

NO. 67016-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GILBERTO MARTINEZ-VAZQUEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANNE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether defendant Gilberto Martinez-Vazquez has failed to show that the prosecutor improperly shifted the burden of proof or commented on his right to remain silent.

2. Whether Martinez-Vazquez has not shown a substantial likelihood that the prosecutor's misstatement during rebuttal argument affected the jury's verdict.

3. Whether Martinez-Vazquez may not challenge the court's denial of his challenges for cause because he accepted the jury as empaneled and did not exercise all of his peremptory challenges.

4. Whether the trial court acted within its discretion in denying Martinez-Vazquez's challenges for cause to Jurors No. 3, 16 and 24.

B. STATEMENT OF THE CASE

1. THE SUBSTANTIVE FACTS.

Margaret Gomez dated Martinez-Vazquez for a short period of time, and then broke up with him. 2RP 43-45.¹ On the night of May 9, 2010, he banged on her apartment door, and the next day she

¹ The State adopts the abbreviations for the report of proceedings used in the Appellant's Opening Brief.

obtained a temporary protection order. 2RP 49-50. When Gomez returned home from court with the protection order, Martinez-Vazquez was across the street. 2RP 51-52. Gomez's building manager then served him with the protection order. Id.

Two days later, Martinez-Vazquez approached Gomez outside her apartment building. 2RP 53-54, 60-61. Martinez-Vazquez stated, "I just want to talk." 2RP 53. When Gomez replied that she was going to call the police, he walked away. Id.

A few hours later, there was a knock on Gomez's apartment door. 2RP 54. She looked through the peephole but the view was blocked. 2RP 54, 71. When she inquired who was there, Martinez-Vazquez replied, "It's me, honey. I just want to talk to you. We can work this out." 2RP 54. Gomez told him to go away and reminded him she had a restraining order. Id.

Gomez called 911, and Seattle Police Officer Anna Green responded. 2RP 19-20, 57-58. The officer verified that there was an order of protection. 2RP 20-25, 58. Officer Green and another officer conducted an area check but did not see Martinez-Vazquez. 2RP 30-31.

Approximately one and a half hours later, Gomez heard a knock on her window. 2RP 55-58. When she looked outside, she

saw Martinez-Vazquez across the street rubbing his private area.

2RP 55.

2. PROCEDURAL FACTS.

The State charged Martinez-Vazquez with Felony Violation of a Court Order. CP 1. At trial, the State called two witnesses: Gomez and Officer Green. Martinez-Vazquez stipulated that at the time of the current alleged offense, he had two prior convictions for violating court orders. 3RP 81.

The defense was that Martinez-Vazquez never contacted Gomez. Defense counsel cross-examined Gomez about the timing of the contacts. Gomez had testified that all of the contacts were between 5:00 p.m. and 8:00 p.m. Defense counsel then cross-examined her with her statement during a defense interview that Martinez-Vazquez had knocked on her door after 8:00 p.m. 3RP 61-73.

The jury found Martinez-Vazquez guilty as charged. CP 15. The trial court imposed a standard range sentence. CP 236-44.

Additional relevant facts are set forth below.

C. ARGUMENT

1. THE PROSECUTOR DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF OR COMMENT ON THE DEFENDANT'S RIGHT TO REMAIN SILENT.

Martinez-Vazquez claims that the prosecutor improperly shifted the burden of proof and commented on his right to remain silent through comments made during closing argument and Officer Green's testimony. However, in neither the argument nor the testimony did the prosecutor shift the burden of proof or comment on his right to remain silent. In fact, throughout the trial, the prosecutor accurately discussed the burden of proof and asked that the jury hold the State to that burden.

In one brief statement in rebuttal, the prosecutor mischaracterized the defense closing argument. This misstatement does not justify reversal of the conviction. The mischaracterization was obviously inaccurate, and the court advised the jurors to rely upon their own memories when evaluating this argument. Martinez-Vazquez cannot show a substantial likelihood that this single erroneous remark affected the verdict.

a. Relevant Facts.

i. Officer Green's testimony.

During Officer Green's testimony, the prosecutor questioned her about her experience in responding to reported violations of no-contact orders:

PROSECUTOR: Of those a hundred investigations that you investigated for no-contact order violation how many times did you show up on the scene with the suspect present?

DEFENSE COUNSEL: Objection; to relevance, 404.

COURT: Overruled.

OFFICER GREEN: Investigated a violation where the suspect is still present?... Not very many. A slim number.

