

No. 96635-4
Court of Appeals No. 76859-0-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

KEITH EAGLE,
Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR SKAGIT COUNTY

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner, Keith Eagle, asks this Court to accept review of the opinion of the Court of Appeals in *State v. Eagle*, 76859-0-I.

B. OPINION BELOW

In its opening statement and examination of witnesses, the State violated the trial court's motion in limine excluding certain evidence. The Court of Appeals concluded the trial court ineffective "curative" instruction cured the error.

C. ISSUE PRESENTED

It is misconduct for a prosecutor to violate trial court rulings and introduce excluded evidence. Here, in violation of court rulings, the prosecutor referred to and elicited information from witnesses about a 911 call and photographs from a police investigation of Mr. Eagle concerning a prior unrelated charge. Did prosecutorial misconduct deprive Mr. Eagle of a fair trial, where the evidence of his intent to assault a police officer was insufficient but the prosecutor misled the jury to speculate that Mr. Eagle was guilty based on unrelated allegations?

D. SUMMARY OF THE CASE

Police originally received a 911 call from Krista Applewhite about an argument between Mr. Eagle and Ms. Brady. RP 12. The police arrived at the scene of the reported argument and contacted Ms. Brady. *Id.* The officers carried out an investigation that included taking photographs. RP 51. Mr. Eagle was not present so the police contacted him and arranged to meet Mr. Eagle at a nearby park. RP 58.

Officer Murdock met with Mr. Eagle at the agreed upon location. RP 58. Officer Murdock approached Mr. Eagle to make an arrest based upon allegations from Applewhite and Brady. RP 59. Officer Murdock asked Mr. Eagle to get out of his truck so he could be arrested. Mr. Eagle exited his truck initially but then got back into the truck telling Officer Murdock that he had to first make a phone call to his ill father. RP 69. Mr. Eagle informed Officer Murdock that he had back issues and Officer Murdock witnessed Mr. Eagle hobble out of the truck in compliance with Officer Murdock's request. RP 114. After Mr. Eagle had exited the truck a second time, but before he had a chance to shut the truck door, Officer Murdock grabbed at Mr. Eagle and Mr. Eagle pulled his arm away. RP 62. Officer. Murdock decided to go "hands on" with Mr. Eagle and took him to the ground. RP 62. Mr.

Eagle was unarmed. RP 49. He had a small medication bottle in his hand. RP 49.

Based on the ambiguous arm movements Mr. Eagle made while Officer Murdock was arresting him the state charged Mr. Eagle with assault in the third degree. The incident was recorded by a stationary park surveillance camera. *Ex. 2.* Officer Murdock reported that the surveillance video indicated that he may have been hit but could not articulate that he felt being hit and was not certain he actually was. RP 70. Officer Murdock never reported being hit by Mr. Eagle nor did Officer Murdock recall being hit by Mr. Eagle. RP 63, 72. Officer Murdock also said he was not afraid that Mr. Eagle was going to hit him. RP 72. Nor were there any recorded photos or injuries reported by Officer Murdock of being hit. RP 72. The second officer, Officer Campo also stated that Mr. Eagle did not strike Officer Murdock. RP 48. Officer Campo reported that he saw what looked like Mr. Eagle taking multiple swings at Officer Murdock. RP 45. But he also stated that Mr. Eagle may have been pulling his arm away from being grabbed by Officer Murdock in response to a “straight wrist twist” performed by Officer Murdock. RP 49, 53.

The prosecutor tried on numerous occasions to introduce statements and testimony about the original 911 call and investigation into a charge of domestic violence. RP 27, 28, 29, 30, 39, 40, 41. This evidence included testimony from the 911 caller, Krista Applewhite, to provide prior context for the assault charge on Mr. Eagle. RP 10. Applewhite had no personal observation of the charged assault in this case. RP 10. The prosecutor stated to the court that one of the reasons for admitting such testimony was that often jurors “wish [they] knew” the context in trials. RP 13. The prosecutor believed that he was entitled to provide “context” for why the officers had been called to arrest Mr. Eagle. RP 13. The court found the 911 caller’s testimony irrelevant. RP 15. The court permitted a limited description of why officers had been called out due to a dispatch call or an officer complaint. RP 15.

