Supreme Court No. 89511-2
Court of Appeals No. 68604-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

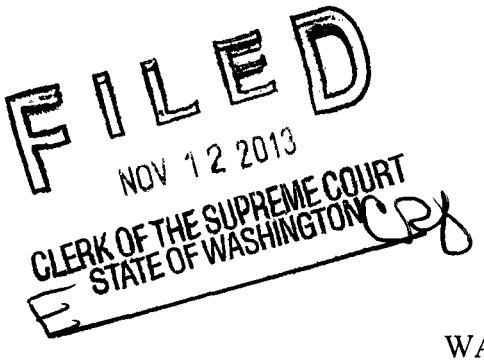
Respondent,

v.

RICHARD BRANDICH,

Petitioner.

PETITION FOR REVIEW



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Rules

A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Richard Brandich, the appellant below, asks this Court to accept review of the Court of Appeals opinion, No. 68604-6-I, filed September 23, 2013. A copy of the Court's slip opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether a question of substantial public interest implicating constitutional rights that should be reviewed by this Court is presented by the prosecutor's misconduct eliciting evidence that the defense mental expert had provided favorable testimony on identical defenses on behalf of the same defense attorney in at least two other cases, and intimating that the expert and defense counsel were in collusion with one another for mutual advantage. RAP 13.4(b)(3); RAP 13.4(b)(4).

2. Whether review is warranted of the Court of Appeals opinion failing to find a violation of the Sixth Amendment right to counsel where the prosecutor improperly implied that defense counsel had unethically colluded with the defense expert for mutual advantage. RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Whether review is warranted of the Court of Appeals opinion finding the trial court's "curative" instruction, which cemented the impression that an improper relationship existed between defense counsel

and the defense expert, mitigated any error from the prosecutor's misconduct. RAP 13.4(b)(3); RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Richard Brandich developed an addiction to opiates after he was laid off from his job as a general manager at Qwest, in Colorado. 5RP 156, 158.[1] Mr. Brandich soon was using Oxycontin, consuming as many as four 80-milligram pills per day, at a street value of $1 per milligram, or $360 per day. 5RP 158; 6RP 35. Eventually, he started using heroin, because the street drug was cheaper than the prescription pills. 6RP 36.

In April 2011, Mr. Brandich decided he wanted to try to stop using. Because he had probation warrants in Colorado, he took the identification card of an acquaintance, Justin Blair, and traveled by bus to Seattle, a 38-hour trip. 5RP 159-61. He brought with him three grams of heroin, a liter of vodka, and some cocaine, so that he would not suffer withdrawals during the trip. 5RP 162-63. He planned to enter a recovery center immediately upon his arrival. Id.

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[1] The verbatim report of proceedings is cited herein as follows:

January 9, 2012	-	2RP
February 1, 2012	-	3RP
February 2, 2012	-	4RP
February 7, 2012	-	5RP
February 8 and 9, 2012	-	6RP

When he got to the Recovery Center of King County in Seattle ("RCKC"), however, his plans went awry. RCKC was unable to admit him that day, so Mr. Brandich found himself in Seattle with nowhere to go and no way to detoxify. 5RP 161-62. Mr. Brandich located a homeless shelter where he was able to sleep. 5RP 162. Before checking into RCKC the following day, he smoked ½ gram of heroin in a Burger King bathroom and drank the entire liter of vodka that he had brought with him. 5RP 164. He then went to RCKC, where he surrendered his possessions and was taken upstairs. Mr. Brandich remembered nothing further until he found himself in a police car, surrounded by police officers. 5RP 166. His next memory was of being questioned in a large room. 5RP 167.

According to RCKC records, upon his admittance, Mr. Brandich was administered the following drugs: Phenobarbital, a sedative hypnotic with a long half-life, Methocarbamol, also known as Robaxin, another sedative, and Dicyclomine, a drug prescribed for gastrointestinal upsets, but which has an amnesiac effect. 5RP 31. He was discharged from the clinic at 10:35 a.m. for allegedly refusing to cooperate, and then returned at 11:30 a.m. that same day. 5RP 32. The records reflected that sometime after that, he was transported to Harborview Medical Center. Id. Mr. Brandich had no memory of any of these events. Id.