PROSECUTOR: Okay. So mostly -- well, how would you characterize the hundred investigations mostly?

DEFENSE COUNSEL: Same objection; relevance and 403.

COURT: Overruled.

OFFICER GREEN: Probably, oh, say 10 out of 100. Not very many.

PROSECUTOR: So 10 out of 100 where the suspect is actually there?

OFFICER GREEN: Yes.

PROSECUTOR: What about the 90 other ones?

OFFICER GREEN: Generally we show up to take a report from the victim and we're reporting on what the reporting party or the victim is telling us.

DEFENSE COUNSEL: Same objection move to strike. (INAUDIBLE) conformity of it, it's not relevant.

COURT: Simply background. I don't see any prejudice to your client.

PROSECUTOR: Is there any other -- so you show up to a scene, so 90 percent of the case, and you just take a statement from an aggrieved party at this point?

OFFICER GREEN: Correct.

PROSECUTOR: Okay. Is there any other evidence that you usually gather or how do you investigate these kind of crimes?

OFFICER GREEN: There generally is not any other evidence for a simple reporting of a violation -

DEFENSE COUNSEL: Again I object to relevance and burden shifting to the this[sic] line of questioning.

COURT: What he's trying to ask is, you know, do they collect evidence, is this the type of case where you collect evidence? Is that what you're talking about?

PROSECUTOR: That's right.

DEFENSE COUNSEL: I think what the State's getting at is the lack of evidence is not -- that the jury should excuse the State if there's lack of evidence.

COURT: If that's what you're saying then I would sustain the objection.

PROSECUTOR: I'm just generally speaking right now about how --

COURT: Right, so you're just trying to educate the jury as to how these types of cases are typically investigated?

PROSECUTOR: Absolutely.

COURT: That's appropriate.

PROSECUTOR: So how would you go about investigating these kinds of cases, assuming that's the 90 percent where you don't have a suspect who's present?

OFFICER GREEN: I speak to the aggrieved party, the reporting party, and to make notes of what they tell me, and then I write it in my report.

PROSECUTOR: Is that basically it?

OFFICER GREEN: Correct, yes.

PROSECUTOR: Okay. Have you ever had a case where you take a statement down and you don't pass it to your chain of command or how does that work once you take the --

OFFICER GREEN: Are you talking about a report?

PROSECUTOR: Yes.

OFFICER GREEN: No, those always have to be approved by a supervisor.

PROSECUTOR: Okay. And is that pretty much all you do as a line officer, kind of responding to these kind of calls when it comes to these kind of cases?

OFFICER GREEN: That's correct. I don't do any follow-up most of the time.

PROSECUTOR: So no forensic evidence, no DNA, nothing like that taken?

OFFICER GREEN: No.

3RP 16-19.

ii. Closing argument.

At the beginning of the prosecutor's closing argument, he told the jury, "It is the State's burden to prove each and every element of the crime charged as given to you by the judge."

4RP 13. He turned to a discussion of the elements of the crime and the testimony at trial. 4RP 14-18. He then anticipated the defense argument:

PROSECUTOR: Now, the Defense is going to come up here and going to talk to you about Ms. Gomez's inconsistencies.... But keep in mind this: Keep in mind that she was consistent in the fact that there was contact by the defendant against Ms. Gomez no matter how you look at it. Think about the cross-examination. Let's say for one second defense's argument -- and assume that it's true for a second. Not at one point does she ever deny that there was not contact. She was merely talking about the three different types of contact that occurred on May 12th: Parking lot, knocking on the door, and the window. Counsel in cross-examination was talking about the timing. "Well, was it 8:00 that the door happened or was it 8:00 when the window happened? Was it 5:00

to 7:00 when the parking lot happened or was that the door?" Any way you look at it there was contact. There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez on May 12th. All evidence, all inference --

DEFENSE COUNSEL: I'm going to object to that last comment, Your Honor, shifting the burden.

COURT: I can't hear you.

DEFENSE COUNSEL: I object to that last comment, burden shifting.

COURT: Your objection is noted.

PROSECUTOR: There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez any way you look at it.

4RP 18-19.

In closing, defense counsel argued that the jury should not believe Gomez's testimony:

State wants you to believe that Mr. Martinez-Vazquez broke this restraining order and Ms. Gomez is just confused about some of the details. But there's a more rational explanation: This just didn't happen. Ms. Gomez's version is inconsistent, uncorroborated, and just doesn't make sense.

