

NO. 34737-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SANTORIO BONDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 05-1-01897-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was evidence sufficient for a reasonable trier of fact to convict defendant of violation of a court order where the State adduced evidence that Ms. Crumble identified defendant by name and evidence that defendant matched the physical description of the suspect?

2. Did defendant fail to preserve the issue of prosecutorial misconduct when he failed to raise sufficient objections, failed to ask the court for curative instructions, and failed to show that the remarks were “so flagrant and ill intentioned” that they resulted in prejudice that could not have been neutralized by a curative instruction?

3. Did defendant fail to meet his burden of showing improper conduct that was prejudicial when the prosecutor properly drew reasonable inferences from the State’s evidence during closing argument, and when the court instructed the jury to disregard any comment made by an attorney not supported by evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On April 20, 2005, the Pierce County Prosecutor’s Office filed an information charging appellant, SANTORIO LORENZO BONDS,

hereinafter “defendant,” with violation of a court order (Count 1), malicious mischief in the third degree (Count 2), and domestic violence court order violation (Counts 3 and 4). CP 1-4. On October 25, 2005, the Prosecutor’s Office filed and amended information charging defendant with a fifth count, burglary in the first degree. CP 16-18.

The matter came on for trial before the Honorable Ronald E. Culpepper on December 14, 2005. RP 1-4. After the State rested, defense counsel motioned to dismiss all five counts. RP 131. The State conceded to Count 2, Count 3, and Count 4. RP 131. The court dismissed Count 2, Count 3, and Count 4. RP 136. The jury convicted defendant of Count 1, violation of a court order. RP 176.

At the sentencing hearing on April 14, 2006, the parties agreed that defendant’s offender score was 9 with a resulting standard sentence of 60 months. CP 189, RP 37-49. The court imposed a sentence of 60 months. CP 194, 198, RP 37-49. The court also imposed various legal financial obligations. RP 195, 198.

Defendant timely appealed from this judgment and sentence. CP 50-63.

2. Facts

On the evening of February 22, 2005, Michael Horton heard a loud noise, similar to a gunshot, which prompted him to look out his front window. RP 31. Looking out the window, he saw his neighbor, Surina Crumble, and her daughters in their front yard. RP 31. Ms. Crumble’s

station wagon was backed in on the driveway. RP 31. Defendant was standing in front of the station wagon with his hands on the hood. RP 31. Ms. Crumble and her daughters were yelling at defendant, to leave and that he was not supposed to be there. RP 32. Ms. Crumble and her daughters then sought shelter inside the house. RP 33. Ms. Crumble's 19-year old daughter was the last to enter the home. RP 34. Before entering she yelled, "call 911, call 911." At that point Mr. Horton told his girlfriend to call the police. RP 39. After Ms. Crumble and her daughters were inside their home, defendant attempted to open the garage door and the front door. RP 39. Unable to open either door, defendant left. RP 39.

Officer Patrick Dos Remedios responded to the 911 call. RP 52-53. When Officer Remedios arrived on the scene, he saw Ms. Crumble pacing in her driveway. RP 54. The windshield of her station wagon was shattered. RP 54. Ms. Crumble was very "nervous...agitated, [and] excited." RP 54. While in this excited state, she told Officer Remedios that her "ex-boyfriend" had confronted her and shattered her windshield before leaving. RP 61. She did not identify her ex-boyfriend by name at that time, but later after she had calmed down, she told Officer Remedios his name, "Santorio Bonds". RP 58, 61. After Officer Remedios finished taking statements from Ms. Crumble and her daughters, he verified that defendant's no contact orders were valid, servable, and enforceable which allowed Officer Remedios to call for a K-9 unit to track defendant. RP 64, 69. The officers searched for a half hour but did not locate defendant. RP

64. The next day Officer Remedios and Deputy Ryan Johnson returned to the vicinity of Ms. Crumble's home in order to apprehend defendant in the event he were to return. RP 66.

At trial, defense counsel argued that the State provided insufficient evidence that the man who contacted Ms. Crumble on the night of February 22, 2005, was in fact defendant. RP 163-170 (defendant's closing argument).

