

No. 39216-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,
v.
SALVADOR GOMEZ REBOLLAR
Appellant.

09 DEC -4 PM 12:37
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks, Judge
Cause No. 09-1-00014-3

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. The State did not commit prosecutorial misconduct when it referred in closing to the failure of Gomez to produce a witness integral to the defense Gomez presented on direct examination, and where Gomez had a romantic relationship with the witness 1

2. Gomez’s counsel did not render ineffective assistance where he did not object to the prosecutor’s rebuttal comments regarding the failure of Josie Gomez to be called as a witness..... 6

3. There was sufficient evidence to support Gomez’s conviction for felony violation of a no contact order..... 8

D. CONCLUSION..... 10

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6
---	---

Washington Supreme Court Decisions

<u>In the Matter of the Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1996)	7
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988)	5
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991)	2
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)	9
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	8
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003)	1, 5
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	7
<u>State v. McFarland</u> , 127 Wn.2d 332, 899 P.2d 1251 (1995)	6
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995)	1
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 p.2d 1068 (1992).....	8

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*,
523 U.S. 1008 (1998)..... 7

State v. Swan,
114 Wn.2d 613, 790 P.2d 610 (1990) 5

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987) 6

Decisions Of The Court Of Appeals

State v. Briggins,
11 Wn. App. 687, 524 P.2d 694, *review denied*,
84 Wn. 2d 1012 (1974) 7

State v. Contreras,
57 Wn. App. 471, 788 P.2d 1114 (1990)..... 2, 3

State v. Galisia,
63 Wn. App. 833, 822 P.2d 303 (1992)..... 9

State v. Walton,
64 Wn. App. 410, 824 P.2d 533 (1992)..... 9

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the State committed prosecutorial misconduct that prejudiced Gomez such that the jury's verdict was affected.

2. Whether Gomez's conviction should be reversed for ineffective assistance of counsel.

2. Whether sufficient evidence supports Gomez's conviction for felony violation of a no contact order.

B. STATEMENT OF THE CASE.

The State accepts Appellant's statement of the case.

C. ARGUMENT.

1. The State did not commit prosecutorial misconduct when it referred in closing to the failure of Gomez to produce a witness integral to the defense Gomez presented on direct examination, and where Gomez had a romantic relationship with the witness.

The State did not commit prosecutorial misconduct in this case. A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a

“substantial likelihood the instances of misconduct affected the jury’s verdict.” Id.

The rebuttal statements by the prosecutor do not constitute prosecutorial conduct. The Washington State Supreme Court has held that it is not the case that “any comment referring to a defendant’s failure to produce witnesses is an impermissible shifting of the burden of proof.” State v. Blair, 117 Wn.2d 479, 492, 816 P.2d 718 (1991). “[A] prosecutor may comment on the defendant’s failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implied the uncalled witness’s ability to corroborate his theory of the case.” State v. Contreras, 57 Wn. App. 471, 474-76, 788 P.2d 1114 (1990) (finding no prosecutorial misconduct where the prosecutor commented in closing argument on the absence of an uncalled witness integral to the alibi defense presented by the defendant on direct examination).

In the present case, Gomez testified at trial that on January 2nd, the date of the offense, he was at Costco with his girlfriend Jenny Sanchez, his children, and her daughter. [RP 37-38]. Gomez denied that his wife Josie Gomez was in the car when he was stopped by police after leaving Costco. [RP 39-40]. He also denied

that he ever saw Josie on that day. [RP 43]. Jenny Sanchez was not called by either party to testify at trial. [See *generally*, RP]. In closing argument, the prosecutor correctly stated that the state bore the burden of proof. [RP 63]. Gomez's defense counsel argued in closing that the adult female passenger in the vehicle with Gomez was Jenny Sanchez, not Josie Gomez. [RP 78}. The prosecutor argued the following in rebuttal:

[Gomez] does not have to prove anything; that the defendant did not have to take the stand; that the burden is solely mine...There is no evidence that the children in the car were anyone besides Josie and the defendant's. The only person who testified to that was the defendant. No one else has testified today that a child belonged to Jenny. No one named Jenny has testified today saying she was in the car, solely based on what the defendant told you.

[RP 81].

The rebuttal comments were not improper. As in Contreras, Gomez claimed on direct examination that he was not with his wife; rather, he was with his girlfriend Jenny. Jenny is a witness integral to this defense. Furthermore, Gomez's romantic relationship with Jenny makes him uniquely able to produce her as a witness. See Contreras, 57 Wn. App. at 476 (holding that "the prosecutor is entitled to attack the adequacy of proof, pointing out weaknesses and inconsistencies, including the lack of testimony which would be

integral to the defendant's theory. This is particularly justified when the defendant bears a special relationship to a potential witness). Therefore, the prosecutor's rebuttal comments do not constitute misconduct.

