68604-6

68604-6

NO. 68604-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BRANDICH, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL TRICKEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether cross-examining a defense expert regarding his bias and financial interest in the case was proper and the reference to his testimony in prior cases with this defense counsel did not impugn defense counsel's integrity.

2. Whether the trial court vitiated any prejudice that resulted from the prosecutor's questions and properly denied a defense motion for mistrial when it instructed the jury that any references to a relationship between defense counsel and the expert witness were stricken and must be disregarded.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Richard Brandich, Jr., was convicted by a jury of attempted robbery in the first degree and attempted escape in the second degree. CP 51-52. The Honorable Michael Trickey, who presided at trial, imposed a standard range sentence on the attempted robbery in the first degree and a suspended sentence on the gross misdemeanor attempted escape. CP 57-67.

2. SUBSTANTIVE FACTS

On April 14, 2011, Brandich attempted to rob a Walgreens pharmacy in Seattle, displaying what appeared to be a handgun. He went to the store at about 4:40 p.m. that day and walked to the pharmacy area in back. Ex. 6 (Walgreens security video)[1]; 2/2/12RP 27, 42-45.[2] He asked about a nonexistent prescription and waited nearby as employees checked for that prescription. 2/2/12RP 27-28; 2/6/12RP 65-67. He waited until there were no other customers nearby, then moved very close to the pharmacy assistant, Dennis Lammers, lowered his voice and requested Oxycontin. 2/2/12RP 31, 48-51, 65. When Lammers said the Oxycontin was locked in a safe and he could not get it, Brandich opened his jacket slightly, displaying the butt of a handgun. Id. at 31-32. Then Brandich asked for any opiates. Id. at 33. Lammers said no to that request because he was afraid that if he moved, Brandich would use the gun. Id. Brandich told Lammers, "You

[1] Three exhibits of video recordings have been designated to this court: Exhibit 1 (police in-car video), Exhibit 6 (Walgreens security video), and Exhibit 25 (detectives' interview with Brandich). An explanation of how each of the videos may be opened for viewing on a computer (PC) is attached as Appendix 1.

[2] The report of proceedings is eight volumes, comprising proceedings on ten days. This brief will reference the record by date.

don't want me to use this." Id. at 34. Lammers was frozen in place during this interaction. Id. at 31, 34.

The pharmacist, Tedros Gebreselassie, could not hear the conversation but observed a tense exchange and came over to help with the apparent customer relations problem. 2/6/12RP 68-69. Gebreselassie told Brandich that Walgreens had no record of the prescription he had requested. Id. at 69-70. Brandich then asked Gebreselassie for opiates but Gebreselassie told Brandich that he could not get them without a prescription. Id. at 70-71. Brandich again opened his jacket and displayed the butt of his gun. Id. at 39, 71.

Gebreselassie loudly said, "Is that a gun? Are you showing me a gun?" and yelled to a nearby manager that this man was trying to rob them and had a gun. 2/2/12RP 39; 2/6/12RP 71-72. Brandich was surprised by this reaction. 2/6/12RP 75-77. He said something like "I don't know what you're talking about" or "That's stupid," and quickly turned and left the store. 2/2/12RP 39; 2/6/12RP 72. The events at Walgreens are shown on video recordings taken by multiple security cameras in the store. Ex. 6 (the attempted robbery is shown on camera "6590-PVM Rx(1)" beginning at 16:48:30. 2/2/12RP 50-55).

Police quickly broadcast a description of the robber; Seattle Police Officer Whitlach saw Brandich come out of a nearby building minutes later and observed that he matched the description. 2/2/12RP 142-43. When Brandich saw the uniformed officer, he turned around and walked in the opposite direction. Id. at 143-44. Other officers stopped him at gunpoint. Id. at 153-55. He refused to comply with initial commands to get to the ground, and started to reach into his coat where the robbery victims had reported seeing the gun, then took his hand out, empty. 2/1/12RP 51-52, 108. Brandich later told Officer Aagard that when he started to reach for his own gun, "he thought about getting shot" and "kinda" wanted to get shot. Ex. 1 (Aagard in-car video at 11:50-12:13, at 5:17 p.m.); 2/2/12RP 104-05.

The gun recovered from inside Brandich's jacket when he was arrested was a replica of a Smith & Wesson semi-automatic pistol; it was a BB gun. 2/1/12RP 53; 2/2/12RP 120-26. Lammers identified Brandich as the robber in a showup minutes after the attempted robbery. 2/1/12RP 38-42; 2/2/12RP 62-64, 157-62.