Later that afternoon Mr. Brandich went to the Walgreen's Pharmacy on Broadway and Pine Street. He approached the pharmacy counter and told the pharmacy technician, Daniel Lammers, that he was collecting a prescription for "Melissa Williams." 4RP 28. Mr. Lammers was unable to find a person by that name on file and asked what the prescription was for. Id. Mr. Brandich said he did not know. Id. He asked Mr. Lammers for a pen, and Mr. Lammers handed him a pen and transfer pad. He then asked Mr. Lammers to look into another prescription. 4RP 29-30.

Mr. Brandich then moved closer to the register and asked for "oxys."[2] 4RP 30. Mr. Lammers "froze in place" and replied that Oxycontin was kept in a locked case and he would not be able to access them. 4RP 31. Mr. Brandich seemed confused by this answer. 4RP 32. He repeated his request, and flashed what appeared to be the butt of a gun. Id. He then asked if Mr. Lammers had any other opiates he could give him. 4RP 33. The pharmacist came over to defuse the situation, and Mr. Brandich demanded "oxys" from him and again flashed what appeared to be the butt of a gun. 4RP 36-38. The pharmacist yelled,

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[2] Mr. Lammers understood Mr. Brandich to mean Oxycontin. 4RP 30.

"He has a gun, he's trying to rob us," and Mr. Brandich turned and walked quickly out of the Walgreen's. 4RP 54.

Mr. Brandich was arrested near the campus of Seattle Central Community College. 4RP 117-18. He did not immediately comply with law enforcement efforts to detain him, or commands to show his hands, even when a military-style rifle was pointed at him. 4RP 117-18, 154, 156. The officer who was aiming the rifle at Mr. Brandich had to tell him "many times" to show his hands. 4RP 158. According to the officer who ultimately took Mr. Brandich into custody, Lorie Aagard, Mr. Brandich was "acting weird." 3RP 52. During the effort to apprehend him, Mr. Brandich started to reach into his coat, as if to draw a weapon even though weapons were drawn upon him, and was passively resistant to attempts to physically take him into custody. 3RP 52-53. Several officers were needed to subdue him. 3RP 53.

Mr. Brandich was brought to Seattle police department robbery headquarters at approximately 7:00 p.m., where he was questioned by two detectives. 4RP 77. Detective Frank Clark described Mr. Brandich's demeanor during this interview as "serious" and "slightly agitated." 4RP 81. Occasionally Mr. Brandich bent over and grabbed his stomach, stating that he did not feel well. Id.

Mr. Brandich was left alone in the interview room for about 20 minutes while Detective Clark completed some paperwork. 4RP 83-84. As Detective Clark was walking back to the room, he heard a crash. 4RP 84. When he looked into the room, he saw that the table had been moved to the center of the room, and Mr. Brandich was standing on it. Id. The ceiling vent had been pulled down and the vent housing pushed out of place. 4RP 86. Mr. Brandich was handcuffed behind his back and moved to a different interview room. 4RP 91. When Detective Clark checked on him again, the handcuffs were at the front of Mr. Brandich's body, and the face plate for the light socket had been removed. 4RP 92. Mr. Brandich did not remember any of these events. 5RP 168-76; 6RP 17.

Mr. Brandich was charged with one count of attempted first degree robbery and one count of escape in the second degree. CP 24-25. At a jury trial, Mr. Brandich called as a witness psycho-pharmacologist Dr. Robert Julien. Dr. Julien testified that based upon his review of the records from RCKC and Mr. Brandich's self report regarding his use of heroin and alcohol, he believed Mr. Brandich was in a drug-demented state. 4RP 22. Specifically, Dr. Julien believed that the substances Mr. Brandich had ingested were of sufficient quantity to render him incapable of forming memory. 1RP 22, 34. He explained that a person in opioid withdrawal, like Mr. Brandich, would feel intense cravings, which could

explain Mr. Brandich's behavior in attempting to rob the pharmacy. 4RP 35. At the same time, the alcohol would function as a disinhibitor. 4RP 71. Dr. Julien testified that a person in a state of drug-induced dementia, such as Mr. Brandich, might not exhibit classic signs of intoxication, and could even appear "totally normal." 4RP 36.

The prosecutor, Samantha Kanner, cross-examined Dr. Julien aggressively. Ms. Kanner first questioned Dr. Julien about a talk he had given to the National Psychological Association, in Washington. 4RP 44. She intimated that Dr. Julien had recommended forensic testimony as a potentially lucrative pursuit for pharmacologists, and asked whether he had said at the conference, "[i]n fact, it can be as simple as calling a local public defenders office and saying, quote, if you need help in a case involving drugs, give me a call." Id. Dr. Julien had no specific recollection of this statement and explained, "I have not seen a transcript of that lecture." Id.