C. ARGUMENT.

1. THE STATE PROVIDED SUFFICIENT EVIDENCE TO CONVINC A JURY BEYOND A REASONABLE DOUBT THAT DEFENDANT CONTACTED MS. CRUMBLE IN VIOLATION OF A NO CONTACT ORDER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988).

The applicable standard of review is whether, after 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. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (*citing* State

v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the

Supreme Court of Washington said:

Great deference . . . is to be given to the trial court's factual findings. In re Seago, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To convict the defendant of the crime of violation of a no-contact order as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) that on or about the 22nd day of February, 2005, the defendant willfully had contact with Ms. Crumble; (2) that such contact was prohibited by a no-contact order; and (4) that the acts occurred in the State of Washington. CP 79 (Jury Instruction No. 8)¹.

Defendant's sole challenge to the sufficiency of the evidence is that the State failed to provide sufficient evidence identifying defendant as the man who confronted Ms. Crumble on the night of February 22, 2005, to enable a reasonable jury to convict him for violating a court order. (Appellant's Brief at p. 7). Defendant states that "[defendant] was never identified as the person at Ms. Crumble's house. Ms Crumble... never

told police that the man at her residence was [defendant].” (Appellant’s brief p. 11). Defendant’s assertion that Ms. Crumble never told the police that man who contacted her at her home was the defendant is incorrect.

The jury heard testimony that Ms. Crumble told Officer Remedios that defendant contacted her in violation of the court’s no contact order, and that she identified defendant by name. RP 61, 66. Officer Remedios testified that when he arrived at Ms. Crumbles’ residence, she told him that her ex-boyfriend confronted her at home and shattered her windshield, and that there were court orders against him. RP 61-62. Officer Remedios testified that Ms. Crumble later identified her ex-boyfriend by name. RP 61.²

After Officer Remedios finished taking a statement from Ms. Crumble and her daughters, he verified that defendant’s no contact orders

¹ RCW 10.99, 22.10, 26.09, 26.26, 26.50, or 74.34.

² Prior to Officer Remedios giving this testimony, the court, at defense counsel’s request, conducted an offer of proof examination. During the offer of proof examination, Officer Remedios stated that when he first arrived at the scene Ms. Crumble, while in an excited state, told him that her ex-boyfriend had confronted her and shattered her windshield. Officer Remedios stated that after Ms Crumble latter calmed down, she identified her ex-boyfriend as Santorio Bonds. The court determined that Ms. Crumble’s initial statement satisfied the excited utterance exception to hearsay, but did not rule on the second statement in which Ms. Crumble named her ex-boyfriend because the State said it would not ask the question. RP 57-59.

were valid and enforceable. RP 64. Officer Remedios then called for a K-9 in order to track defendant. RP 64.

Three days following the incident, Officer Remedios returned to the vicinity of Ms. Crumbles residence in order to apprehend the defendant in the event defendant were to go back to Ms. Crumble's home. RP 66. The state asked;

Q And who was it that you were trying to detain if they came back to the house?

A We were looking for Santorio Bonds.

RP 66.

Given that Ms. Crumble gave Officer Remedios the name of her ex-boyfriend who contacted her, and that the individual Officer Remedios then went looking for after verifying the no contact orders against him was defendant, it is reasonable and logical to infer that the name given to him by Ms. Crumbles was defendant's.

In addition to testimony that Ms. Crumble named defendant, the jury heard testimony that defendant matched the physical description of the suspect. Ms. Crumble's neighbor, Mr. Horton observed the incident, and while he could not see the man's face because it was dark, he was able to distinguish the man's body type, his height and weight, and his race.

PR 40-41. Mr. Horton, familiar with defendant prior to the incident, stated

that the physical features of the man he saw in contact with Ms. Crumble matched defendant's. RP 41. Mr. Horton was not "100 percent" certain that the man he saw was defendant, but he "assumed" it was him. RP 40, 42. Viewing testimony that the defendant was named and that he matched the physical description of the suspect in the light most favorable to the State, any rational trier of fact could find that defendant was the individual who made contact with Ms. Crumble on February 22nd, 2005. See Joy 121 Wn.2d 333 at 338, see also Salinas, 119 Wn.2d 192 at 201. The inferences drawn by the jury from the evidence produced by the State are reasonable, and therefore, the court should uphold the jury's decision.