Brandich was taken to the offices of the Seattle Police Robbery Unit. 2/2/12RP 163-64. His interview by robbery detectives from about 6:55 p.m. to 7:45 p.m. was audio and video

recorded. Ex. 25;[3] 2/6/12RP 18. Brandich agreed that he understood his rights as provided; he asked for water and cigarettes, which he was provided. Ex. 25; Pretrial Ex. 5 at 1-5. After the interview, detectives gave him a white jumpsuit, collected his clothing, and left him alone in the interview room. 2/2/12RP 83, 100; 2/6/12RP 17-18, 21.

About 15 minutes later, Detective Clark heard a crash from the room and saw Brandich standing on the table, which had been moved to permit access to a ceiling vent. 2/2/12RP 84-86. Brandich had removed the vent cover and had removed three of four screws from the housing of the vent, which was still in the ceiling. 2/6/12RP 22. Detectives handcuffed Brandich and put him in another interview room. Id. at 24. About 20 minutes later Clark discovered that Brandich had switched the position of his hands to the front and had removed the cover of an electrical outlet in the second room. 2/2/12 RP 91-92; 2/6/12RP 23-25.

At that point, the detectives took Brandich to their office area and sat him on the ground where they could watch him. 2/2/12RP 93; 2/6/12RP 25. Brandich said that he had been trying remove the

[3] A transcript of the interview was admitted as Pretrial Exhibit 5, which has been designated to this Court for its convenience. The portions highlighted in yellow were redacted from the video recording seen by the jury, Exhibit 25. 1/10/12RP 35-37; 2/6/12RP 18, 27.

vent so he could climb through the ceiling and drop into another room, from which he could escape. 2/2/12RP 93-94. He bragged that he had three of the four screws out. 2/2/12RP 93-94; 2/6/12RP 26. He was cheerful and also bragged that he had "really played them" (the detectives) in the interview. 2/2/12RP 93-94; 2/6/12RP 26-27.

3. BRANDICH'S DEFENSE

Brandich testified that he was an alcoholic and heroin addict and that he came to Seattle from Colorado on the day before the robbery, in order to obtain free medical detoxification. 2/7/12RP 157-58. He used the identity of "Joshua Blair" while in Seattle, because he had warrants in Colorado and did not want to be arrested. Id. at 158-61.

Brandich said that on the day of the robbery he smoked heroin and drank vodka 30 minutes before he went to a detoxification facility, Recovery Center of King County (RCKC). 2/7/12RP 21, 164. He said that he remembered nothing after he was admitted to RCKC at 10:30 that morning. Id. at 166-67. The next thing he remembered was talking to police in a room, and then being in a red suit in a jail dorm. Id.; 2/8/12RP 15-17. Later

Brandich testified that he did not remember being in the police interview room. 2/7/12RP 169; 2/8/12RP 23.

Brandich agreed that he was the person who was pictured in the Walgreens video. 2/7/12RP 168. He said that the BB gun was in his bag when he checked into RCKC that morning. Id. at 76, 165.

Dr. Robert Julien, a retired anesthesiologist who has studied psychopharmacology and written a text on pharmacology, was retained by the defense. 2/7/12RP 18-19, 149. Julien testified that based on his experience as an anesthesiologist, he has come to the conclusion that a person who because of alcohol or drug use cannot form long-term memories also cannot meet the legal definition of intent. Id. at 22-23, 86. He stated that this proposition has not been studied or discussed by other experts because he just published the theory in 2011. Id. at 86-87.

Julien opined that a person who ingested the substances Brandich reported to Julien, in addition to what Brandich was given at RCKC in aid of his detoxification, could for some time be in a blackout, which he described as drug-demented. 2/7/12RP 22-24. A person in such a blackout, he said, could not form intent although they could act normally. Id. at 36, 84-86, 101-05.

Julien based his conclusion that the drugs ingested were consistent with a blackout on Brandich's self-report in an interview in October of 2011. 2/7/12RP 22, 48, 55, 144. Julien is not a trained interviewer and simply assumed that whatever he was told by Brandich was true. Id. at 33, 144-45. He did not consider the possibility that Brandich might lie to him. Id. at 144. He did not review the video recordings of the defendant committing the crime or talking to police two hours later. Id. at 20, 99, 107.

Julien testified that his opinion was based on Brandich using a small amount of heroin and drinking an entire fifth of liquor on the morning of the robbery. 2/7/12RP 25-26, 63-64, 75, 140-41. Brandich testified that he smoked half a gram of heroin that morning and drank about three quarters of a bottle of vodka. Id. at 164. Brandich reported to Julien that he did vaguely remember fiddling with an electrical outlet. Id. at 83. At trial Brandich denied making that statement to Julien. 2/8/12RP 18-19.

