

FILED
SUPREME COURT
STATE OF WASHINGTON
11/2/2023 2:32 PM
BY ERIN L. LENNON
CLERK

NO. 1024070
(COA NO. 56582-0-II)

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

ROBERT J. FINANDERS, JR.,
Petitioner.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

THE HONORABLE RANDALL C. KROG, JUDGE

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE ISSUE

At trial, a State's witness twice testified that Petitioner removed a trailer from a storage facility, contravening the trial court's pretrial order prohibiting such statements. Immediately following each remark, the defense objected and the trial court issued curative instructions. Reviewing Petitioner's claim of prosecutorial misconduct, the Court of Appeals determined Petitioner failed to demonstrate sufficient prejudice. When analyzing the prejudicial effect of the witness's remarks, did the Court of Appeals properly distinguish *State v. Taylor*, 18 Wn. App. 2d 568, 581, 490 P.3d 263 (2021) (assessing a trial court's denial of the defense's motion for mistrial) and instead evaluate whether the remarks had a substantial likelihood of affecting the jury's verdict?

II. STATEMENT OF THE CASE

Appellant Robert Finanders, Jr., was charged and found guilty of possession of stolen property in the first degree, in connection with a travel trailer stolen from a storage facility in Gresham, Oregon on September 20, 2020.

A. **Pretrial Ruling.**

In its motion in limine, the State asked, in relevant part, to admit evidence of Finanders's involvement in the theft of the trailer to show Finanders had knowledge that it was stolen—an element of the charged offense. The trial court ruled that evidence the State had listed showing opportunity to have access to the trailer was admissible under ER 404(b), “but not the final conclusion that Finanders actually committed the theft.” RP 91. The court noted that the State in its argument could make any reasonable inference from the evidence. RP 91.

B. Trial.

At trial, the State called Dean Anderson, who testified that he had rented a storage unit at Powell Storage in Gresham, Oregon for about two months during the fall of 2020. RP 241. Anderson gave his access code to the facility to Finanders and shared the storage unit with him. RP 242. Anderson learned he was being evicted from the storage facility. The following exchange then occurred:

[Prosecutor:] All right, so you said you had the [storage] facility for a couple of months, how did that come to an end?

[Anderson:] I got a call from the storage, left a message on my phone saying that I needed to get my things, that I was being evicted.

[Prosecutor:] And why did that happen?

[Anderson:] I had no idea until I got there and they told me that...

[Defense counsel:] Objection as to hearsay, Your Honor.

THE COURT: [Overruled.]

[Anderson:] They had told me that Mr. Finanders had taken a trailer from the property.

[Defense counsel:] Objection, Your Honor.

THE COURT: Sustained as to the statement. Disregard the statement as to it. He can explain why he was getting evicted.

[Prosecutor:] Okay, what was the reason that you were being evicted?

[Anderson:] Because Mr...

[Prosecutor:] Well, I mean, a theft had occurred at that location?

[Anderson:] Yes, they told me that had been a trailer removed by Robert Finanders.

[Defense counsel:] Objection.

THE COURT: Sustained. Disregard the last statement about, comment as to who may have allegedly done that.

RP 243-44. In that exchange, Anderson testified he was told by staff of the facility that Finanders had removed the trailer. RP 244. The trial court sustained defense counsel's objection to this comment and instructed the jury to disregard. RP 244. Anderson repeated the comment and the court again instructed to disregard. Anderson shared his access code with Finanders about three weeks prior to Anderson's eviction from the facility. RP 245. Anderson accompanied Finanders two or three

times to the facility, most recently about a week prior to being evicted. Anderson did not give his code to anyone other than Finanders. RP 248.

City of Gresham, Oregon police officer Nathan Still testified that he responded to a reported theft at Powell Storage in late September 2020. RP 250. Still received video surveillance recordings from September 18 and 20, 2020. The footage from September 18 showed Anderson and another person at the facility during the day moving things in and out using two vehicles: a black Ford pickup truck and a Chevrolet Suburban. RP 252. The September 20 recording showed the same pickup truck entering the facility at night and backing up to the trailer. RP 255. An individual exits the truck and hooks it up to the trailer. RP 256. Still learned Anderson's access code had been used on September 20, contacted him, and provided information about the stolen trailer to Skamania County. RP 260.

Jeremy Winkler, manager at Powell Storage, testified he knew of a client who stored a travel trailer at the facility and knew Anderson was a client. RP 267. Winkler testified the trailer was stolen at about 9:55 p.m. on September 20, 2020. Each client used a unique access code at the gate when entering and leaving the facility. RP 269. The facility's software logged all events and showed Anderson's code was used when the trailer was stolen. RP 269-70. In addition, Winkler knew Anderson's code had been used on September 18, when he noticed an unfamiliar truck enter the facility and access Anderson's storage unit. RP 272. Winkler originally believed Anderson entered the facility with the truck that day, but later believed he was mistaken and that Anderson was not present. RP 272.