Ms. Kanner pressed,

> Okay. Is that fair to say, though? If somebody wants to get involved in this type of work, the type of work you do, testifying about blackouts and amnesia and this connection to intent, all they have to do is give a local public defender's office a call and say ... if you have a case involving drugs, give me a call?

4RP 45.

Mr. Brandich's defense counsel objected to this question based upon the court's *in limine* ruling excluding evidence that Dr. Julien had been retained by a public defender's office and was being paid public defender rates. Id. The court overruled the objection. Id.

Later during her questioning, the following exchange transpired:

> Question (by Ms. Kanner): Now doctor, in your – by your testimony, blackouts are pretty common among defendants caught on video committing crimes.
>
> Answer (by Dr. Julien): I believe so. I have seen no statistics on that comment.
>
> Q: And you've had at least three cases in the past year where defendants who have been caught on tape committing robberies, like of a bank or a pharmacy, have claimed amnesia?
>
> A: Yes, ma'am. I remember two. I don't know if there were three or not.
>
> Q: And Mr. Wolfe was defense counsel in all those cases?
>
> A: In at least one, maybe two others. I can't – I don't keep those records.
>
> Q: And in all of those cases, you testified that drugs and/or alcohol, either together or not together, put those three men –
>
> Mr. Wolfe: Objection, your Honor. And defense has a motion outside of the presence of the jury.
>
> Ms. Kanner: Your Honor, I believe it goes directly to the bias of this witness.

> The Court: Why don't we do this. I'm going to reserve ruling. Let's move on and finish your cross-examination, and then I'll take up that objection outside of the presence of the jury.
>
> Ms. Kanner: Sure.
>
> Q: And you've testified on numerous times and in cases where alleged crimes have been caught on video that those people are in blackouts, based entirely on their self-reports of what they've consumed, either alcohol or drugs or a combination, correct?
>
> A: That's correct. I've never argued whether they did what they did or not. The question was solely whether they had the legal capacity to meet the legal definition of intent – intentional behaviors.
>
> Q: Did Mr. Wolfe take your seminar, "Understanding Drugs of Abuse and Legal Defense"?
>
> Mr. Wolfe: Objection, calls for speculation.
>
> The Court: Sustained. Not relevant.
>
> Mr. Wolfe: Move to strike.
>
> The Court: There's no answer to strike. The objection is sustained.

4RP 90-92.

Outside of the presence of the jury, Mr. Wolfe moved for a mistrial. 4RP 109-114. He noted Ms. Kanner's questions regarding Dr. Julien contacting public defender's offices, and her questions regarding Dr. Julien's testimony in other similar cases. 4RP 109. He noted, as well, that Ms. Kanner had elicited testimony from Dr. Julien that Mr. Wolfe was

counsel in those other cases, and that she had also asked whether Mr. Wolfe had attended Dr. Julien's seminars. 4RP 110.

Mr. Wolfe argued that the implication of Ms. Kanner's questions was one of collusion between defense counsel and the expert, where Mr. Wolfe attended Dr. Julien's conference, gave him referrals, and fed him money. 4RP 111. He argued that no curative instruction could cure the taint from these questions and resulting improper inference. Id. He made an offer of proof that he had never attended one of Dr. Julien's seminars, and that Dr. Julien was one of the few experts willing to offer testimony at the rates paid by the King County Office of Public Defense ("OPD"). Id. He contended that as a consequence of Ms. Kanner's cross-examination, the defense would have to force the issue of Mr. Brandich's status as an indigent defendant and establish the legitimate process of securing defense experts through OPD, making defense counsel a witness. 4RP 112.

In response, Ms. Kanner claimed that while she did not intend to cast aspersions on Mr. Wolfe, it was her belief that Dr. Julien was "pandering his services" to defense attorneys and would "say anything to get hired." 4RP 116. She noted that she was aware of two other cases involving similar circumstances and Mr. Wolfe as defense counsel. 4RP 116.

The court was sympathetic to Mr. Wolfe's arguments, and noted,

> If you're a public defender or appointed counsel, the number of witnesses who will take your appointments can be fairly small. And so sometimes your universe of witnesses is small and then again, it is ineffective assistance of counsel if you don't have a witness. So I think it puts appointed counsel in a tough situation.

4RP 119.