Upon admission to RCKC for drug detoxification on the morning of the robbery, Brandich had said that he had not used heroin since April 12, 2011, two days earlier. 2/7/12RP 63. He told the detectives right after the robbery that the last time he used heroin was a few days earlier. Ex. 25; Pretrial Ex. 5 (transcript) at

16. The day after his arrest, he told a court services employee that he did not have any issues with drugs or alcohol. 2/8/12RP 51-52. Brandich told the jury that he had a history of lying and that they could not know whether he was telling the truth when he testified. 2/7/12RP 177.

The victims of this attempted robbery observed no signs that Brandich was intoxicated. 2/2/12RP 56-57; 2/6/12RP 72-73. The police officers who transported him to the precinct and then to police headquarters observed no signs of intoxication. 2/2/12RP 107, 165-66. The detectives who interviewed Brandich two hours after the crime observed no signs of intoxication, although Detective Magan did notice alcohol on Brandich's breath. 2/2/12RP 82; 2/6/12RP 15-17. Brandich is seen communicating effectively in the video of his transport immediately after the attempted robbery and in the video of his 45-minute interview with the detectives. Ex. 1 (Aagard video (5011) at 7 minutes); Ex. 25.

In determining that Brandich's custodial statements were admissible, the trial court viewed the video recordings of Aagard's interaction with Brandich during his transport and the detectives' interview at police headquarters. CP 93-95; 1/9/12RP 19-21, 50; 1/10/12RP 9-10, 18-19. The court concluded that Brandich had

twice been properly advised of his constitutional rights and his waivers of those rights were knowing, intelligent, and voluntary. CP 93-95; 1/10/12RP at 18-19.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MISTRIAL.

Brandich argues that he was deprived of a fair trial because the trial prosecutor committed misconduct by impugning the integrity of the defense attorney during cross-examination of Dr. Robert Julien, a defense witness. This claim should be rejected. The questions at issue were part of the prosecutor's effort to establish the bias of the witness. The questions were not improper and the reference to defense counsel did not impugn his integrity. Even if the questions were improper, the trial court's curative instruction was sufficient to ameliorate any resulting prejudice.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. Const. amend. V, VI; WA Const. art. I, § 3. A defendant who claims on appeal that prosecutorial misconduct deprived him of a fair trial bears the burden of

establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Brandich has not established that the challenged cross-examination was improper or that any prejudice was not cured by the court's instruction that it was stricken and should be disregarded. If any prejudice survived that instruction, there is not a substantial likelihood that it had an impact on the jury's verdict in light of the overwhelming evidence of the defendant's guilt.

a. Relevant Facts.

Defense counsel, Justin Wolfe, established on direct examination of Dr. Julien that he had retained Julien in this case. 2/7/12RP 19. The trial prosecutor cross-examined Julien at length. 2/7/12RP 40-144. She began by establishing that he was a defense expert in criminal cases and had testified more than 50 times for the defense, but never for the prosecution. Id. at 41. He has had at least four articles published in "Oregon Defense

Attorney," which is published by the Oregon Criminal Defense Lawyers Association. Id. at 41-42.

The prosecutor asked Julien to confirm that he gave an all-day seminar entitled "Understanding Drugs of Abuse in Legal Defense"; Julien confirmed that he had presented that seminar in both Portland and Washington. Id. at 42. Julien confirmed that one of the course objectives was "to link sedative drug action, cognitive impairments, amnesia, and the ability to form actions while in an amnestic state or when charged with intentional actions." Id. at 43. Julien volunteered that he had published on that subject. Id. He agreed that most of the attendees had been criminal defense attorneys. Id.

The prosecutor then asked Julien about a quotation attributed to him in the "The National Psychologist" newspaper. The quotation appears in a June 2011 article in that publication. Pretrial Ex. 6[4]; J. Bradshaw, *RxP Training Can Be Profitable In Courtrooms*, **THE NATIONAL PSYCHOLOGIST**, June 26, 2011, at http://nationalpsychologist.com/2011/06/rxp-training-can-be-profitable-in-courtrooms/101502.html. The article states that Julien "spoke with the voice of experience as he outlined the lucrative field

[4] The court later had the prosecutor's copy of the article marked as pretrial exhibit 6. 2/7/12RP 115, 123.

of forensic psychopharmacology" at a pharmacotherapy conference. Id. Julien was quoted as follows:

> "It's financially rewarding," Julien said. 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."

Id. When the prosecutor asked Julien about the statement attributed to him, Julien agreed that "it can be a job opportunity" and that he "may have" made the second statement about calling the local public defender's office to get started but had not seen a transcript of his lecture. Id. at 44.