4RP 21. He noted that the officer testified that she had responded at 5:30 p.m. that day and then argued:

[W]e know from an interview of Ms. Gomez just a few days ago that she said unequivocally, not once but twice, that she did not have any contact with Mr. Martinez-Vazquez before 8:00 p.m. that day.

And it wasn't that there was any confusion in the questioning. In fact she was specific about it and said she knew it was after 8:00 p.m. because that was around bedtime.

4RP 22.

Defense counsel stated that "there was a fever dream quality" about Gomez and that it did not "make any sense there's no corroboration of this alleged incident." 4RP 22-23. He then suggested, "The reasonable explanation for this is that it didn't happen, that it's either a false memory that Ms. Gomez has created over the past many months or it was a false story in the beginning with details she's embellished and forgotten that when she first told this story she actually called the police much earlier in the day."

4RP 23.

In rebuttal, the prosecutor argued:

PROSECUTOR: Counsel talks a lot about the 8:00 p.m. contact, the 8:00 p.m. contact. They already admitted themselves there was 8:00 p.m. contact. There's 8:00 p.m. contact.

DEFENSE COUNSEL: Object to mischaracterization of argument.

COURT: The jury will have to use their collective memory about what the evidence was during the trial.

PROSECUTOR: Again, three separate occasions: The door, the parking lot, the window at 8:00 p.m. or as such. 8:00. Just got to be unanimous. Just got to

pick the time and the date -- well, the date we know is the 12th. Just got to pick a time. 8:00 p.m.

4RP 26-27.

b. The Prosecutor Did Not Improperly Shift The Burden Of Proof.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

First, Martinez-Vazquez claims that the prosecutor shifted the burden of proof by eliciting testimony from Officer Green about

the typical steps that she took when responding to a report of a violation of a no-contact order. Martinez-Vazquez objected when this testimony was presented, and the trial court admitted the testimony only after confirming that it was offered to educate the jury as to how the police investigate this type of case. 3RP 17-18. Martinez-Vazquez has not assigned error to the trial court's evidentiary ruling, nor has he shown that it was an abuse of discretion to permit the testimony. It was not error to allow it; the appellate courts have recognized that similar background testimony from police officers may be admitted.² Here, the testimony provided relevant background explaining how the police typically respond to 911 calls involving no-contact order violations. Contrary to Martinez-Vazquez's claim that this testimony amounted to burden shifting, the prosecutor never argued or suggested that the jurors should excuse any deficiencies in the police investigation based upon this testimony.

² See State v. Avendano-Lopez, 79 Wn. App. 706, 709-11, 904 P.2d 324 (1995) (testimony explaining "arcane world of drug dealing and certain drug transactions" properly admitted); State v. Cruz, 77 Wn. App. 811, 815, 894 P.2d 573 (1995) (testimony consisting of detective's knowledge of typical heroin transactions properly admitted).

Second, Martinez-Vazquez claims that during closing argument the prosecutor shifted the burden of proof and commented on his right to remain silent by stating, "There is not one shred of evidence to show that the defendant did not have contact with Ms. Gomez any way you look at it." 4RP 19. The prosecutor made this statement during his discussion of the expected defense challenge to Gomez's testimony. The prosecutor pointed out that, while the defense was likely to complain about Gomez's alleged inconsistencies about the timing of the events, she had been consistent with the fact that Martinez-Vazquez had contacted her. 4RP 18-19.

The prosecutor's challenged statement, while inartfully phrased in the double negative, was not improper. A prosecutor may state that certain testimony is undenied or may comment that evidence is undisputed without reference to who could have denied it. State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995); State v. Morris, 150 Wn. App. 927, 931, 210 P.3d 1025 (2009). "[A] prosecuting attorney may comment on a lack of defense evidence so long as the prosecuting attorney does not directly refer to the defendant's decision not to testify." State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). The prosecutor in this case stayed

within these bounds and did not comment on the right to remain silent or invite the jury to shift the burden of proof to Martinez-Vazquez.³

In fact, throughout the trial, the prosecutor repeatedly and accurately reminded the jury of the burden of proof. During voir dire, he asked, "Does everybody kind of understand that concept of absolute presumption of innocence. That this man stands before you right now 100 percent not guilty. Does anybody have a problem with that? Holding the State to its burden or the issue of presumption of innocence." 2RP 41-42. Again in closing, he stated, "It is the State's burden to prove each and every element of the crime charged as given to you by the judge." 4RP 13. A review of the entire record belies the notion that the prosecutor sought to undermine or shift the burden of proof.