2. DEFENDANT FAILED TO PRESERVE THE ISSUE WHETHER THE PROSECUTOR MADE INAPPROPRIATE REMARKS IN CLOSING ARGUMENT, AND FAILS TO MEET HIS BURDEN OF PROVING IMPROPER CONDUCT THAT WAS PREJUDICIAL.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

An objection which does not specify the particular ground upon which it is based is insufficient to preserve the issue for appellate review. State v. Boast, 87 Wn.2d 447, 451-452, 553 P.2d 1322 (1976). Where a defendant makes an objection not accompanied by a reasonably definite statement of the grounds, neither the State nor the trial court is put on notice of the defendant's claimed defects.” State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). Further, an assignment of error upon a certain ground cannot be made where no objection was made on that same ground below. State v. Boast, 87 Wn.2d 447 at 451-452 (*quoting Kull v. Department of Labor & Indus.*, 21 Wn.2d 672, 682-83, 152 P.2d 961 (1944)).

A trial court's rulings based on allegations of prosecutorial misconduct are reviewed under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based

on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998) “remarks must be read in context”. State v. Pastrana, 94 Wn. App. 463, 479, 972 P.2d 557 (1999) (*citing State v. Greer*, 62 Wn. App. 779, 792-93, 815 P.2d 295 (1991)).

Improper remarks do not constitute prejudicial error unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. Finch, 137 Wn.2d 792 at 839. The trial court is best suited to evaluate the prejudice of the statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

If the error could have been obviated by a curative instruction and the defendant failed to request one, reversal is not required. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where the defendant does not request a curative instruction, the error is considered waived unless the court finds that the remark was “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.” Id.

In this case, defendant argues that the prosecutor made numerous improper statements during closing argument, and that the cumulative effect of these statements denied him a fair trial. (Appellant’s brief at p. 16). However, by not sufficiently objecting to the statements or requesting curative instructions at trial, defendant waived the alleged errors and thereby failed to preserve the issue of prosecutorial misconduct for appeal. Even if the issue was preserved, defendant fails to meet his burden of showing conduct that was improper and prejudicial. The State will address each of the alleged improper statements in turn.

First, defendant argues that the following statement made by the prosecutor in closing is improper, un-sworn testimony unsupported by evidence:

Was it the defendant? Was that person Santorio Bonds? And the answer is yes because there’s nobody else, and there’s no reason for any other story to come out. This is not just a question of what evidence is there--

RP 159, (Appellant’s brief at p. 11-12). Defense counsel objected to this remark, stating, “It’s a comment on the burden of proof.” Before the court ruled on the objection, the prosecutor went on to say, “I’ll make that clear... The State has the burden of proof beyond a reasonable doubt,

absolutely... [W]e grab that burden 100 percent...” RP 159. After the prosecutor clarified his initial statement, defense counsel did not make a subsequent objection, nor did defense counsel ask the court for a curative instruction. Additionally, defendant’s objection did not raise the issue of improper, un-sworn testimony. Defendant therefore waived the alleged error now raised for the first time on appeal. Even if this issue was adequately preserved, defendant fails to show that the comment was improper and prejudicial.

Defendant’s argument that the above statement constitutes improper, un-sworn testimony hinges on his previous assertion that the State provided insufficient evidence identifying defendant as the man who contacted Ms. Crumble.

The prosecutor’s remark is not improper testimony, rather it is a proper inference drawn from the State’s evidence. Prosecutors may argue an inference from the evidence, and prejudicial error will not be found unless it is “clear and unmistakable” that counsel is expressing a personal opinion.” State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). As previously addressed, the State presented evidence that Ms. Crumble named defendant, and evidence that defendant matched the physical description of the suspect. In light of this evidence, it was proper for the prosecutor to draw the inference that defendant contacted Ms. Crumble.