The prosecutor then asked if the quoted remark about the ease of getting started by calling the public defender's office was true. 2/7/12RP 45. Defense counsel objected, citing "the Court's prior ruling regarding this subject." Id. This objection apparently referred to the trial court's previous grant of a motion by the State to bar Julien from volunteering that he was court-appointed or that his rate was set by the Office of Public Defense in this case.[5] Id. at 13-14. The basis for the court's ruling was that it was inappropriate for the jury to know that Brandich was indigent. Id. at 14. Despite

[5] The court did rule that if the State elicited the $150 per hour compensation Julien received, Brandich could elicit that this was lower than his normal rate. 2/7/12RP 14.

that ruling, Julien had testified on direct examination that Brandich was homeless. Id. at 32.

The court overruled the objection to the prosecutor's question regarding Julien's statement about the ease of soliciting business from a public defender's office. 2/7/12RP 45. Asked if he recommends this method of getting started in obtaining the financial rewards of this field, Julien confirmed that. Id. at 45-46.

The prosecutor asked about Julien's rate of compensation, which was $150 per hour in this case. 2/7/12RP 47. Then the prosecutor asked about the risks of relying on a self-report of amnesia and about the inconsistencies between his testimony and the records of RCKC upon which he said he relied. Id. at 49-71, 76-81. The prosecutor asked detailed questions about how Julien's opinion would be affected if the quantity of alcohol and heroin consumed that morning was less than Brandich told Julien six months after the incident. Id. at 63-64, 72-75. The prosecutor asked about the memories Brandich reported when interviewed by Julien. Id. at 81-83. The prosecutor asked about Julien's theory that a person in a blackout cannot form intent and the lack of scientific verification of that theory. Id. at 84-89.

The next portion of the cross-examination is the basis of Brandich's claim on appeal:

> Q. Now, Doctor, in your -- by your testimony, blackouts are pretty common among defendants caught on video committing crimes. Wouldn't you agree?
>
> A. 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 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 --
>
> 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 on 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 mental 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.

2/7/RP 90-91.

The prosecutor continued with questions about how a person in a blackout could make all of the decisions and engage in all of the logical behavior that Brandich did in attempting this robbery. 2/7/12RP 92-106.

Outside the presence of the jury, Brandich moved for a mistrial, arguing that the prosecutor had commented on Brandich's status as an indigent defendant and disparaged defense counsel.

2/7/12RP 109-11. The prosecutor responded that there was no inference that Brandich was indigent in the questioning and that she did not intend to disparage counsel but did intend to establish that Julien "pander[s] his services to defense attorneys" and "will say anything that gets him hired." Id. at 116-19.

The court concluded that the prosecutor had not made a connection between Brandich and indigency. 2/7/12RP 121-22. That conclusion has not been challenged in this appeal.

The court concluded that there were only two objections at issue – one the court sustained and one it overruled. 2/7/12RP 122. The court denied the motion for mistrial, concluding that it could remedy the error by striking all testimony "involving any relationship alleged or otherwise between defense counsel and the witness." Id. Brandich did not object to that wording. Id. at 122-23. The court then instructed the jury as follows:

> 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 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.

2/7/12RP 124.

The prosecutor resumed cross-examination for a substantial period of time. 2/7/12RP 124-44. No further reference was made to any connection between defense counsel and the witness. Neither attorney referred to these questions or answers again during the course of the trial or during closing arguments.

b. Questioning The Defense Expert Regarding His Bias And Financial Interest Was Proper Cross-Examination.

The challenged cross-examination was not improper and so did not constitute reversible error. The motion for mistrial was properly rejected because any impropriety was cured by the court's instruction, as the trial court concluded, but also because there was no impropriety. The propriety of the questioning is an alternative basis to affirm these convictions. See State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997) (court may affirm a lower court's judgment on any ground presented in the record).

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The cross-examiner is permitted to discredit a witness

by revealing possible biases or ulterior motives. Id. The partiality of a witness is always relevant. Id.

Rigorous cross-examination is proper and properly includes inquiry into matters that show "bias, ill will, interest, or corruption." State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994). It is not improper to show bias or interest by establishing that the witness is part of the defense team. Id. Vigorous cross-examination is one of the traditional and appropriate means of attacking disputed expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595-96, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The interplay between testifying experts and the lawyers who retain them is a proper subject for cross-examination. Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278, 301-03 & n.23 (4th Cir. 2007). The State is not precluded from challenging experts in criminal cases by this traditional means and did not act in bad faith by doing so in this case.

It is proper to show the potential bias of an expert by establishing that the witness works mostly for one side in litigation and makes a significant amount of money by doing so. See State v. Gore, 143 Wn.2d 288, 309 n.9, 21 P.3d 262 (2001) (court considered financial stake of experts was relevant to credibility);

Ma'ele v. Arrington, 111 Wn. App. 557, 565, 45 P.3d 557 (2002) (being able to establish that expert worked mostly for the defense and made $240,000 in one year doing so adequately established potential bias without bringing out specific cases or exact number).