³ In the cases cited by Martinez-Vazquez, the prosecutor directly criticized the defendant for failing to present any evidence. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) ("the prosecutor argued that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it."); State v. Cleveland, 58 Wn. App. 634, 647, 794 P.2d 546 (1990) (prosecutor argued, "Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.").

Finally, Martinez-Vazquez argues that the prosecutor shifted the burden of proof by stating in rebuttal argument that "[c]ounsel talks a lot about the 8:00 p.m. contact, the 8:00 p.m. contact. They already admitted themselves there was 8:00 p.m. contact."

4RP 26. The suggestion that defense counsel had admitted that there was contact between Martinez-Vazquez and Gomez at 8:00 p.m. was inaccurate. However, this argument did not shift the burden; it was simply an inaccurate characterization of the defense closing argument.

A prosecutor's misstatement of the law or facts does not automatically justify reversal of a conviction. State v. Barajas, 143 Wn. App. 24, 38, 177 P.3d 106 (2007). Martinez-Vazquez must show that there is a substantial likelihood that this single comment affected the jury's verdict. Here, the trial court instructed the jurors to rely upon their collective memories in determining the accuracy of the prosecutor's remark, and any juror paying the slightest bit of attention would have understood that Martinez-Vazquez denied having any contact with Gomez. Immediately before the prosecutor's rebuttal argument, defense counsel repeatedly stated that the evidence failed to show that there had been contact between Martinez-Vazquez and Gomez. Defense counsel argued

that "[t]his just didn't happen." 4RP 21. After discussing Gomez's testimony, counsel stated, "The reasonable explanation for this is that it didn't happen, that it's either a false memory that Ms. Gomez has created over the past many months or it was a false story in the beginning with details she's embellished and forgotten that when she first told this story she actually called the police much earlier in the day." 4RP 23. The jury could have no doubt that the defense in this case was that there was no contact. Given these circumstances, this Court should hold that Martinez-Vazquez has not shown a substantial likelihood that the prosecutor's erroneous comment in rebuttal affected the jury's verdict.

2. THE TRIAL COURT PROPERLY DENIED THE CHALLENGES FOR CAUSE.

Martinez-Vazquez claims that the trial court erred in refusing to grant his challenges for cause to Jurors No. 3, 16 and 24. Martinez-Vazquez may not challenge the court's denial of his challenges for cause on appeal because he accepted the jury as empaneled and had three remaining unused peremptory challenges. Even if his challenge is allowed, he has not shown that the trial court abused its discretion in denying his challenges for

cause. During voir dire, he failed to establish that any of the challenged jurors had actual bias requiring their removal.

a. Relevant Facts.

Defense counsel began voir dire by telling the jury that Martinez-Vazquez had been twice convicted of violating a no-contact order:

DEFENSE COUNSEL: One of the things that you recall that the judge made in her opening remarks is that in this case Mr. Martinez has previously been convicted of violating to[sic] prior no contact orders.^[4] Does knowing that fact and knowing that he's charged now with a felony violation of a no contact order does that give you some concern? Does that make you think that, "Well, he's been already convicted," lead to some conclusion.

...

JUROR NO. 4: Regardless of my personal history that fact may affect my thinking, but I don't know one way or another. I have no -- I have no -- I mean that doesn't make me think that he's guilty or whatever. I have no feelings.

DEFENSE COUNSEL: So the fact that he has two prior convictions for violation of a contact order and being charged with a third one that doesn't make you think that he more likely than not did it this time?

JUROR NO. 4: It may make anyone of us think that.

....

⁴ In fact, the judge had not told the jury that Martinez-Vazquez had two prior convictions. She had simply read the elements of the current charged crime to the jury. 1RP 14.

DEFENSE COUNSEL: And that's based on your experience?

JUROR NO. 4: No. That's not based on my experience. It's based on just logic. You know, a guys [sic] steals a car twice, he might still [sic] a car a third time. That's just logic.

1RP 49-50.

Defense counsel engaged in a discussion with Jurors No. 4 and 15 about what weight the prior convictions would have on determining guilt. 1RP 50-52. Counsel then asked, "And me telling you that's not right for you to feel that way, that in and of itself is not going to change your mind?" 1RP 53. Juror No. 15 responded, "Probably not." Id.