Skamania County Deputy Sheriff Summer Scheyer testified that in October 2020, Gresham, Oregon police contacted her about a stolen trailer they suspected was

somewhere near Stevenson, Washington, and provided a photograph and description of the trailer. 284-85. On November 20, 2020, while investigating a different case, Scheyer discovered a trailer visually matching that description on forest service property within Skamania County. RP 286-87. Scheyer returned the next day with two more deputies, approached the trailer, and determined the license plate number matched that of the trailer stolen from Gresham. 289-90. The deputies announced themselves and detained Sandra Schnoor, who exited the trailer. RP 290. After a few minutes, a vehicle approached and the deputies ordered the driver to exit and detained him. RP 291. In the courtroom, Scheyer identified the driver as Finanders. RP 291. Scheyer explained to Finanders the trailer was reported stolen. RP 292. Finanders told her he purchased the trailer but left the paperwork in Portland and could not remember the name of the seller. RP 292.

Sandra Schnoor testified that about a month prior to November 21, 2020, she moved into the travel trailer, where her mother and Finanders had already been living. RP 302-04.

Michael Hunter, the owner of the trailer, testified that in 2020 he owned a 30-foot Keystone travel trailer that he kept at Powell Storage in Gresham, Oregon. RP 306-07. Around September 26, 2020, Hunter discovered the trailer was missing from storage and reported it to police. RP 308. Hunter made an insurance claim on the trailer and its contents and received compensation from the insurer. RP 308-11. Hunter gave no one, apart from his wife, permission to use the trailer. RP 312. Hunter identified the trailer visible in Scheyer's body-worn camera footage recording events from November 21, 2020 and in the Powell Storage surveillance footage from September 18 and 20, 2020. RP 313-14.

The jury found Finanders guilty of possession of stolen property in the first degree. RP 397.

C. Appeal.

On appeal, Finanders's sole assignment of error claimed State's witness Dean Anderson's remarks were the result of prosecutorial misconduct and deprived him of a fair trial. Br. of Appellant at 2. Without ruling on whether Anderson's testimony was the result of misconduct, the Court of Appeals analyzed the prejudice arising from Anderson's remarks and ruled that, given the trial court's instructions to the jury and the extent of the State's evidence connecting Finanders to the trailer theft, Finanders failed to show a substantial likelihood that the witness's remarks affected the jury's verdict. *State v. Finanders*, No. 56582-0-II (COA Div. II June 06, 2023) (hereinafter cited as "Opinion" or "Op.") at 8-9. The Court of Appeals affirmed Finanders's conviction. Op. at 10.

III. ARGUMENT

DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE COURT OF APPEALS' RULING DOES NOT DEPART FROM PUBLISHED APPELLATE DECISIONS.

This Court should deny discretionary review because the Court of Appeals' decision does not conflict with published appellate precedent. Finanders's single claim before this Court alleges the Court of Appeals erred by refusing to evaluate prejudice according to the analysis of *State v. Taylor*, 18 Wn. App. 2d 568, 490 P.3d 263 (2021), which addressed a trial court's denial of a motion for mistrial. Pet. for Review at 1-2. The Court of Appeals properly declined to apply *Taylor* and instead correctly determined the witness's improper testimony did not have a substantial likelihood of affecting the jury's verdict.

In cases of prosecutorial misconduct, the burden rests on the defendant to show that the conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d

759, 858, 147 P.3d 1201 (2006), *overruled on other grounds*, *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). Once proved, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *Id.* at 841; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

A. Grounds For Discretionary Review.

The sole grounds under which the Supreme Court may accept discretionary review of a court of appeals decision on a decision by a court of limited jurisdiction are:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
- or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;
- or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved;
- or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Finanders alleges that the Court of Appeals' decision terminating review conflicts with the Court of Appeals decision in *State v. Taylor*, 18 Wn. App. 2d 568, and qualifies for discretionary review by this Court under subsection (2) above. Finanders's petition fails to show how the Court of Appeals' ruling conflicts with other appellate case precedent and must be denied.