Full cross-examination is critical to the integrity of the truth-finding process. The Supreme Court has described the defense attorney's use of the same expert on previous occasions as important to expose the witness's bias toward the defense. Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 203, 668 P.2d 571 (1983) (holding that additional cross-examination regarding a remote financial interest was unnecessary when this important cross-examination had occurred).

Evidence of bias is not excluded on the basis that it is evidence of a collateral matter. Winslow v. Mell, 48 Wn.2d 581, 585, 295 P.2d 319 (1956). Brandich incorrectly asserts that cross-examination as to facts that establish bias constitutes improper reference to matters outside the evidence. Even evidence of prior misconduct of the defendant may be used on cross-examination for the purpose of impeaching a witness. ER 405(a); State v. Donaldson, 76 Wn.2d 513, 517, 458 P.2d 21 (1969). An argument that a witness has a potential bias that makes

the witness more likely to testify favorably to the defense does not imply facts not in evidence or improperly demonize the defense. State v. Hartzell, 156 Wn. App. 918, 943, 237 P.3d 928 (2010) (no error in arguing that defendant's mother would help when told a particular date was important).

The prosecutor in this case began her cross-examination of Julien by establishing his bias, based on his financial interest in testifying in a manner favorable to defendants. 2/7/12RP 41-44. She established that he recommended legal work as a job opportunity for those with expertise in pharmacology. Id. at 44. Julien had been quoted as recommending that an expert solicit the local public defender's office for business. Pretrial Ex. 6 (RxP Training Can Be Profitable In The Courtroom, supra); 2/7/12RP 44. He put on seminars that were primarily attended by defense attorneys, although he insisted that any attorney was welcome. 2/7/12RP 42-43. The prosecutor established that Julien always testifies for the defense, has testified more than 50 times, and has consulted with defense counsel on many more cases. Id. at 41. Julien has successfully marketed himself as an expert for the defense.

There is nothing negative in asking whether Julien had testified in three other robbery cases where Wolfe was counsel; Julien said that he remembered at least one other, maybe two. 2/7/12RP 90. There is no negative connotation to the words used. The inference to be drawn is that Wolfe was one of the many defense attorneys to which Julien had successfully marketed his services. That Wolfe hired Julien does not suggest that Wolfe received any kickback for doing so. The suggestion is that Wolfe found Julien's testimony helpful and for that reason hired him. If hiring a defense expert on more than one occasion were an improper disparagement of defense counsel, impeaching an expert based on his or her financial interest in being an expert for a particular side would be impossible. To the contrary, that is an approved basis of cross-examination for bias.

Likewise, the prosecutor's question as to whether Wolfe had attended one of Julien's seminars also suggested no nefarious relationship. The seminar was open to all and there is no reason to believe that its purpose was to establish dishonest partnerships with counsel. The question suggested only that Wolfe may have learned of the expertise proffered by Julien at the seminar and

concluded that it would be helpful to his presentation of a defense in one or more cases. It suggests that Julien successfully marketed himself with his seminars. Upon defense objection to this question, the court ruled that the question was irrelevant, and prevented Julien from answering it; Wolfe represented to the court that he had not attended the seminar.

The assertion that Wolfe had previously hired the same expert does not approach the references found to be improper in other cases. See State v. Thorgerson, 172 Wn.2d 438, 450-52, 258 P.3d 43 (2011) (arguing the defense was "bogus" and that defense counsel used "sleight of hand" tactics improperly implied dishonesty but was not prejudicial); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (defense counsel's "mischaracterizations," "twisting" facts and "hoping that you are not smart enough to figure out" what they are doing were improper although not reversible).

The trial court expressed his concern about the "tough position" that appointed counsel sometimes may be in because the number of experts willing to work for the public appointment rate

can be fairly small.[6] 2/7/12RP 119. This suggests that the court did consider repeated hiring of the same expert to be evidence of potential bias of the expert. The question challenged on appeal indicates no more than that Wolfe hired Julien in two or three of the 50 cases in which he has testified for the defense. The trial court did not conclude that the questions suggested collusion or dishonesty, nor did they.

In this appeal Brandich articulates the nature of the prejudice as follows: "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." App. Brief at 23. Although an alliance between an attorney and an expert witness may be distasteful, it is not dishonest, and it is the type of relationship that is properly the subject of cross-examination: the expert has a potential bias toward the defense because if he reaches conclusions favorable to the defense, he will continue to be hired, to his financial benefit.

[6] The reluctance of other experts to testify at the public appointment rate is irrelevant in this case, because Julien testified that he was the only expert who endorsed his theory that a blackout negates the capacity to engage in intentional behavior. 2/7/12RP 84-87.