The court commented that the situation was "very close." 4RP 121. The court noted that it had been Ms. Kanner who initially moved to exclude any reference to the fact that Dr. Julien had been retained by a public defender agency. Id.

The court ultimately denied Mr. Wolfe's motion for a mistrial because the court believed that the jury could be instructed to disregard any testimony about the relationship between Mr. Wolfe and Dr. Julien. 4RP 122. Mr. Wolfe renewed his motion for a mistrial, stating that he had "very real concerns" about whether a limiting instruction could dispel the taint from Ms. Kanner's improper questions. Id.

Pursuant to its ruling, when trial proceedings resumed, the court gave the following limiting instruction to the jury:

> During the cross-examination this morning, there were several references made to an alleged relationship or cooperation between the defense counsel and the witness. I'm now going to sustain the objections to that. I'm going to strike all of that question and testimony, and you are instructed to disregard any allegations or inferences of any kind of relationship between defense counsel and the witness.

4RP 124.

On appeal Mr. Brandich argued that the prosecutor committed misconduct that violated his right to a defense and a fair trial, and that the court's curative instruction did not

D. ARGUMENT

This Court should review the Court of Appeals opinion finding that the prosecutor's cross-examination which impugned defense counsel by suggesting that he had colluded with the appointed expert to fabricate a bogus defense was not misconduct that prevented Mr. Brandich from receiving a fair trial.

1. A prosecutor has the ethical duty to ensure that criminal trials are fair.

A prosecutor serves two equally important functions. She enforces the law by prosecuting those who have violated the peace and dignity of the state by breaking it, and she functions as the representative of the people in a quasijudicial search for justice. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Defendants are among the people the prosecutor represents. Id. (citation omitted). Thus, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314

(1935) (prosecutor has the obligation to ensure that the accused receives a fair trial); U.S. Const. amend. XIV; Const. art. I, § 3.

2. A prosecutor commits misconduct which violates an accused person's Sixth Amendment right to counsel when she disparages defense counsel's role or impugns defense counsel's integrity.

It is misconduct for a prosecutor to cast aspersions upon defense counsel's role or to impugn the defense lawyer's integrity. State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011); State v. Gonzales, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002); see also United States v. Young, 470 U.S. 1, 9, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (an attorney "must not be permitted to make unfounded and inflammatory attacks on the opposing advocate"). Such misconduct undermines the accused's Sixth Amendment right to counsel and the right to a defense. Bates v. Bell, 402 F.3d 635, 647 (6th Cir. 2005).

In Thorgerson, the prosecutor impugned defense counsel's integrity by characterizing the presentation of his case as "bogus" and involving "sleight of hand." 172 Wn.2d at 451-52. This Court emphasized that "[i]n particular, 'sleight of hand' implies wrongful deception or even dishonesty in the context of a court proceeding." Id. at 452. The Court held that these comments "went beyond the bounds of acceptable behavior." Id.

In Bates, the prosecutor made personal attacks on defense counsel when he attempted to object to the State's cross-examination and claimed that defense counsel's objections were a diversionary tactic. 402 F.3d at 646-47. In holding that the misconduct warranted reversal of Bates' death sentence, the Court noted that the misconduct was "plainly deliberate," and observed that "the intentionality of the prosecutor's improper remarks can be inferred from their strategic use." Id. at 648.

3. This prosecutor's comments critically undermined defense counsel's integrity before the jury by implying he regularly colluded with the defense expert to manufacture bogus defenses, where in fact the expert was one of the few expert witnesses available to indigent defendants.

Similar to Bates, the prosecutor's remarks in this case were likely deliberate, and appeared designed to suggest that Mr. Wolfe repeatedly colluded with Dr. Julien to present bogus defenses to the jury. The prosecutor's comments thus presented the error identified by the Court in Thorgerson, where the prosecutor's remarks directly called into question defense counsel's honesty and integrity. Even after the trial court sustained Mr. Wolfe's objection to the prosecutor's questions about Mr. Wolfe being counsel on previous cases where a similar defense was presented, Ms. Kanner persisted with cross-examination about whether

Mr. Wolfe had taken Dr. Julien's seminar, "Understanding Drugs of Abuse and Legal Defense." 4RP 90-92.