B. The Court Of Appeals Applied The Correct Standard To Determine Finanders Failed To Prove Sufficient Prejudice.

The Court of Appeals properly decided that Finanders had not met his burden of proving prosecutorial misconduct relating to Dean Anderson's improper testimony. See Op. at 6-10. In its analysis, the Court of Appeals identified the appropriate standard for evaluating prosecutorial misconduct, to which the defense objected at trial. The Court properly observed that the defendant bears the burden of demonstrating the conduct was both improper and sufficiently prejudicial such that the conduct

“had a substantial likelihood of affecting the jury’s verdict.” Op. at 7 (citing *State v. Emery*, 174 Wn.2d 741, 756-60, 278 P.3d 653 (2012)). The Court further noted that it evaluates prejudice in the “context of the total argument, the issues in the case, the evidence, and the instructions given to the jury.” Op. at 7 (citing *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)). As the Court further observed, “[a] correct and thorough curative instruction may cure prejudice against the defendant as we presume that juries follow the trial court’s instructions.” *Id.*

Instead of the above standard, Finanders incorrectly argues the Court should have applied the test used in *State v. Taylor*, 18 Wn. App. 2d 568, to evaluate a trial court’s denial of a motion for mistrial. Pet. for Review at 8. In that case, the trial court denied the defense’s motion for mistrial where one of the prosecution’s key witnesses mentioned Taylor’s criminal history, his “lengthy history” of drug abuse, and that Taylor requested an attorney at

the time of arrest. *Id.* at 579. The trial court issued a curative instruction regarding the criminal history and request for an attorney, but decided against such an instruction regarding Taylor's history of substance abuse. The Court of Appeals, Division One, reversed Taylor's conviction after determining that "nothing short of a new trial can ensure that the defendant will be tried fairly." *Id.* at 579. Assessing the severity of the prejudice to the defendant, the Court looked to:

(1) the seriousness of the irregularity, (2) whether the statement at issue was cumulative of other properly admitted evidence, and (3) whether the irregularity was able to be cured by an instruction to disregard the improper testimony, which the jury is presumed to follow.

Id. The Court concluded that "[i]n isolation, each of these irregularities could have been resolved or mitigated with curative instructions, but the misstatements here accumulated quickly over the course of direct examination of a single key witness."

The Court of Appeals correctly distinguished *Taylor*, noting that the standard for prosecutorial misconduct applied because Finanders's defense counsel objected to the improper testimony and did not move for a mistrial. Op. at 8. Finanders's petition fails to recite the test used by *Taylor* or defend its application to the present case in lieu of the "established standard of review" for prosecutorial misconduct employed by the Court of Appeals. *Emery*, 174 Wn.2d at 758.

In addition, the Court noted that the trial court immediately instructed the jury to disregard in each instance of the witness's improper statements. Op. at 8. The Court contrasted this with *Taylor*, in which the trial court decided not to instruct the jury to disregard the witness's statement about the defendant's substance abuse. *Id.* (citing *Taylor*, 18 Wn. App. 2d at 582). The Court of Appeals noted the trial court in Finanders's case instructed the jury to give limited weight to evidence

related to events surrounding the theft of the trailer. *Id.* at 9 (citing CP 61). Further, the Court of Appeals observed the “slight” potential prejudice of Anderson’s improper testimony, given the extent of properly admitted circumstantial evidence that Finanders knew the trailer was stolen. *Id.* at 9. Because *Taylor’s* analysis was inapplicable to a claim of prosecutorial misconduct, and because numerous factual distinctions exist, the Court of Appeals properly distinguished *Taylor* from the instant case.

In addition, it must be noted that the Court of Appeals never decided that the prosecution was responsible for Anderson’s improper testimony. For the sake of evaluating the dispositive issue of prejudicial effect, the Court “assum[ed] the prosecutor failed to adequately discuss the trial court’s pretrial order with Anderson.” *Op.* at 8. But the issue of whether improper conduct by the prosecutor caused the irregularity, as

opposed to the witness misunderstanding or disregarding instructions, is an important consideration under both the prosecutorial misconduct standard and when assessing a motion for mistrial. See *Taylor*, 18 Wn. App. 2d at 581 (“[w]hen reviewing the series of irregularities as a whole, we are compelled to also consider who was responsible for the errant testimony”). *Taylor* noted that “the record clearly demonstrates that [the expert witness] was not properly advised as to the limitations for testimony.” *Id.* In contrast, the present case contains no record relating to the prosecution’s preparation of Anderson as a witness. The prosecution’s questioning of Anderson never indicated an intent to elicit the improper testimony. Lacking a factual basis in the record, Finanders simply imputes Anderson’s impropriety to the prosecutor on the assumption that the prosecutor failed to inform Anderson adequately of the trial court’s order. No authority exists for that imputation of misconduct. For those reasons, even

under *Taylor's* analysis, Finanders would have failed to show prosecutorial responsibility for Anderson's improper testimony.

IV. **CONCLUSION**

Because Finanders had failed to demonstrate a single instance of the Court of Appeals' decision departing from published appellate case precedent (to wit, *State v. Taylor*), this Court should deny discretionary review.

RESPECTFULLY SUBMITTED, this 2nd day of November, 2023. (I certify this document contains 2,626 words, excluding the parts of the document exempted from the word count by RAP 18.17.)

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November 02, 2023 - 2:32 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Robert James Finanders Jr.
Superior Court Case Number: 20-1-00053-0

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