In Bates v. Bell,[7] upon which Brandich relies, the prosecutors in a death penalty sentencing hearing "(1) improperly incited the passions and prejudices of the jury, (2) injected their personal belief and opinions into the record, and (3) inappropriately criticized Bates's counsel for objecting to their improper arguments." 402 F.3d at 641. At least six times, the prosecutor responded to a defense objection with personal attacks on opposing counsel or suggestions that the objection was an attempt to improperly divert the jury's attention. Id. at 646. The court concluded that the remarks that criticized defense counsel for protecting the defendant through objections were an improper intimidation tactic that could have a detrimental effect on the quality of representation. Id. at 647. The challenged remarks in this case, in contrast, were part of an effort to establish the potential bias of an expert witness who markets himself to the defense and solely testifies for the defense. Defense experts cannot be insulated from cross-examination as to bias by casting the prosecutor's questions as disparagement of defense counsel.

[7] 402 F.3d 635 (6th Cir. 2005).

The cross-examination questions challenged suggest nothing dishonest on the part of defense counsel. They suggest only a potential bias of Julien because of his financial interest in continuing to testify for the defense. As Brandich acknowledges on appeal, the prosecutor did not use the words "relationship" or "cooperation" – her object was not to show that Julien had any relationship to Wolfe, but that Julien had a financial interest that created a potential bias toward the defense. This is proper cross-examination as to bias, and Brandich was not deprived of a fair trial by these questions.

c. The Trial Court Properly Exercised Its Discretion In Giving A Curative Instruction And Denying A Mistrial.

Even if the questions asked and the witness's confirmation that he previously testified in one or two other cases where Wolfe was counsel were improper, they were not so inflammatory that a mistrial was required. The trial court's curative instruction was sufficient to cure any prejudice. If that instruction did not cure any error, Brandich nevertheless has not established that there is a substantial likelihood that this questioning affected the verdicts. The trial court properly exercised its discretion in denying a mistrial.

A trial court should grant a mistrial based on improper statements of the prosecutor "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Russell, 125 Wn.2d at 85, quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The decision is within the discretion of the trial court; denial of a motion for mistrial will be overturned only when there is a substantial likelihood that the statements affected the jury's verdict. Russell, 125 Wn.2d at 85.

The Supreme Court has emphasized that even flagrant misconduct can be cured. State v. Emery, 174 Wn.2d 741, 762 n.13, 278 P.3d 653 (2012). Even if a prosecutor's improper statements are not curable, the defendant still must show a substantial likelihood any remaining prejudice affected the verdict in order to obtain reversal. Id. at 764 n.14. The comments are not viewed in isolation, "but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." Id.

If the prosecutor's questions suggested that there was some impropriety in defense counsel's hiring a witness who was biased in favor of the defense, the resulting prejudice was cured by the trial

court's instruction to the jury, striking and directing the jury to disregard any references to the relationship between defense counsel and the witness. 2/7/12RP 124. The court believed that instruction would be sufficient to cure any prejudice and deference should be given to that decision made in the context of the trial. The prosecutor did not characterize defense counsel as dishonest, or suggest that he had any improper relationship with Julien.

The jury is presumed to follow the court's instruction to disregard matters that are stricken by the court. Russell, 125 Wn.2d at 84, citing State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990). The trial court informed the jury at the beginning of the trial, in the curative instruction, and in its written instructions that it should disregard any evidence that was stricken. CP 27; 2/1/12RP 24; 2/7/12RP 124. The jury also was instructed at the beginning of the trial and in its written instructions that the lawyers' statements and arguments are not evidence. CP 29; 2/1/12RP 23.

While statements that are irrelevant and inflammatory may be so inherently prejudicial that a fair trial is impossible[8], the cross-examination challenged in this case did not have such an

[8] E.g., In re Glasmann, __ Wn.2d __, 286 P.3d 673 (2012) (prosecutor repeatedly expressed personal opinion of defendant's guilt with statements and inflammatory visual images, including altered evidence, in closing argument).

inflammatory effect in the context of the entire trial. The questions were in the middle of a lengthy cross-examination that covered Julien's defense bias based on his financial interest, the lack of any research or other experts who support his theory that a blackout prevents formation of intent, and the unreliability of the facts on which his opinion was based. Neither party referred to the challenged questions or answers again.

In this case, Brandich argues only that an inference of impropriety could be made based on the prosecutor's questions about Wolfe hiring Julien more than once and Wolfe possibly attending a seminar Julien presented. Brandich's argument that the curative instruction underscored the prejudice by using the words "relationship" and "cooperation" illustrates that the questions at issue did not describe impropriety—the court's words certainly did not describe impropriety, yet Brandich characterizes them as worsening the situation. There is no reason to believe that the jury could not disregard the unstated, unspecified inference. "As Judge Learned Hand wrote, 'Juries are not leaves swayed by every breath.' United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923)." State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007).

