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Court of Appeals  
Division I  
State of Washington

NO. 71426-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

WALTER J. JIMERSON JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE WILLIAM DOWNING

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

Did the prosecutor commit misconduct by stating that, "There's been no other evidence presented that this was not Mr. Jimerson?"

B. STATEMENT OF THE CASE

Walter Jimerson Jr. was convicted by jury trial of burglary in the second degree. CP 14. The facts presented at trial established that Jimerson manually opened the automatic doors and entered a Bartell's drug store approximately fifteen minutes before the store was open for business. 2RP 14<sup>1</sup>. Store surveillance video showed that once inside the store, Jimerson walked first to a Pepsi cooler, then to a lighter display, and finally to the cigarette case where he used a key he had taken from a cash register to attempt to unlock the case. Ex. 1. The store manager, Mark Becker, saw Jimerson on the security monitor in his office. 2RP 22-23. Becker contacted Jimerson and detained him until police arrived. 2RP 26-27. Jimerson was searched and two sodas and two lighters were recovered from his person. 2RP 27-28.

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<sup>1</sup> There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 3, 2013; 2RP – Dec. 4, 2013; 3RP – Jan. 14, 2014.

During closing argument, when discussing the issue of identity, the prosecutor stated, "You've seen the video, you've heard the testimony. You've heard the driver's license was taken off of Mr. Jimerson's person, had his name on it. There's been no other evidence presented that this was not Mr. Jimerson." 2RP 65. Defense counsel objected based on burden shifting and the court responded, "Go ahead." 2RP 65.

C. ARGUMENT

The defendant contends that the prosecutor committed reversible misconduct by improperly shifting the burden of proof to the defense during closing argument. Even if the prosecutor's statement was improper, this claim should be rejected because the defendant cannot demonstrate that there is a substantial likelihood that the statements affected the jury verdict.

In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). When reviewing the prosecutor's statements during closing argument, the Court should review the statements in the context of the entire 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). In determining whether prosecutorial misconduct occurred, the Court first evaluates whether the prosecutor's comments were improper. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the statements were improper, and an objection was lodged, then the Court considers whether there was a substantial likelihood that the statements affected the outcome. Id. If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, the inquiry ends. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

1. THE PROSECUTOR'S STATEMENT WAS A COMMENT ON THE STATE'S EVIDENCE AND WAS NOT IMPROPER.

In the present case, the defendant argues that the prosecutor's statement that there was "no other evidence presented that this was not Mr. Jimerson" was improper because it shifted the burden to the defense by drawing the jury's attention to the fact that Jimerson did not testify or put on any witnesses. Appellant's Br. at 5. This argument fails. When reviewed in the context of the

entire argument, it is clear that the statement - though perhaps inartfully worded - was a comment on the State's evidence rather than a comment on the defendant's failure to testify or the lack of defense evidence.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830, 843 (2003). The State may, however, comment on its own evidence. See State v. Crawford, 21 Wn. App. 146, 151-52, 584 P.2d 442 (1978) (State may argue the fact that evidence is unrefuted, even though it thereby subtly alludes to the absence of a defense). In this case, the statement was made after a brief summary of the State's evidence relating to identity. Not only was the reference to "other evidence" fleeting, it also did not suggest that testimony from the defendant would be the only source of other evidence as to identity.

Given the entire context of the State's argument, this case is more akin to Crawford than to either State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), or State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990), both cases where the

prosecutor's statements were found to be improper.<sup>2</sup> In Traweek, the prosecutor specifically referenced the fact that the defendant did not have to testify and commented on the lack of defense witnesses, thereby suggesting that the defendant was obliged to call witnesses to prove his innocence. Traweek, 43 Wn. App. at 106-07. Likewise, in Cleveland, the prosecutor went beyond commenting on the State's evidence by stating that the defendant had a good attorney who would not overlook any opportunity to present favorable evidence. Cleveland, 55 Wn. App. at 648. Here, the prosecutor did not directly refer to the defendant's failure to testify or in any way suggest that the defendant had a duty to present evidence. Rather, after a lengthy discussion of the burden of proof, the prosecutor simply summarized the State's evidence as to identity without explicitly referencing or emphasizing the fact that the defendant did not testify.

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<sup>2</sup> Although the prosecutor's statements were found to be improper, in both cases the court found that there was not reversible error.

2. EVEN IF THE PROSECUTOR'S STATEMENT WAS IMPROPER, IT DID NOT RESULT IN PREJUDICE THAT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY'S VERDICT.

Once a defendant establishes that a prosecutor's statements are improper, and the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. Anderson, 153 Wn. App. at 427. In this case, the prosecutor's statement, which was objected to at trial, was limited to the issue of identity only. Because identity was not at issue in this case, the defendant cannot show the requisite prejudice.

The defendant was charged with burglary in the second degree. As highlighted by the defendant's brief, the primary issue in this case was not identity, but rather whether the defendant had the requisite intent to commit a crime. Appellant's Br. at 6 ("There were many reasons to doubt Jimerson's intent to commit theft, an essential element of the burglary charge."). That identity was not a true issue in this case is further supported by defense counsel's closing argument which repeatedly called on the jurors to avoid judging Jimerson "by his cover." 2RP 74. Although the issue of identity was never specifically conceded, the entire argument is

predicated on the fact that it was Jimerson who entered the store.  
2RP 92 ("Mr. Jimerson was not there to commit burglary.").

When reviewed in the context of the entire argument, the issues in the case, and the evidence addressed in the argument, there is no basis to suggest that the prosecutor's statement had a substantial likelihood of affecting the jury's verdict. The portion of the prosecutor's argument that was objected to was limited to identity and did not bear upon the ultimate issue of intent to commit a crime. Given the overwhelming evidence and the complete lack of defense argument as to identity, there is no reason to believe that the prosecutor's statement either drew the jury's attention to the fact that the defendant failed to testify, or had any persuasive quality in the context of the larger issues.

Finally, even if the comments did have some prejudicial effect, the jury instructions provided by the trial court negated that effect. See Traweck, 43 Wn. App. at 108 (Jury instructions made it clear that the jury could harbor a reasonable doubt even if the defendant produced no evidence). The trial court's instructions specifically informed the jury that: (1) the State, as the plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt; (2) the defendant has no burden that a

reasonable doubt exists; (3) a reasonable doubt may arise from the evidence or lack of evidence. 2RP 56-57. Because the jury is presumed to follow the instructions of the court, State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1987), it is clear that any prejudice that may have resulted from the prosecutor's statement did not have a substantial likelihood of affecting the verdict.

D. CONCLUSION

This Court should affirm the defendant's conviction and sentence.

DATED this 5<sup>TH</sup> day of August, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert at SweigertJ@nwattorney.net, containing a copy of the Brief of Respondent, in STATE V. WALTER J. JIMERSON JR., Cause No. 71426-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

uBrame  
Name  
Done in Seattle, Washington

8/5/14  
Date 8/5/14