NO. 43358-3-II (Consolidated)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COREY YOUNG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Ronald E. Culpepper

No. 11-1-04679-8

Brief of Respondent to Appellant's Supplemental Brief

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2. Whether the appellant has failed to meet his burden where the record is insufficient to support his claim?

B. STATEMENT OF THE CASE.

The State adopts the statement of the case from the Brief of Respondent.

C. ARGUMENT.

1. THE CLAIMS IN APPELLANT'S SUPPLEMENTAL OPENING BRIEF ARE NOT PROPER ON APPEAL BECAUSE THE RECORD IS INSUFFICIENT FOR REVIEW.

The appellant claims that the prosecutor below committed misconduct in cross-examination by asking a leading question regarding a bullet that had allegedly been found in the pocket of the jacket Young was wearing even though the trial record contained no testimony regarding such a bullet being found there. App. Supp. Br. at 5ff.

Under ER 607, "the credibility of a witness may be attacked by any party [...]."

"Washington courts follow the usual rule that a witness may be impeached by introducing evidence to contradict the witness on a material fact, but that the witness cannot be contradicted on a collateral matter. 5A Karl B. Tegland, Wash. Prac., Evidence Law and Practice, § 607.17 (5th ed. 2007). This is referred to as impeachment by contradiction, or impeachment by specific contradiction. *See* 5A Tegland § 607.17; McCormick on Evidence, 7th ed. § 45; Robert Aronson and Maureen Howard, The Law of Evidence In Washington, §7.06[5].

Impeachment by contradiction may be accomplished by extrinsic evidence, however, under the "collateral matter" rule it may do so only so long as the evidence is also independently relevant. Aronson and Howard, § 7.06[5]; McCormick § 45; 81 Am. Jur. 2d Witnesses §959. Collateral facts are facts that are not independently relevant. *See* Aronson and Howard, § 7.06[5]; McCormick § 45.

A prosecutor may impeach or contradict a witness on the basis of extrinsic evidence if the prosecutor has a good faith belief that the evidence could be admitted. *See* ***State v. Johnson***, 90 Wn. App. 54, 71, 950 P.2d 981 (1998). *See also, e.g.*, ***State v. Babich***, 68 Wn. App. 438,

842 P.2d 1053 (1993) (quoting ***United States v. Silverstein***, 737 F.2d 864, 868 (10th Cir. 1984).

However, a prosecutor may not use impeachment as a guise for submitting substantive evidence that is otherwise unavailable. ***State v. Babich***, 68 Wn. App. 438, 444, 842 P.2d 1053 (quoting ***Silverstein***, 737 F.2d at 868 (10th Cir. 1984)), *review denied*, 121 Wn.2d 1015, 854 P.2d 42 (1993). Impeachment with extrinsic evidence is likely to be improper where it is protracted or extensive, and the prosecutor has no good faith basis to believe it is independently admissible. *See, e.g.*, ***State v. Yoakum***, 37 Wn.2d 137, 222 P.2d 181 (1950); ***Babich***, 68 Wn. App. at 445-46. Use of such evidence would also be improper where it is argued in closing as substantive evidence.

Where counsel refers to extrinsic evidence for impeachment purposes, it is not always necessary that such evidence ultimately be introduced. *See, e.g.,* 5A Tegland, § 613.15. Error is more likely to occur if the attorney seeks to impeach the witness with a claimed prior inconsistent statement, the witness denies making the statement, and the attorney then never introduces evidence that the statement was actually made. *See* 5ATegland § 613.14; ***State v. Lopez***, 95 Wn. App. 842, 855, 980 P.2d 224 (1999).

ER 103(c) seeks to prevent counsel from suggesting to the jury facts that would otherwise be inadmissible, or facts that cannot otherwise be presented to the jury because no witness is willing and available to testify to those facts. 5 Tegland §103.22. This is often colloquially described as referring to "facts not in evidence." *See* 5 Tegland § 103.22. The precise scope of the prohibition on the use of facts not in evidence is ambiguous and ER 103 vests application of the rule in the sound discretion of the trial court. 5 Tegland § 103.22. Although the rule is ambiguous, the limitation on facts not in evidence is not universal, as many evidence rules rely upon the use of facts not in evidence. 5 Tegland § 103.22 n. 11. Perhaps most notable of these is the use of extrinsic evidence for purposes of cross-examination. 5 Tegland § 103.22 n. 11. For that reason, cases holding that abuses of facts not in evidence have occurred should not be interpreted too broadly. 5 Tegland § 103.22 n. 11.

Under ER 103(c) the court will usually act upon an objection by opposing counsel, however, the court also has authority to act on its own initiative when necessary. 5 Tegland §103.22. Issues relating to this should generally be left to the preferences of the attorneys and the sound discretion of the trial court absent an egregious violation.