Defense counsel then asked who else shared that feeling, and a number of jurors responded positively. Id.

DEFENSE COUNSEL: So Juror No. 4, so the general question just so I'm clear is that having heard from the judge that Mr. Martinez has two prior convictions of violation of a no contact order, the fact that he now stands charged of a third violation makes you believe that he likely committed this crime. I'm [sic] I stating that fairly, Juror No. 1?

JUROR NO. 1: Yeah.

DEFENSE COUNSEL: Juror No. 3, would you agree with that?

JUROR NO. 3: It depends. First, how do you feel? You feel that he might have. Yeah, my gut instinct is that if you do it twice you're more likely to do it a third time. Do I believe? I don't know if I have a belief.

DEFENSE COUNSEL: Okay. Is that how you feel?

JUROR NO. 3: That's how I feel.

DEFENSE COUNSEL: And anything that I -- if I say that's wrong for you to feel that way, is that going to change your mind?

JUROR NO. 3: No, but if you showed me evidence to the contrary.

1RP 53-54. Defense counsel elicited that Jurors No. 4, 5, 16, 17, 18, 24, 25, 30, 37 and 39 felt the same way. 1RP 54-55.

During the next session of voir dire, defense counsel requested that the jurors assume that the defendant had two prior convictions and asked if they started out "with the presumption that he's guilty of this offense." 1RP 80. Counsel asked no questions of Jurors No. 3, 16 and 24. 1RP 80-85.

At the conclusion of voir dire, defense counsel challenged for cause Jurors No. 15, 18, 20, 25 and 30 on the basis that they stated that they had a presumption of guilt based upon the two prior convictions. 1RP 87. After further questioning these jurors, the court granted the challenges for cause as to Juror No. 15 and 30. 1RP 87-89.

Defense counsel then stated that she had additional challenges for cause to Jurors No. 1, 3, 4, 5, 16, 17, 37 and 39. Counsel stated, "These were jurors that when I asked about the prior convictions and with the defendant being charged with a third conviction, they said they had strong feelings about that." 1RP 90. The trial court noted that was not the standard for a challenge for cause. 1RP 90. The judge then addressed the jurors and asked: "[Do] all the jurors understand that the standard here is not that he more likely than not committed the third offense. The standard is did the State prove beyond a reasonable doubt that he committed this offense. The State also has to prove that he has committed two prior offenses." 1RP 91-92. The judge asked each challenged juror whether he or she would be able to follow the law regarding presumption of innocence and burden of proof and whether they had any doubt whether they could do so. 1RP 91-94. All of the jurors responded that they would follow the law, and the court denied the challenges for cause. 1RP 91-94.

After using four of his seven peremptory challenges, Martinez-Vazquez accepted the jury as constituted. 1RP 5, 94-96.

b. Martinez-Vazquez's Challenge Fails Because He Accepted The Panel And Did Not Exercise All Of His Peremptory Challenges.

With three peremptory challenges remaining, Martinez-Vazquez accepted the jury as constituted, including the three jurors that he claims should have been removed. The Washington Supreme Court has repeatedly held that the failure to exercise all available peremptory challenges precludes a challenge on appeal to the trial court's denial of a challenge for cause. In State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001), Clark argued that the trial court erred by denying certain challenges for cause. Citing numerous prior decisions as support, the Court rejected this claim because Clark had not exercised all of his peremptory challenges:

At the threshold this issue is not properly raised because Clark accepted the jury as ultimately empaneled and did not exercise all of his peremptory challenges. Under well-settled case law, Clark can therefore show no prejudice based on the jury's composition. State v. Tharp, 42 Wn.2d 494, 500, 256 P.2d 482 (1953) (defendant must show the use of all of his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror and is barred from any claim of error in this regard); State v. Collins, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (no prejudicial error where defendant accepted the jury while having available peremptory challenges; nor did he challenge the panel); State v. Robinson, 75 Wn.2d 230, 231-32, 450 P.2d 180 (1969) (no prejudice may be shown where defendant failed to use all of his peremptory challenges); Gentry,

125 Wn.2d at 616, 888 P.2d 1105 (where defendant participated in selecting and ultimately accepted jury panel, his constitutional right to an impartial jury selected by him was not violated). We most recently reiterated this rule in State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed.2d 57 (2000).

Id. at 762.