Additionally, after making this statement, the prosecutor went on to explain to the jury that they should not convict the defendant if they themselves could not make the same inference, or if they determined the State's inferences to be unreasonable. RP 159 160.

Second, defendant contends that the following excerpt from closing argument is likewise unsupported un-sworn testimony:

I think we can pretty safely assume that [] not every African American male in Pierce County and every African American men in America, as counsel wanted you to think about, that this could be anybody. No. We have to assume – we don't have to assume anything. We know he's got the no contact order so we know that he is the same guy she's talking about.

RP 171. Defense counsel objected, stating, "Your Honor; that's not correct." Defense counsel neither specified that he was objecting to an un-sworn, improper statement, nor did defense counsel ask the court for a curative instruction. The objection, therefore, was insufficient and defendant waived the alleged error now on appeal.

Even if defendant's objection sufficiently preserved the issue, the prosecutor's remark was proper. The prosecutor made the above statement during rebuttal, in response to a comment made by defendant in closing argument, in which defendant attempted to discount Mr. Horton's testimony that defendant matched the physical description of the suspect,

and Officer Remedios' testimony that Ms. Crumble identified defendant by name. Defendant stated:

If we could identify anyone by, well, he's about the same weight, looks about the same size, and he's the same race, we could say that about every single African-American potentially in Pierce County, in the nation... There was no statement made by Ms. Crumble ... other than "its my ex-boyfriend". Which African-American ex-boyfriend are we talking about.

RP 165. The prosecutor rebutted defendant's argument by reminding the jury that the testimony given did more than just establish that the suspect was Ms. Crumble's ex-boyfriend and black. The State presented evidence that Ms. Crumble identified defendant by name to Officer Remedios, and presented a witness who knew defendant, observed the incident, testified that the physical characteristics of defendant matched those of the suspect, and stated that while he could not be 100 percent certain that the man he observed was defendant, he assumed that he was. By making reasonable inferences from the State's evidence, the prosecutor properly rebutted defendant's assertion that every black male in the nation met the State's description of the suspect.

Next, defendant contends that the prosecutor made two separate statements by which he improperly shifted the burden of proof from the State to the defendant. The first of these two statements follows:

Do you know the defendant contacted Surina Crumble? It's a simple yes or no. When you say to yourself, I know he did it but I

really wish there was something else. Listen to what you are saying to yourself: I know he did it.

RP 161. (See Appellant's brief at p. 16). In this instance defendant made a general objection, stating that the remark was "not proper." Defendant's objection did not specify the particular ground on which it was based. Neither the trial court nor the State was put on notice of defendant's claimed defects. Therefore, the objection was insufficient preserve the issue for appellate review. McCorkle, 88 Wn. App. 485 at 500.

Defendant asserts that this comment "relieved the jury of proof beyond a reasonable doubt." (Appellants brief at p. 16). However, this statement when viewed in context of the whole argument is not improper. See Pastrana, 94 Wn. App. 463 at 479. Prior to making the above statement, the prosecutor properly explained the State's burden and proof beyond a reasonable doubt and read the court's instruction on beyond a reasonable doubt.

The State has the burden of proof beyond a reasonable doubt, absolutely... We have that burden 100 percent. And when you look at the evidence and all of the reasonable inferences... If you think it's reasonable that [Ms. Crumble] would blame someone who wasn't there, then you should acquit [defendant]... [But,] if after [] consideration of all the evidence or lack of evidence.. you have an *abiding belief in the truth of the charge* [then] you are convinced beyond a reasonable doubt.

RP 159-160. (emphasis added). The prosecutor's contested remark was used to further explain "abiding belief in the truth of the charge" to the jury. Viewed in context of the prosecutor's entire closing argument, this remark does not lessen the State's burden.