Here, Young testified on direct examination that the victim, Mr. Yang, was in fact not a victim of robbery and kidnapping at all, but rather

that he had agreed to take Young and Dragaca to the 7-11 to buy them alcohol and to get some marijuana, and that he did so cooperatively and voluntarily. 2RP 163, ln. 15 to p. 164, ln. 6. Young claimed that he and Dragaca did not threaten Mr. Yang, and that they did not have a gun with them. 2RP 163, ln. 25 to p. 164, ln. 7. Young claimed that as he drove into the parking lot and saw all the police, Mr. Yang started "tripping" and asking if they were in any kind of trouble, to which Young responded that he had some warrants and he had some weed on him. 2RP 165, ln. 14-19. Young explained that he then decided to run from the vehicle because he thought he had warrants and he had some marijuana on his person. 2RP 165, ln. 21-25.

There had been testimony by the officers that before they caught him Young had discarded the red jacket and the hat he had been wearing. *See* 1RP 24,ln. 23-25; p. 27, ln. 11-16; p. 73, ln. 23-24; p. 78, ln. 2-10.

He was cross-examined regarding the jacket, which cross-examination proceeded as follows:

Q. And you ran?
A. Yes, sir.
Q. And you discarded a red jacket?
A. Yes, sir.
Q. And a red hat. Why is that?
A. Because I felt that the police had seen me in that jacket.
Q. So what's the point? You didn't do anything wrong, did you?
A. No, but I thought I had warrants.

Q. You thought you had warrants. Did you have warrants?
A. No.
Q. No warrants. Why would you think you had warrants?
A. Because I got in a situation at my mom's house where the police got called on me.
Q. So that's why you ran?
A. Yes sir.
Q. And that's why you discarded the jacket, thinking nobody could identify you?
A. Yes, sir.
Q. There was a .22-caliber bullet found in that jacket. Is that your gun?
A. No, sir. I don't know anything about that.
Q. You don't know anything about what?
A. A .22-caliber bullet.
Q. Well, you were just told just a few minutes ago for the first time that the officers put the other .22 in with the other ammunition, weren't you?
A. Can you rephrase that?
Q. You were just told a few minutes ago that the .22 bullet that was found in your pocket was put in with the other .22 bullets?
A. No. There was no .22 in my pocket.
Q. Were you just told that?
A. I don't get what you're trying to say.
Q. You don't. Okay. So you're denying that you had a .22-caliber round in your pocket, right?
A. I'm not denying that there was one in there. I'm saying that not to my knowledge there was one.
Q. Then you're really confusing me. Your not denying it, but not to your knowledge, so there could have been a .22-caliber round in your pocket?
A. The jacket wasn't mine.
Q. I see. The jacket wasn't yours. Whose was it?
A. It was a friend at the house.
Q. What's his name?
A. Justin
[...]

2RP 167, ln. 1 to p. 168, ln. 22.

The testimony from the officers in the case was that they found six bullets in the magazine for the gun, and one bullet in the chamber for a total of six bullets. 1RP 29, ln. 19-20; p. 30, ln. 24 to p. 31, ln.2. However, it is possible that there was some confusion about the correct number of bullets in the gun, as the officer first says five, then corrects to six bullets. *See* 1RP 29, ln. 19-20. A total of six bullets were admitted into evidence. 1RP 42, ln. 3-13; Ex. 9.

There is no testimony elsewhere in the record regarding a bullet being found in the pocket of the jacket. This has led the defense to refer to it as "the seventh bullet." However, the State would suggest that it is very possibly an incorrect inference from the prosecutor's statements.

When Young expressed confusion about the prosecutor's questioning, the prosecutor stated, "You were just told a few minutes ago that the .22 bullet that was found in your pocket was put in with the other .22 bullets?

Based on the prosecutor's statements and the total number of bullets in evidence, it is a more likely inference that a bullet found in the jacket was placed with those found in the gun and it ended up mistakenly getting counted as one of the bullets from the gun.

Regardless of what the prosecutor's statements may suggest about the number of bullets, the State acknowledges that it has been unable to

find any substantive testimony or other reference in the report of proceedings to a bullet having been found in the pocket of the jacket, with the exception of the prosecutor's statements in examination of Young.

Given that neither the opposing attorneys nor the court disputed the prosecutor's statement that Young was informed of the bullet found in the jacket just a few minutes before he testified, it appears highly probable that shortly before Young's testimony some information about the finding of the bullet was presented in the courtroom, however, it was apparently done off the record. Indeed, after Dragaca finished testifying, and before Young did, the court took a recess outside the presence of the jury. It is also worth noting that while the defendant was fairly precise in his responses to the prosecutor, he never disputed being told that a bullet was found in the jacket.

