105 Wn.2d at 647 (affirming trial court finding of implied waiver where defendant had not been specifically asked whether he would waive rights but police advised him of rights, he understood them, he answered questions about victim's death, and nothing in the record indicated he was coerced into making statements).

the source of Holland's knowledge of the shooting.

By claiming prosecutorial misconduct, Holland bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial.[10] Even improper remarks are not grounds for reversal if they respond to a defense argument and are not so prejudicial as to be incurable by an instruction.[11] Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.[12] Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict."[13] We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.[14]

A prosecutor is entitled to make a fair response to defense counsel's arguments.[15] The mere mention that the defendant lacks evidence to support his theory of the case does not constitute misconduct or shift the burden of proof to the defendant.[16] A prosecutor may comment on the absence of certain evidence if persons other than the defendant could have testified about the matter.[17]

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[10] State v. Korum, 157 Wn.2d 614, 650, 141 P.3d 13 (2006).
[11] State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).
[12] Russell, 125 Wn.2d at 86.
[13] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).
[14] State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).
[15] Russell, 125 Wn.2d at 87.
[16] State v. Jackson, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009) (no misconduct when prosecutor outlined numerous reasons why jury should find the State's witnesses more credible than the defendant's witness).

First, Holland did not preserve his claim of error by objecting to the prosecutor's comments about drug addiction and the effects of sherm. And although the record reflects that Holland objected to the later comment about the phone calls, he did not obtain a ruling from the trial court on the objection or request a curative instruction. Holland does not argue or demonstrate that either comment was so prejudicial as to be incurable by an instruction.

Second, even if Holland had properly objected to both comments, there was no misconduct. The prosecutor's comments were a pertinent reply to defense counsel's arguments and properly encouraged the jury to draw an unfavorable inference from the lack of evidence to support Holland's theory of the case.[18] Evidence to support Holland's claims of drug addiction, memory loss, and contemporaneous cellular phone calls about the shooting could have been supplied by witnesses other than the defendant. The trial court properly instructed the jury that the State had the burden of proof. Holland fails to establish prosecutorial misconduct.

Affirmed.

Leach, A.C.J.

WE CONCUR:

[17] Jackson, 150 Wn. App. at 887 (citing State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)).

[18] See State v. Hartzell, 153 Wn. App. 137, 162, 221 P.3d 928 (2009).