Additionally, any confusion possibly resulting from the prosecutor's remark was obviated by the jury instructions regarding the beyond a reasonable doubt standard. The court instructed the jury that the State had the burden of proof beyond a reasonable doubt, that the attorneys' arguments are not evidence, and that the jury must disregard any remark, statement or argument which is not supported by the evidence. CP 71 (Jury Instruction No. 1). It is presumed that the jury followed the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

The second of the two statements where defendant alleges the prosecutor shifted the State's burden, and the final of the four statements where defendant alleges misconduct follows:

We didn't hear from Ms. Crumble. She's not here. Why she is not here, we don't know... I could tell you my theory. Mr. Chin can tell you his theory. You may have your own theory. But what we do know is if this was so easy, if Mr. Bonds didn't do this, and she loved him so much that she didn't want him to get in trouble, she could have sat here and told you that.

RP 157.

Defendant failed to preserve this issue for review and has failed to meet his burden of proving prejudice.

Defendant's objection was insufficient to preserve the issue whether the prosecutor's remark shifted the State's burden. Defendant objected to this remark, but on grounds different from those now on appeal. Defendant objected on the grounds that the prosecutor called the jury to speculate, not that the prosecutor was shifting the State's burden. The trial court sustained the objection, "so far as asking them to speculate." RP 157. Defendant thereby preserved the issue of asking the jury to speculate, but not the issue of whether the remark shifted the State's burden. Nor did defendant ask the court for a curative instruction.

Defendant claims that the prosecutor's remark was improper under the missing witness doctrine. Under this doctrine, when a party fails to produce otherwise proper evidence which is within his or her control, the jury may draw an inference unfavorable to that party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (*citing* State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)). Most jurisdictions permit the missing witness inference in criminal cases where the defense fails to call logical witnesses. Blair, 117 Wn.2d 479, at 486. The inference may be drawn only where there is an unexplained failure to call a witness who it would be natural for a party to call if that party knew that the testimony would be

favorable. Blair, 117 Wn.2d 479 at 488 (*citing* Davis, 73 Wn.2d 271 at 279-80).

The inference may not be drawn when to do so would infringe on the defendant's constitutional rights, including the right to remain silent. Blair, 117 Wn.2d 479 at 491. The Blair court did not agree, however, that any comment on a defendant's failure to produce witnesses is an impermissible shifting of the burden of proof.

“Here, nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence. The prosecutor was entitled to argue the reasonable inference from the evidence presented.”

Blair, 117 Wn.2d 479 at 491.

The doctrine does not apply if the uncalled witness is equally available to both parties. State v. Blair, 117 Wn.2d 479, 490, 816 P.2d 718 (1991) (*citing* State v. Davis, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968)). Availability has been explained as follows:

For a witness to be “available” to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

Davis, 73 Wn.2d 271 at 277. In this case, it would have been best to have resolved at trial questions such as the availability of Ms. Crumble

to both parties and defendant's explanation for her absence. This court need not resolve these questions, however, because even assuming the prosecutor's remarks were improper, defendant has failed in his burden of proving prejudice. State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986).

First, the remark did not draw attention to defendant's decision not to testify, thus, the comment did not infringe on his constitutional right to remain silent. Second, had defendant properly objected, the court could have again instructed the jury that the State alone had the burden of proving each and every element of the crime. See, In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). Third, the trial court did not determine the comment to be prejudicial. See, State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983) (The trial court is best suited to evaluate the prejudice of the statement). Fourth, the court properly instructed the jury on the burden of proof. CP 73 (Jury Instruction No. 2). And we must presume that the jury followed this instruction. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Additionally, the court instructed the jury that the attorney's remarks were not evidence, and to disregard any comment made by an attorney not supported by law or evidence. CP 71 (Jury Instruction No. 1). Finally, in the context of the entire closing argument, there is little or no likelihood that the prosecutor's comments

affected the verdict. To the extent the remark was a comment on defendant's failure to produce evidence, they could have been cured with instruction. State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986), overruled in part in Blair, 117 Wn.2d 479 at 491, and State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996).

D. CONCLUSION.

For the above reasons, the State respectfully requests this Court to uphold defendant's conviction.

DATED: October 4, 2006.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/4/08 Theresa T
Date Signature

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