Despite the court’s ruling, the prosecutor declared that the officers were responding to a 911 call in his opening statement. RP 15, 27-30. The defense objected on the basis that it was inadmissible hearsay evidence and requested a mistrial. CRP 27-30. The court overruled the objection but declared that there should not be discussion or testimony of “911 calls,” and reminded the jury that opening

statements were not evidence. RP 30. Defense counsel objected to discussion of photographs in the prosecutor's opening statement and when the prosecutor asked his first witness questions about taking photographs during their investigation of a previously dropped charge. RP 41. The court overruled the objection. RP 41. The court did sustain a continuing objection to any mention of a 911 call and all the details of the prior investigation. RP 41-42.

The prosecutor admitted that based on what the jury had heard they might speculate why the police stopped Mr. Eagle. RP 40. The prosecutor admitted that due to the past bad acts of the defendant the prosecutor in this case was not willing to reduce the charge to something different. RP 153.

The jury could not conclude that the swing of the arm was intended to strike officer Murdock or that Mr. Eagle was moving after being tackled by Officer Murdock. CP 44. The jury convicted Mr. Eagle of third degree assault.

E. ARGUMENT

The prosecutor's misconduct deprived Mr. Eagle a fair trial

As a “quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). The prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Improper arguments should be reviewed in the context of the “total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994). Improper comments are prejudice if there is a substantial likelihood that the misconduct affected the jury verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Prior to trial, the court granted Mr. Eagle's motion to prevent inadmissible evidence from being communicated to the jury by any means. However, the prosecution sought to introduce information that would prejudice Mr. Eagle's trial. First, the prosecution sought to admit the testimony of Ms. Applewhite, the individual who called 911 in relation to an argument between Mr. Eagle and Ms. Brady. RP 10. The

probative nature of Ms. Applewhite's testimony, wholly unrelated to the charges, was substantially outweighed by the unfair prejudice it would cause at Mr. Eagle's trial.

After the court declined to allow Ms. Applewhite to testify, the prosecution nonetheless sought to admit evidence that there had been a 911 call as evidence to provide the jury with a "context" for the police arresting Mr. Eagle, because jurors often "wish [they] knew" about such surrounding circumstances in trials. RP 13. The court again found testimony about the 911 call prejudicial and intentionally restricted any reference to the reason for the police's interactions with Mr. Eagle to being in response to a dispatch or officer complaint. RP 15.

Despite this clear ruling by the court to exclude inadmissible evidence, the prosecutor violated the ruling in their very opening statement. RP 27-30. The prosecutor declared that the police were responding to a 911 call. RP 27-30. The court again reiterated that the parties should "stay away from [the mention of] 911 calls." RP 30.

In addition the prosecutor discussed the "photographs" that were taken by police in their previous investigation into the domestic violence claims. RP 41. By doing so the prosecutor showed the defendant's prior trouble with the law providing facts that may be

persuasive to suggest that Mr. Eagle had the propensity to commit the crime charged. These comments were highly prejudicial and wholly irrelevant to the charged crime of assault in the third degree of a law enforcement officer.

The continued attempts by the prosecution to make the jury aware of the 911 call and prior police investigation misled and prejudiced the jury into considering the former dismissed charge as relevant to the current charge. Because the evidence of intent to assault Officer Murdock was insufficient to meet the standard of beyond a reasonable doubt and therefore the prosecutorial misconduct was not harmless.

The prosecutor's improper conduct substantially affected the jury verdict, depriving Mr. Eagle of a fair and impartial trial. Therefore, Mr. Eagle's conviction should be reversed.