Even if these comments did constitute misconduct, Gomez would still have to prove that he was prejudiced by the remarks. In light of the other evidence of Gomez's guilt produced at trial and in the context of the prosecutor's full argument, it cannot be said that Gomez was prejudiced by the prosecutor's statements. The State presented the testimony of Deputy Malcolm McIver who testified that he checked the identification of the adult female passenger in the car with Gomez and noted in his report her name and date of birth as Josie Gomez, November 4th, 1981. [RP 18-19]. Deputy McIver also identified Josie Gomez from a Department of Licensing photograph as the woman he saw in the vehicle with Gomez. [RP 19]. The bulk of the prosecutor's argument focused on this evidence, and the other evidence presented as to Gomez's previous convictions for violation of a no contact order, and Josie Gomez's status as the protected party. [RP 63-70; RP 80-83]. There is not a substantial likelihood that the prosecutor's rebuttal

remarks affected the jury's verdict; therefore Gomez was not prejudiced.

Gomez's defense counsel's decision not to object to the prosecutor's rebuttal comments supports the conclusion that there was no prejudice to Gomez. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Dhaliwal, 150 Wn.2d at 578. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). State v. Belgarde provides an example of remarks creating prejudice that could not be cured by an instruction. 110 Wn.2d 504, 506, 755 P.2d 174 (1988). In Belgarde, the defendant testified that he had some affiliation with the American Indian Movement (AIM). Id. In closing, the prosecutor made the following remarks:

What is AIM? Sean Finn is the political wing of the Irish Republican Army. AIM is to the English what the Sean Finn is to the Irish. It is a deadly group of madmen...AIM -- the people are frightened of AIM. . . . I remember Wounded Knee, South Dakota. Do any

of you? It is one of the most chilling events of the last decade. You might talk that over once you get in there. That was the American Indian Movement. That was a faction of the American Indians that were militant, that were butchers, that killed indiscriminately Whites and their own.

Id. The prosecutor's comments in the present case come nowhere close to the creating the type of prejudice created by these remarks. If the comments in the present case were misconduct, they could have been cured by an instruction. Prosecutorial misconduct is not a basis for reversal of Gomez's conviction.

2. Gomez's counsel did not render ineffective assistance where he did not object to the prosecutor's rebuttal comments regarding the failure of Josie Gomez to be called as a witness.

Gomez did not receive ineffective assistance of counsel. There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's

performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

In the present case, Gomez's defense counsel's performance was not deficient. Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974). Defense counsel did not object to the prosecutor's remarks because to do so would have been frivolous. For the reasons stated above, the remarks did not constitute misconduct; thus, there was no reason for defense counsel to object. Defense counsel's performance cannot be said to fall below an objective standard of reasonableness.

Moreover, Gomez cannot show that he was prejudiced by his counsel's performance. In his brief, Gomez claims, "The

prejudice here is apparent—but for counsel’s failure to object to the State’s improper rebuttal closing argument the trial court would have been compelled to declare a mistrial with the result that Gomez would not have been convicted.” Brief of Appellant, 11. However, Gomez offers no authority to support this conclusion. He makes no argument as to why the result would have been different if his counsel objected. Therefore, Gomez did not receive ineffective assistance of counsel.

3. There was sufficient evidence to support Gomez’s conviction for felony violation of a no contact order.

The State produced sufficient evidence at trial to convict Gomez of felony violation of a no contact order. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof

exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In the present case, the State was required to prove beyond a reasonable doubt that on January 2, 2009 there was a no contact order applicable to the defendant, the defendant knew of the order, that he knowingly violated the order, that he had twice before been convicted of violating a court order, and that the act occurred in Washington State. [CP 35]. During the trial, the State produced the no contact order applicable to Gomez and it was admitted as evidence. [RP 22-23]. Deputy McIver testified that Gomez admitted to knowing about the order [RP 23]. Deputy McIver further testified that the protected party, Josie Gomez, was with Gomez in the car. [RP 18-19]. Gomez admitted on the stand that he had twice been

convicted of violating a court order [RP 44], and the State admitted a judgment and sentence and a court docket proving the convictions. [RP 26-27]. Finally, there is no dispute that the acts occurred in Washington. This evidence is more than sufficient to convince a reasonable jury of the defendant's guilty, especially when the evidence is viewed in the light most favorable to the State.

D. CONCLUSION.

The State did not commit prosecutorial misconduct during Gomez's trial, nor did Gomez receive ineffective assistance of counsel. Furthermore, there was sufficient evidence to support Gomez's conviction for felony violation of a no contact order. The State respectfully requests that Gomez's conviction be affirmed.

Respectfully submitted this 3d day of December, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

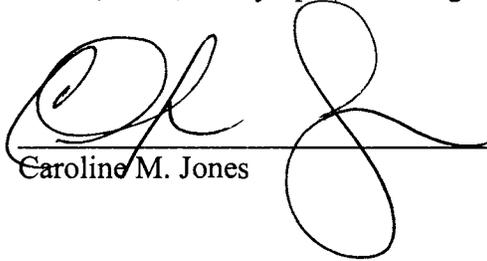
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: PATRICIA A. PETHICK
ATTORNEY AT LAW
PO BOX 7269
TACOMA, WA 98417

FILED
COURT OF APPEALS
DIVISION II
09 DEC -4 PM 12:37
STATE OF WASHINGTON
BY cmj
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of December, 2009, at Olympia, Washington.



Caroline M. Jones