As Mr. Wolfe noted, and as the trial court found, contrary to Ms. Kanner's insinuation about a grubby partnership between Mr. Wolfe and Dr. Julien for mutual profit, Dr. Julien was one of a very limited number of potential experts willing to take cases at the low compensation rates paid by OPD. 4RP 109, 111, 119. The trial court specifically remarked that appointed counsel in such circumstances is in a "tough situation" because of the small number of available expert witnesses. 4RP 119. Far from a relationship of mutual advantage, Mr. Wolfe's relationship with Dr. Julien was born out of necessity: there simply were few other experts available. 4RP 111.

The prosecutor's remarks were plainly misconduct. There was no conceivable good faith basis for the prosecutor to elicit evidence that Dr. Julien had offered similar testimony in previous cases on behalf of Mr. Wolfe's clients. Nor, given Mr. Wolfe's offer of proof that he had never attended one of Dr. Julien's seminars, did Ms. Kanner have any good faith reason for posing this question either. As the trial court observed in sustaining Mr. Wolfe's objection, the answer to this latter question was not relevant. By placing the suggestion before the jury, however, Ms. Kanner managed to make it seem both pertinent and significant.

Mr. Wolfe had no way to effectively rebut the prosecutor's unsavory insinuations or dispel the taint from her questions short of (a) presenting evidence regarding OPD's system for approval and appointment of expert witnesses, and (b) testifying himself that he retained Dr. Julien because he was one of a limited number of available witnesses, not because he had attended Dr. Julien's seminar. The prosecutor in essence thus placed irrelevant and prejudicial "facts" before the jury in a manner that left defense counsel with no effective means of rebuttal.

In In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012), this Court decried a prosecutor's efforts to attempt to influence the verdict by the introduction of extrinsic evidence. Id. at 704-05. "The 'long-standing rule' is that 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.'" Id. at 705 (quoting State v. Pete, 152 Wn.2d 546, 555 n. 4, 98 P.3d 803 (2004) (internal citation omitted)). In Pete, the Court defined such evidence as "'information that is *outside all the evidence* admitted at trial, either orally or by document.'" Pete, 152 Wn.2d at 552 (citation omitted, emphasis in original). This Court observed that this type of evidence is "improper because it is not subject to objection, cross examination, explanation or rebuttal." Id.

4. No curative instruction could have dispelled the taint from the prosecutor's improper remarks.

In Pete, the jury inadvertently was presented in the deliberation room with the written and signed statement that Pete gave following his arrest. Id. at 554. The Court held, "[t]he jury's receipt of this extrinsic evidence ... presented a 'no win' situation for Pete because he was not able to object to or explain the extrinsic evidence." Id. at 555. A curative instruction was given to the jury by the bailiff, who "instructed the jurors to disregard the unadmitted documents during their deliberations." Id. at 551. This Court held that this did not "mitigate the harmfulness of the error," and further commented, "[e]ven if the trial court had given the instruction, which would be the appropriate practice, the same can be said." Id. At 555.

Here, likewise, this Court should grant review and hold that the curative instruction given by the trial court could not have dispelled the taint from the prosecutor's misconduct. Glasmann, 175 Wn.2d at 707 (in some instances, a curative instruction is incapable of dispelling the taint from improper remarks and evidence).

> While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.

State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

In this case, the distasteful suggestion of an improper alliance between defense counsel and the expert, possibly forged at a seminar given by the expert and inuring to the advantage and profit of both, could not be dispelled by a curative instruction. For the same reason, the remedy sought by Mr. Wolfe of a mistrial was the only appropriate remedy. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (trial court should grant a mistrial "when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly").

The trial court ruled that the issue was "very close" but elected to deny the motion for mistrial and instead issue a curative instruction. Unfortunately, the instruction given by the trial court likely served only to underscore the impermissible inference from Ms. Kanner's questions. The trial court told the jury that during the prosecutor's cross-examination "there were several references made to an alleged relationship or cooperation between the defense counsel and the witness." 4RP 124. These words accurately characterized the tenor of Ms. Kanner's remarks, neatly tying together her several improper questions – which did not reference the words, "cooperation" or "relationship" – to make this point

explicit for her. The judge's instruction did not cure the error by telling the jury that no inappropriate relationship existed, but instead simply told the jury to disregard the possible relationship.

5. The court's instruction to the jury did not cure but rather aggravated the problem.

The Court of Appeals wrongly found that the court's instruction cured the error. This was incorrect. The court's instruction emphasized that a "relationship," or "cooperation," between defense counsel, Mr. Wolfe, and Dr. Julien existed, but told the jury to disregard it. 4RP 124. The court told the jury:

> During the cross-examination this morning, there were several references made to an alleged relationship or cooperation between the defense counsel and the witness. I'm now going to sustain the objections to that. I'm going to strike all of that question and testimony, and you are instructed to disregard any allegations or inferences of any kind of relationship between defense counsel and the witness.