Martinez-Vazquez acknowledges this authority but claims that this rule was changed by the Supreme Court in State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). The Court in Fire made no such pronouncement and, in fact, did not even discuss any of the authorities cited above, let alone overrule them. In Fire, a different issue was presented: whether a defendant could seek reversal of his conviction based upon the trial court's alleged error in denying a challenge for cause when the defendant later used a peremptory challenge to remove that juror. Id. at 157. The Court held that if a defendant uses a peremptory challenge to cure a trial court's error in not excusing a juror for cause, he cannot demonstrate prejudice, and reversal of his conviction is not warranted. Id. at 165.

In its discussion of the issue, the court noted, "If a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use

a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.” Id. at 158. In making this statement, the court did not discuss any of the many cases holding that a defendant may not obtain reversal if he did not exercise all of his peremptory challenges. In fact, the effect of the failure to exercise all peremptory challenges was not at issue in Fire, and, therefore, the court's discussion of the issue is dicta. Fire cannot be read as overturning, *sub silentio*, more than fifty years of settled law. State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999) (“We will not overrule such binding precedent *sub silentio*.”).

Accordingly, Martinez-Vazquez may not challenge the trial court's denial of his challenges for cause because he accepted the jury as empaneled and did not exercise all of his peremptory challenges.

c. The Trial Court Acted Within Its Discretion In Denying The Challenges For Cause.

If Martinez-Vazquez may raise this issue on appeal, this Court should hold that the trial court properly denied his challenges for cause because he failed to show that the jurors were actually biased.

This Court reviews a trial court's denial of a challenge for cause for a manifest abuse of discretion. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). In order to justify a challenge for cause, the defendant must prove actual bias. Id. at 838. A juror's "equivocal answers alone" do not justify removal for cause; instead, the appropriate question is "whether a juror with preconceived ideas can set them aside" and decide the case on an impartial basis. Id. at 839. The trial court is in the best position to address this question because it has the ability to evaluate factors outside the written record, such as a juror's demeanor and conduct. Id.

Martinez-Vazquez's challenge for cause is based upon the responses that he solicited from jurors during voir dire after his counsel announced that he had two prior convictions for the same crime. When defense counsel inquired whether the jurors would

believe that the existence of the prior convictions made it more likely that he committed the current offense, several jurors, not having been instructed about the relevant law and restrictions on the consideration of evidence, thought the prior convictions might be relevant. 1RP 49-54. Juror No. 3 offered the most complete statement, but still expressed some uncertainty about the subject: "My gut instinct is that if you do it twice you're more likely to do it a third time. Do I believe? I don't know if I have a belief." 1RP 53. Defense counsel never asked the jurors whether they would disregard the court's limiting instruction on the consideration of these convictions.

These responses do not establish an actual basis requiring removal of the jurors. The jurors' reactions to these questions were hardly surprising. A non-lawyer, unaware of the law and restrictions on the consideration of evidence, could reasonably believe that evidence of prior similar behavior is relevant. There is an entire body of law surrounding ER 404(b) allowing such evidence under certain circumstances. The legislature recently

enacted a statute, RCW 10.58.090, based upon the theory that a person's commission of a prior sex offense is relevant when he is charged with a new sex offense. In order to avoid the danger that the jurors would consider the prior convictions as propensity evidence, here the court appropriately gave the jury a limiting instruction with respect to the prior convictions. CP 26. Defense counsel never inquired whether these jurors would refuse to follow the court's limiting instruction.⁵

The jurors' responses to defense counsel's questions did not establish that they had preconceived biases that could not be set aside. The trial court properly denied the challenges for cause after confirming that the jurors understood that the State was required to prove all elements of the crime, including the two prior convictions, beyond a reasonable doubt. Martinez-Vazquez has not shown that the court abused its discretion in denying the challenges for cause.

⁵ Defense counsel never revealed to the jurors that the law might restrict consideration of the prior convictions. At one point, she inquired whether a juror would change his mind if she told the juror "that's wrong for you to feel that way." 1RP 54.

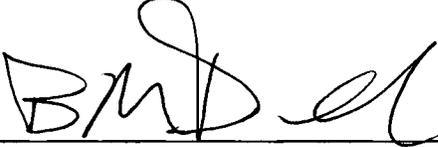
D. CONCLUSION

For the reasons cited above, this Court should affirm
Martinez-Vazquez's conviction.

DATED this 22nd day of December, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lindsay Calkins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. GILBERTO MARTINEZ-VAZQUEZ, Cause No. 67016-6-1, 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.

U Brame
Name
Done in Seattle, Washington

12/22/11
Date

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