Moreover, remarks that do impugn the integrity of defense counsel do not necessarily deprive a defendant of a fair trial. The following remarks disparaging defense counsel have been found not to be reversible: arguing the defense was "bogus" and that defense counsel used "sleight of hand" tactics;[9] arguing defense counsel engaged in unbelievable personal attack on expert witness (and arguing facts not in evidence);[10] quarreling and bandying of insults between counsel (and other misconduct).[11] Even a relatively direct assertion of collusion of defense counsel with a witness was found to be curable in State v. Munguia, 107 Wn. App. 328, 336-37, 26 P.3d 1017 (2001) (prosecutor stated "clearly he is defense counsel's witness. He is going to say whatever defense counsel says.").

Brandich argues that the questions here are reversible error because they constituted the introduction of extrinsic evidence, which created an irreversible taint. As argued in the previous section of this brief, cross examination as to bias is not the introduction of extrinsic evidence. Supra at p. 20-21. Even if it

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[9] Thorgerson, 172 Wn.2d at 450-52.

[10] State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).

[11] State v. Lindsay, __Wn. App. __, 288 P.3d 641, 651-52 (2012).

were, the cases on which Brandich relies are distinguishable. In State v. Pete, during deliberations the jury received copies of two statements of the defendant that were not admitted at trial. 152 Wn.2d 546, 98 P.3d 803 (2004). In State v. Miles, the jury heard inadmissible evidence that the defendants were planning another robbery similar to the robbery charged. 73 Wn.2d 67, 71, 436 P.2d 198 (1968). In Glasmann, supra, during closing argument the prosecutor repeatedly expressed a personal opinion of the defendant's guilt with statements and with powerful, inflammatory visual images, including altered evidence. 286 P.3d at 676-77, 681. Cases in which extrinsic evidence is referenced only in remarks of the prosecutor have repeatedly been found not reversible error. E.g., Warren, 165 Wn.2d 17, 29-30 (argument that children assess carefully to whom they will disclose abuse and that delays in disclosure are common because of repression of the abuse, neither fact in evidence); State v. Fisher, 130 Wn. App. 1, 19-22, 108 P.3d 1262 (2005) (argument regarding competency of non-testifying witness and his inability to handle intense cross-examination).

Finally, even if the questions were improper and the resulting prejudice was not entirely cured, there is not a substantial likelihood that any remaining prejudice affected the jury's verdict. The evidence in this case was overwhelming as to both crimes.

In order to convict Brandich of attempted robbery in the first degree, the jury was required to conclude that, intending to commit robbery in the first degree, he took a substantial step toward committing that crime. CP 26; RCW 9A.28.020. Robbery in the first degree is committed when a person takes personal property from the person or in the presence of another, by the use or threatened use of force or violence, and displays what appears to be a firearm in the commission of the robbery. CP 40-41; RCW 9A.56.190, 9A.56.200.

The two victims both described Brandich demanding opiates, displaying a handgun, and threatening to use it. 2/2/12RP 27-39; 2/6/12RP 65-72. The attempted robbery is on videotape – while there is no audio, Brandich is seen waiting until there are no other people nearby, getting close to Lammers, opening his jacket in Lammers' direction, then opening his jacket toward Gebreselassie, Gebreselassie dramatically pointing toward Brandich, and Brandich

fleeing. Ex. 6 (Camera views labeled RX Process Line and PVM Rx(1) beginning at 16:40, robbery at 16:48).

Brandich admitted at trial that he was the man in the video. 2/7/12RP 168. He was arrested minutes later with a handgun (a replica of a semi-automatic pistol) and paper and pen that the pharmacy assistant had given him. 2/2/12RP 29-30, 120-26, 142-44, 153-55; 2/6/12RP 10. In his interview with detectives, Brandich admitted that he went into Walgreens but he repeatedly denied that he "pulled" a gun on anyone – he evaded the repeated question of whether he showed the gun. Ex. 25.

In order to convict Brandich of attempted escape in the second degree, the jury was required to conclude that, intending to commit escape in the second degree, he took a substantial step toward committing that crime. CP 26; RCW 9A.28.020. Escape in the second degree is committed when a person knowingly escapes from a detention facility, which includes a place used for the confinement of a person who has been arrested for a crime. CP 44-45; RCW 9A.76.120(1)(a).

Brandich was detained in the interview room after being arrested for the attempted robbery. As Brandich was alone in the interview room and standing on the table, there is no doubt that he is the person who removed the ceiling vent and was in the process of removing the vent housing when he was caught. He told the detectives that he was attempting to escape by crawling through the ceiling into another room. 2/2/12RP 93-94; 2/6/12RP 26-27.

Dr. Julien's testimony did not negate the mental elements of the crimes. Julien testified that if Brandich ingested all of the substances that he said he ingested, when he said he ingested them, that would be consistent with having a blackout; because Brandich said he had no memory of the robbery, Julien concluded that he could not have acted with intent during the course of it.