4RP 124.

Although courts generally presume that jurors follow the court's instructions, jurors are human, and courts recognize that in some circumstances a curative instruction cannot dispel the prejudicial effect of certain kinds of evidence. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968); accord State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). The prosecutor's misconduct told the jury that Mr. Brandich's

diminished capacity defense was a ploy concocted between and apparently previously used to successful effect by Mr. Wolfe and Dr. Julien. The court's instruction confirmed this impression.

The jury was being asked to decide not whether Mr. Brandich had committed the offense, but whether Mr. Brandich's ability to form intent was diminished by his consumption of narcotics. It was thus of critical importance that the jury believe Dr. Julien's testimony. No curative instruction could have caused the jurors to decide to believe the truth of his testimony after they were supplied extrinsic evidence suggesting that he was a charlatan and in collusion with defense counsel. Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), this Court should grant review.

E. CONCLUSION

For the foregoing reasons, this Court should grant review.

DATED this 22nd day of October, 2013.

Respectfully submitted:

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

STATE OF WASHINGTON, Respondent, v. RICHARD ALLEN BRANDICH, JR. Appellant.	)	No. 68604-6-I UNPUBLISHED OPINION FILED: September 23, 2013

VERELLEN, J. — Richard Brandich appeals his conviction for attempted robbery in the first degree and attempted escape in the second degree. He contends the prosecutor impugned defense counsel when she solicited testimony from the defense expert witness that defense counsel had retained him in prior cases, suggesting defense counsel colluded with the expert. The State's cross-examination of the defense expert witness did not constitute misconduct because it was designed to examine the defense expert's bias. Even if the cross-examination did suggest defense counsel somehow benefited from retaining the expert consistently, the court gave a curative instruction directing the jury to disregard the testimony regarding any association between defense counsel and the expert. We affirm Brandich's convictions.

FACTS

Brandich became addicted to opiates after he was laid off from his job as a general manager at Qwest. After using prescription opiates for some time, Brandich

began to use heroin because it was cheaper. On April 14, 2011, he checked himself into the Recovery Center of King County. After he was admitted, staff administered a variety of sedatives. He was discharged shortly thereafter for refusal to cooperate.

Later in the afternoon of April 14, Brandich went to a Walgreen's pharmacy in Seattle. He approached the pharmacy counter and told the pharmacy technician he was looking for "oxys."[1] The technician explained that Oxycontin was kept in a locked case. Brandich again repeated his request, flashing what appeared to be a gun. The pharmacist noticed the interaction between the technician and Brandich and came over toward them. Brandich demanded "oxys" from the pharmacist and again flashed a gun. The pharmacist yelled, "He has a gun, he's trying to rob us."[2] Brandich then quickly left.

When law enforcement contacted Brandich shortly after he left Walgreen's, he did not immediately respond to the officers' instructions and passively resisted arrest. When officers brought Brandich to police headquarters for questioning, Brandich was left alone in an interview room for approximately 20 minutes. During that time, he removed three of the four screws that held the ceiling vent in place and pulled the vent and vent housing out of place. Brandich told police he was trying to remove the vent so he could climb through the ceiling and escape from another room.

The State charged Brandich with one count of attempted robbery in the first degree and one count of attempted escape in the second degree. Brandich's defense

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[1] Report of Proceedings (RP) (Feb. 2, 2012) at 30.

[2] RP (Feb. 2, 2012) at 53. The gun was a replica of a pistol but was actually a BB gun.

theory was that he could not remember anything that happened on April 14 after he was admitted to the Recovery Center.

To support Brandich's defense, defense counsel retained Dr. Robert Julien, a retired esthesiologist who also has a Ph.D. in pharmacology.[3] Dr. Julien testified that Brandich could have been experiencing a blackout during the events of April 14, caused by the drugs Brandich reported ingesting before checking himself in to the Recovery Center, in conjunction with the drugs the Recovery Center staff administered to Brandich. Because Brandich was in a state of blackout, Dr. Julien testified, Brandich could not form the requisite intent to commit the crimes, even though he appeared to be acting normally.