The trial court attempted to cure the error by instructing the jury that the prosecutor's statements were not evidence and that they should "disregard any statements or argument by the attorneys that are not consistent with the facts you determine them to be." RP 32.

This statement by the court does not cure the error because the court only instructed the jury to disregard statements **they** concluded

are “not consistent.” RP 32. The jury likely believed an accusation of domestic violence *is* consistent with someone intending to assault a police officer. Indeed, that is likely the reason the prosecutor went to such lengths to put that evidence before them. A true curative instruction would have told the jury specifically what evidence, facts, or argument it must disregard. For example a true curative instruction would have told the jury “you must disregard what the prosecutor just said.” It simply is not the jury’s job to know what it should ignore, it is the court’s job to ensure they only hear what they should and that they disregard what they should not have heard. The conclusion of the Court of Appeals that this ineffective statement somehow cured the error is wrong. Opinion at 4.

The evidence about the investigation into a serious accusation of domestic violence was seriously prejudicial in nature. It was repeated to the jury more than once, and the trial court did not cure the prejudicial impact on the jury.

Pursuant to RAP 13.4, this Court should accept review.

F. CONCLUSION

The Court should accept review and hold that a jury instruction only “cures” the prejudice of a prosecutor’s misconduct, where the instruction actually tells the jury the comment was improper and should be ignored.

DATED this 5th day of December 2018.

A handwritten signature in black ink, appearing to read "Gregory C. Link". The signature is fluid and cursive, with a large initial "G" and "L".

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 76859-0-1
Respondent,)	(consolidated with 77058-6-1)
)	
v.)	DIVISION ONE
)	
KEITH EDWIN EAGLE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: November 5, 2018

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STATE OF WASHINGTON
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SMITH, J. — Keith Eagle appeals his conviction for third degree assault against a law enforcement officer. Eagle argues that prosecutorial misconduct prejudiced his right to a fair trial and that there was insufficient evidence to support his conviction. We disagree and affirm.

FACTS

On September 26, 2016, Krysta Applewhite called 911 when she heard a man yelling at a woman and the woman yelling "someone call 911." Clerk's Papers (CP) at 1. Officers Kyle Campo and Joshua Murdock responded to the domestic complaint. Officer Campo contacted D.O., who claimed that Eagle hit her, pulled her hair, took her phone from her when she tried to call 911, and pushed her to the ground, causing her to cut herself on the gravel. Officer Campo then spoke to Eagle by phone, and Eagle agreed to meet officers at a nearby park. Officer Murdock arrived at the park and approached Eagle's

vehicle. After speaking with Eagle briefly, Officer Murdock advised him that he was under arrest. Eagle did not submit to arrest. Eventually Officer Murdock had to physically force Eagle to the ground to place him into custody. The altercation was recorded by a surveillance video.

The State originally charged Eagle with third degree assault against a law enforcement officer and fourth degree assault against D.O. When D.O. insisted that the incident leading to the fourth degree assault charge was a misunderstanding, the State dropped that charge.

During the jury trial, both Officer Campo and Officer Murdock testified. Officer Murdock testified that, although he did not remember Eagle making contact with him, he remembered Eagle trying to hit him and that he believed the surveillance video showed that Eagle did hit him. The court also admitted the surveillance video into evidence. Eagle did not testify. During deliberations, the jury twice asked to view the surveillance video and viewed the video frame-by-frame. The jury returned a guilty verdict.

After the trial, Eagle moved for arrest of judgment and a new trial, challenging sufficiency of the evidence, the frame-by-frame display of the video, and the jury's failure to request a frame-by-frame viewing in writing. The trial court denied the motion and sentenced Eagle to nine months of confinement. The trial court entered findings of fact and conclusions of law supporting its denial of the motion for a new trial. Specifically, the court found that the video and the officers' testimony provided sufficient evidence of third degree assault and that the frame-by-frame playback did not prejudice Eagle. Eagle appeals.