The theory that Brandich did not act intentionally is refuted completely by his behavior during the robbery. Intent is established if a person acts with the objective or purpose to accomplish a result that constitutes a crime. CP 39; RCW 9A.08.010(1)(a). Brandich wanted opiates, asked for them, and used force to try to obtain them against the will of the victims.

After he was arrested, Brandich repeatedly referred to events earlier in the day, refuting the proposition that he was not forming long-term memories, which is a prerequisite to Julien's conclusion that he could not form intent. For example, Brandich told Officer Aagard that he had gone for his gun when he was stopped by police because he was thinking about wanting to be shot. Ex. 1 (Aagard in-car video at 11:50-12:13, at 5:17 p.m.); 2/2/12RP 104-05. He told the detectives that he had gone into Walgreens and denied "pulling" a gun. Ex. 25. Brandich also bragged to the detectives about his escape attempt, including the detail of having removed three of four screws – that bragging was too long after the event to have been anything other than a long term memory. 2/7/12RP 127-36.

Moreover, Brandich's total lack of credibility nullified Julien's testimony. Julien did not even assert that he concluded that Brandich was credible – he is not a trained interviewer and it is his policy not to consider the possibility that a defendant is not telling the truth. 2/7/12RP 33, 55, 144-45. Julien was not justified in relying on Brandich's report of the amount of drugs he had taken that morning. Six months after the crime, Brandich told Julien he had a pint of liquor and some heroin that morning. 2/7/12RP 21,

164. However, when he was admitted to RCKC that morning, Brandich said he had not used heroin since April 12th, two days earlier. 2/7/12RP 63. He also told the detectives that day that he had last used heroin a few days earlier. Ex. 25; Pretrial Ex. 5 at 16. Brandich admitted at trial that he had a history of lying; that was illustrated at trial by his admitted lies about his identity (to a homeless shelter, to RCKC, and to the police) to avoid Colorado warrants, and lies about his drug use (to RCKC, Julien, and a bail screener). 2/7/12RP 59-62, 159-61, 179-80; 2/8/12RP 51-52. His lack of credibility also was illustrated by his denial at trial of memories that he admitted to Dr. Julien, relating to the time during which the escape attempt occurred. 2/7/12RP 83, 166-67, 169; 2/8/12RP 18-19.

The evidence of Brandich's guilt was overwhelming, so even if there was some unfair prejudice caused by the challenged cross-examination that was not cured by the court's instruction, there is not a substantial likelihood that it affected the verdicts. Brandich has not established prosecutorial misconduct or prejudice and his convictions should be affirmed.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Brandich's convictions and sentence.

DATED this 9TH day of January, 2013.

Respectfully submitted,

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Appendix 1

Appendix 1

Viewing Exhibits That Are Video Recordings

Exhibit 1: To view police in-car videos, after inserting the disk into a computer, click on the DVD drive to show a list of the files. The first four numbers in the file name reflects the officer's serial number. 2/1/12RP 56. Two files were admitted – the first and fifth on the list. 2/2/12RP 179-81. Officer Aagard's in-car video is the first, beginning with 5011 (2/1/12RP 56); Brandich enters the car seven minutes into the recording. 1//9/12RP 20. Officer Britt's in-car video is fifth on the list, beginning with 6770 and ending with 210 (2/2/12RP 180-81). Select the video file desired. It will play on a PC in MediaPlayer.

Exhibit 6: To view Walgreens security cameras video, after inserting the disk into a computer, click on the DVD drive to show a list of the files. Click on the last file: VG Player_EN.exe. When the player opens, click on the "file" tab in the upper left corner. In the drop down menu, click "open." From the list on the left side, select the disk drive (usually "D"). This displays a list of the recordings from each camera view, with the camera name in the fifth column under "camera name." Select the file for the camera desired. E.g. The camera name "6590-PVM Rx(1)" is the primary pharmacy view (2/2/12RP 47) and the camera name "6590-RX Process line" is Lammers' workstation (2/2/12RP 46). Proceed to the time indicated as 16:40 to view from Brandich's entry into the store. 2/2/12RP 42. Begin at the time of 16:48:30 to view the interaction including the attempted robbery of both victims. 2/2/12RP 50-55.

Exhibit 25: To view video of interview with Detectives Magan and Clark, after inserting the disk into a computer, click on the DVD drive to show a list of the files. The file with the recording of the interview is labeled "Brandich Interview.avi". Click on it to open and play. It will play on a PC in MediaPlayer.

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 Susan Wilk, 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. RICHARD BRANDICH, JR., Cause No. 68604-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

Done in Seattle, Washington

01-09-13

Date