Plausible explanations for the prosecutor's statements and lack of objections by defense counsel exist, which are consistent with the prosecutor acting in good faith, and the defense acting as effective counsel for sound tactical reasons.

This was a short, two-day trial. Sometime after giving testimony, a witness, presumably one of the officers, could have contacted the parties and informed them that after leaving the stand, that they realized their testimony was mistaken because they had forgotten about the discovery of

the bullet in the jacket pocket, and that the witness was willing to come in and correct the testimony. This information could have been presented to the parties on the second day, perhaps shortly before Young testified.

The prosecutor confronted Young with the information in order to impeach Young's credibility, with a good faith expectation that Young would either admit the information, or that he would be able to call the witness in to impeach young later. However, when Young answered that he didn't know whether or not there was a bullet in the pocket because the jacket was borrowed, the prosecutor probably did not have a basis to call the witness in to impeach Young. Notwithstanding the prosecutor's good faith intentions, he would not have been in a position to present the impeachment evidence.

Moreover, it would have been a sound tactical decision for defense counsel to decide that they did not want the witness to come in and testify to the facts. This would make sense for two reasons. First, it could undermine the defenses they had already presented. Second, where the prosecutors' cross-examination was inconsistent with the evidence presented, it tended to undermine the credibility of the State's case. The jury was instructed that the statements of counsel were not evidence, and that the jury should rely on their own collective recollection of the evidence in the case.

Finally, where the witness's changed testimony was presented late to defense counsel, the prosecutor may well have deferred to the preference of defense counsel about presenting it.

The point in presenting this possible course of facts is not to suggest that it is correct or what actually occurred. The State is making no such suggestion. Rather, the State's presentation is intended in part to demonstrate there exist reasonable explanations of the record that does exist, including its gaps that are consistent with the prosecutor acting in good faith, and defense counsel making sound tactical decisions. However, the State presents this account for another, far more significant reason.

Obviously the State's analysis of the statements and their surrounding circumstances are the height of speculation, and wholly unsupported by any facts actually in the record. That is precisely the State's point.

Because the record is silent on these issues, it is insufficient to permit review of whether the prosecutor had a good faith basis for referring to the extrinsic evidence on impeachment, whether the prosecutor's conduct was flagrant and ill-intentioned, or whether defense counsel had a tactical reason for not objecting.

By raising this issue for the first time on appeal, the defense is implicitly asking this court to draw inferences as to the intent and conduct, of the attorneys below i.e., the defense is asking this court to make factual determinations. However it would be highly improper for this court to do so. Appellate courts do not make factual determinations. ***State v. Walters***, 162 Wn. App. 74, 255 P.3d 835 (2011); ***Doyle v. Lee***, 166 Wn. App. 397, 406, 272 P.3d 256 (2012). *See also* ***Thorndike v. Hesperian Orchards, Inc.***, 54 Wn.2d 570, 572-575, 343 P.2d 183 (1959).

Even worse, by asking this court to make assumptions and draw implicit inferences, the defense is asking this court to make one-sided determinations which the record is insufficient to support. This court is limited to the record before it. *See* RAP 9.1. Asking this court to draw inferences from lacunae in the record is to ask this court to reach beyond the record.

Factual determinations and hearings should be made by the trial courts. The proper procedural mechanism to present claims based on facts outside the appellate record is through a personal restraint petition. *See* ***State v. Breitung***, 173 Wn.2d 393, 400, 267 P.3d 1012 (2011) (citing ***State v. Grier***, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011)); ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Indeed, these cases are

controlling and dispositive on this issue. This claim should be dismissed as not proper for appellate review.

2. THE APPELLANT FAILS ON HIS CLAIMS BECASE THE RECORD DOES NOT CONTAIN SUFFICIENT FACTS FOR HIM TO MEET HIS BURDEN OF PROOF.

The appellant fails to meet his burden on these claims because the record does not contain sufficient facts to support his claims.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. ***State v. Finch***, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct,

it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Here, there was no objection to the prosecutor's questioning on cross-examination. Presumably that is why the appellant has also included a claim of ineffective assistance of counsel.

However, to demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion

in the trial court. ***McFarland***, 127 Wn.2d at 333-34 (citing RAP 2.5(a)(3)).

Here, the trial record does not contain the facts necessary to adjudicate the claimed error. For this reason, if the court were to consider the merits, the appellant necessarily fails to meet his burden and the claim should be denied.

D. CONCLUSION.

The claim should be dismissed because it is not properly before this court on appeal where its resolution necessarily requires determination of facts outside the extant record.

The record is insufficient to allow the defendant to meet his burden of proof, so if the court were to consider the claim on the merits, it should also be dismissed.

Either way, the claim should be dismissed.

DATED: January 14, 2014

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