During the State's cross-examination of Dr. Julien, the prosecutor established Dr. Julien had testified more than 50 times for defendants, but never for the prosecution. The prosecutor also established Dr. Julien had suggested in an article published in *The National Psychologist* that forensic testimony could be lucrative for pharmacologists. The article attributed the following quote to Dr. Julien, stating that he said entering the field "can be as simple as calling the local public defender's office and saying, 'If you need help in a case involving drugs, give me a call.'"[4] When the prosecutor examined Dr. Julien further on this alleged statement, defense counsel objected because the court

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[3] Esthesiology is the science concerned with sensory phenomena.

[4] RP (Feb. 7, 2012) at 44.

had already ruled in limine that Dr. Julien would not testify that his hourly rate was set by the Office of Public Defense.[5] The court overruled the objection.

The prosecutor also elicited testimony from Dr. Julien about other cases in which he testified that defendants had claimed blackout as a defense:

> Q. And you've had at least three cases in the past year where defendants who have been caught on tape committing robberies, like of a bank or a pharmacy, have claimed amnesia?
>
> A. Yes, ma'am. I remember two. I don't know if there were three or not.
>
> Q. And Mr. Wolfe [Brandich's counsel] was defense counsel in all those cases?
>
> A. In at least one other, maybe two others. I can't—I don't keep those records.
>
> Q. And in all of those cases, you testified that drugs and/or alcohol, either together or not together, put those three men—[6]

At that point, defense counsel objected, stating he had a motion to make outside the presence of the jury. The prosecutor replied that the line of questioning went directly to Dr. Julien's bias. The court reserved ruling, and allowed the prosecution to continue cross-examination.

The prosecutor then asked Dr. Julien:

> Q. Did Mr. Wolfe take your seminar, "Understanding Drugs of Abuse and Legal Defense"?
>
> MR. WOLFE: Objection, calls for speculation.

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[5] The court prevented testimony on his hourly rate because it was inappropriate for the jury to know that Brandich was indigent. However, defense counsel elicited testimony from Dr. Julien on direct that Brandich was homeless.

[6] RP (Feb. 7, 2012) at 90.

COURT: Sustained. Not relevant.

MR. WOLFE: Move to strike.

COURT There's no answer to strike. The objection is sustained.[7]

After cross-examination of Dr. Julien, outside the presence of the jury, defense counsel moved for a mistrial. Defense counsel argued the prosecutor's cross-examination regarding Dr. Julien's similar testimony in other cases with defense counsel suggested collusion between the expert and defense counsel. In essence, defense counsel suggested the jury heard testimony that he attended Dr. Julien's conference, gave him referrals, and fed him money. The prosecutor responded that she did not intend to disparage defense counsel, but rather intended to establish that Dr. Julien pandered to defense attorneys.

The court denied the motion for mistrial, but concluded it would give a curative instruction to address counsel's objection to the testimony regarding defense counsel's past work with Dr. Julien.[8] The court then instructed the jury:

> During the cross-examination this morning, there were several references made to alleged relationship or cooperation between the defense counsel and the witness. I'm going to now sustain the objections to that. I'm going to strike all of that question and testimony, and you are instructed to disregard any allegations or inferences of any kind of relationship between defense counsel and the witness.[9]

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[7] RP (Feb. 7, 2012) at 91.

[8] The court noted the situation was "very close" and understood that public defenders often struggle to find experts to testify, and that universe of witnesses is very small. RP (Feb. 7, 2012) at 121.

[9] RP (Feb. 7, 2012) at 124.

The jury convicted Brandich as charged. The court imposed a standard range sentence on the attempted robbery conviction and a suspended sentence on the attempted escape conviction. Brandich now appeals.

ANALYSIS

Prosecutorial Misconduct

Brandich contends he was deprived of a fair trial due to improper cross-examination of the defense's expert witness, in which the prosecutor impugned defense counsel by suggesting defense counsel was in collusion with the expert. A prosecutor may not disparage defense counsel or otherwise impugn defense counsel's integrity.[10] Such misconduct undermines the defendant's Sixth Amendment right to counsel and the right to a defense.[11] To prevail on a claim of prosecutorial misconduct, Brandich must show the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[12] We will find prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict.[13]

Cross-examination may include an inquiry into matters that show "bias, ill will, interest, or corruption."[14] The scope of such cross-examination is within the discretion

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[10] State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011).

[11] Bates v. Bell, 402 F.3d 635, 647 (6th Cir. 2005); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984); State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

[12] State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997).