PROSECUTORIAL MISCONDUCT

Eagle argues that the prosecutor committed reversible misconduct when the prosecutor referenced the 911 call in his opening statement and when the prosecutor solicited testimony from Officer Campo that the officer took photographs as part of his investigation. We disagree.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish ‘that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.’” State v. Thorgeron, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Where the defendant moves for a mistrial based on alleged prosecutorial misconduct, we will give deference to the trial court’s ruling on the matter. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). “The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial.” Id. (internal quotation marks omitted) (quoting State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

Here, before trial, Eagle presented a motion in limine requesting that Applewhite’s testimony on the circumstances of the 911 call that she made be excluded as irrelevant. The trial court granted the motion.

In his opening statement, the prosecutor explained that Officer Murdock and Officer Campo responded to a dispatch on the date of the alleged assault. He described their investigative activities: “They contacted witnesses, spoke to the reporting person, the person who called 911. They took photographs.”

Report of Proceedings (RP) (Feb. 21, 2017) at 27. Defense counsel objected and the trial court excused the jury. Defense counsel asked for a mistrial, arguing that the prosecutor's reference to the 911 call violated the court's ruling on the defense motion in limine. The trial court denied the motion for a mistrial, holding that the reference to the 911 call did not describe the substance of that call and that an instruction to the jury to disregard the remark would cure any prejudice. The court then instructed the jury as follows:

Members of the Jury, I'm going to remind you, we talked about this a little bit earlier, the only thing you are going to use in this case, to determine the case is the instructions from the Court and the evidence as we present them [sic]. The lawyers' statements are not evidence. You are to disregard any statements or argument by the attorneys that are not consistent with the facts you determine them to be.

Id. at 32. The 911 call did not come up again during the trial.

We presume that the jury followed the trial court's instructions and did not consider the 911 call. State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) ("Juries are presumed to follow instructions absent evidence to the contrary.") (quoting State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)). As such, this statement by the prosecutor was not prejudicial and does not require reversal. The trial court did not abuse its discretion in denying Eagle's motion for a mistrial.

Eagle also argues that the prosecutor committed misconduct when he solicited testimony from Officer Campo that the officer took photographs. Eagle claims that the testimony evidenced his prior trouble with the law and suggested that he had the propensity to commit the crime charged. We disagree.

During Officer Campo's testimony, the prosecutor asked Officer Campo questions about his investigation. Specifically, he asked, "[W]hat things did you do?" RP (Feb. 21, 2017) at 39. Officer Campo responded, "In the stage of my investigation I took photographs." Id. Defense counsel again objected and the trial court excused the jury. Defense counsel argued that any discussion about the photographs taken in the underlying investigation was improper because that incident was not relevant to the charged offense. The trial court overruled the objection but allowed a continuing defense objection to any additional details of the underlying investigation.

The prosecutor's question and Officer Campo's response were neither improper nor prejudicial. The State was required to prove that Officer Murdock was assaulted while he was performing his official duties, and evidence that there was an investigation satisfied that element. Officer Campo did not give any details about the content of the photographs taken or the underlying investigation. The prosecutor's question was not improper, and Officer Campo's response did not prejudice Eagle's right to a fair trial. Reversal is not necessary.

FAILURE TO EXCLUDE INADMISSIBLE EVIDENCE

Eagle argues that the trial court erred in admitting evidence of the underlying investigation because the potential for prejudice outweighed its probative value. We disagree.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is admissible unless a rule of law

prohibits its admission. ER 402. ER 403 prohibits the trial court from admitting relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Unfair prejudice is prejudice that is more likely to arouse an emotional response than a rational decision by the jury and suggests a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) “[N]early all evidence will prejudice one side or the other,” and “[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial.” Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

A trial court sits in the best position to determine the prejudicial effect of evidence. State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. Id. at 922.

Here, to convict Eagle of third degree assault, the State had to prove that Officer Murdock “was performing his or her official duties” at the time of the assault. CP at 37. Eagle argues that the prosecutor's opening statements that the police responded to a 911 call, contacted witnesses, took photographs, and spoke to the reporting person, as well as Officer Campo's testimony that he took photographs, were improper admissions of evidence. As discussed above, the trial court properly instructed the jury to disregard the prosecutor's remarks that were not consistent with the evidence. RP (Feb. 21, 2017) at 32. Additionally, Officer Campo's testimony was probative to the extent that it proved he and

Officer Murdock were performing their official duties at the time of the assault. Eagle does not show that the danger of unfair prejudice outweighed the evidence's probative value, and nothing in these statements refers to the nature or circumstances of the underlying investigation. For these reasons, the trial court did not abuse its discretion in admitting Officer Campo's testimony.

SUFFICIENCY OF THE EVIDENCE

Eagle argues that the State presented insufficient evidence that he intended to assault Officer Murdock when he swung his arm at him. We disagree.

Due process requires the State to prove beyond a reasonable doubt every element of the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the elements of the relevant crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In challenging sufficiency of the evidence, the defendant "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The jury is the sole and exclusive judge of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). We do not reweigh the evidence or substitute our judgment for that of the jury. Green, 94 Wn.2d at 221. "Instead, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding

the persuasiveness of evidence." State v. Johnson, 159 Wn. App. 766, 774, 247 P.3d 11 (2011).

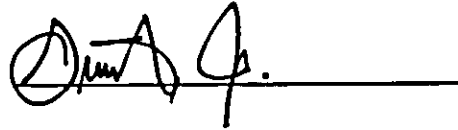
To convict Eagle of third degree assault, the State had to prove beyond a reasonable doubt that Eagle intended to (1) touch or strike Officer Murdock, (2) inflict bodily injury on Officer Murdock but failed to accomplish that purpose, or (3) create apprehension and fear of bodily injury in Officer Murdock.

Here, taking the evidence in the light most favorable to the State, there is sufficient evidence of Eagle's intent to commit assault. Officer Murdock testified that Eagle was resisting arrest and he decided that he needed to "go hands on" with Eagle to physically take control of him. RP at 62. Eagle then resisted by "[p]ulling away and then making a fist with one of his hands which he raised above his head, which I believe was an attempt to strike me." Id. Officer Murdock stated that he "[a]bsolutely" believed he was going to be struck by Eagle. Id. While Officer Murdock did not remember actually getting hit, he testified that "after viewing the video it does appear he did make contact with me." Id. at 64. Officer Murdock also stated that within a couple of minutes after the altercation, he noticed that he had a headache. Id. This was sufficient evidence for a rational trier of fact to find that Eagle intentionally assaulted Officer Murdock.

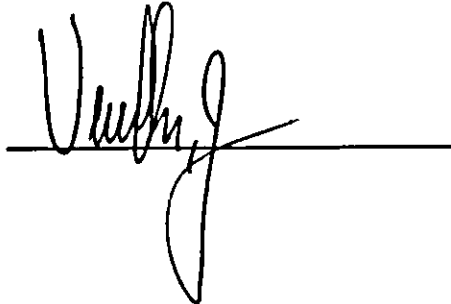
Eagle argues that the jury did not decide that he assaulted Officer Murdock after the close of evidence, but rather came to their conclusion after they were able to view the video frame-by-frame during deliberations. But, this court should not consider the point at which a jury makes up their minds about

guilt or innocence because that is evidence of jurors' mental processes that inheres in the verdict. State v. Hatley, 41 Wn. App. 789, 793-94, 706 P.2d 1083 (1985). Eagle argues that the frame-by-frame playback of the video biased the jury's perception of his intent by making his arm motion seem more deliberate than it appeared at regular speed. But, even assuming this were true, the video is not the only evidence of Eagle's intent. Officer Murdock's testimony alone provides sufficient evidence of Eagle's intent. Reversal is not warranted.

We affirm.

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WE CONCUR:

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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. 76859-0-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:

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Date: December 5, 2018

WASHINGTON APPELLATE PROJECT

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