[13] Id.

[14] State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994).

of the trial court.[15] The State may question a defense witness to determine whether he is part of the "defense team."[16] The State established on cross-examination that Dr. Julien always testified for the defense, that he has testified more than 50 times, and that he has consulted with defense counsel on many more cases. The State's specific questioning of Dr. Julien about how many times he had worked with this particular defense counsel appears unnecessary, given the testimony it had already elicited about Dr. Julien's record of testifying for the defense.

However, the questioning about Dr. Julien's past work with defense counsel did not constitute misconduct. Rather, it was part of the State's larger strategy to examine whether Dr. Julien was biased and specifically marketed himself to the defense bar. While Brandich argues the jury could have inferred collusion between defense counsel and Dr. Julien, the State argues the jury could have also inferred that Wolfe found Julien's testimony helpful and hired him a few times. Further, none of the testimony suggested defense counsel personally benefited from working with Dr. Julien.

Finally, even if the State's cross-examination of Julien about his past work with defense counsel constituted misconduct, the court gave a limiting instruction. The trial court's curative instruction reflected its decision to strike all of the testimony about the alleged relationship between defense counsel and Dr. Julien, and specifically instructed the jury to "disregard any allegations or inferences of any kind of relationship between defense counsel and the witness."[17] The jury is presumed to follow instructions.[18]

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[15] Id.

[16] Id.

[17] RP (Feb. 7, 2012) at 124.

Brandich argues the court's curative instruction underscored the impermissible inference of collusion between defense counsel and Dr. Julien. He contends the court should have affirmatively instructed the jury that no inappropriate relationship existed rather than instructing the jury that it should disregard the testimony. We find Brandich's argument unpersuasive, as the instruction mitigated the possibility the jury would draw an adverse inference from this testimony.

We conclude that no misconduct occurred because the State's cross-examination fell within the scope of its legitimate strategy to attack Dr. Julien's credibility by showing bias.

Motion for Mistrial

In addition to Brandich's objection based on prosecutorial misconduct, Brandich also moved for a mistrial. He argues that mistrial was the only appropriate remedy because the limiting instruction only served to further highlight an "improper alliance" between defense counsel and Dr. Julien.[19]

A trial court should grant a mistrial based on prosecutorial misconduct only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.[20] We will overturn the trial court's decision on a motion for mistrial only when there is a substantial likelihood the statements affected the jury's verdict.[21] Given the thorough curative instruction and the presumption that the jury

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[18] Russell, 125 Wn.2d at 84.

[19] Appellant's Br. at 23.

[20] Russell, 125 Wn.2d at 85.

[21] Id.

followed it, we cannot conclude there was a substantial likelihood the testimony about the alleged relationship affected the jury's verdict. The court did not abuse its discretion in denying Brandich's motion for a mistrial.

Statement of Additional Grounds

In his statement of additional grounds, Brandich asserts the trial court failed to adequately poll the entire jury after two of the jurors were present in the courtroom as Brandich entered in restraints. The courtroom deputy immediately noticed the problem, and the jurors were sent back to the jury room. The court then questioned the two jurors who were present when Brandich entered to determine what they say and whether they communicated with other jurors about the issue. Juror 11 told the court he had seen Brandich in restraints, and the court excused that juror. Juror 8 told the court she had averted her eyes when she saw Brandich, and that she did not see the restraints. Over defense objection, juror 8 remained on the jury. The court admonished juror 8 to refrain from talking "about the questions we've had here; just don't repeat anything to the other jurors."[22]

"A substantive claim of unconstitutional shackling in this [s]tate is subject to harmless error analysis."[23] The defendant must show that the shackling "'had substantial or injurious effect or influence on the jury's verdict.'"[24] The trial court determined, after questioning juror 8, that juror 8 had not seen Brandich in restraints.

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[22] RP (Feb. 2, 2012) at 13.

[23] In re Pers. Restraint of Davis, 152 Wn.2d 647, 694, 101 P.3d 1 (2004).

[24] Id. (quoting State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)).

We do not disturb this credibility determination on appeal.[25] Because the court excused the juror who saw Brandich in restraints, the shackling did not affect the jury's verdict.

Affirmed.

WE CONCUR:

[25] Id. at 682-83 (trial court's credibility determination of a juror who testified at a reference hearing regarding shackling of defendant could not be disturbed on appeal).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68604-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Donna Wise, DPA
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 22, 2013