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No. 34471-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD JONES

Appellant.

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

The Honorable Paula Casey, Judge

Superior Court Cause No. 04-1-02370-3

BRIEF OF RESPONDENT

George Oscar Darkenwald
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. STATEMENT OF THE ISSUES

1. Whether the inadvertent playing to the jury of a single unredacted sentence from a “body wire” on the State’s confidential informant constituted either prosecutorial misconduct or judicial error amounting to undue prejudice to defendant.

Appellant’s assignments of error:

“1. The trial court erred in allowing the prosecutor to play a portion of the body wire recording that it had excluded pursuant to ER 404(b).”

“2. The trial court erred in denying Jones’s motion for a mistrial based on the prosecutor’s misconduct in playing an excluded portion of the body wire recording by holding that this error was not prejudicial.”

2. Whether the prosecutor was allowed to improperly elicit testimony about the reason for the confidential informant’s absence at trial.

Appellant’s assignment of error:

“3. The trial court erred in allowing the prosecutor, over Jones’s objection, to elicit irrelevant testimony that the CI was not testifying because he was frightened the implication being the CI’s fear was caused by the defendant where Jones was charged with neither tampering nor intimidation of a witness.”

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3. Whether the prosecutor's references to the confidential informant in argument constituted prosecutorial misconduct that should not have been allowed by the court.

Appellant's assignments of error:

"4. The trial court erred in allowing the prosecutor, over Jones's objection, to improperly argue in closing that the CI had not testified because of Jones and in mischaracterizing the evidence to argue facts not in evidence."

"5. The trial court erred in allowing the prosecutor, over Jones's objection, to bolster the non-testifying CI's credibility during closing argument."

4. Whether either cumulative error or lack of sufficient evidence requires reversal.

Appellant's assignments of error:

"6. The trial court erred in failing to dismiss Jones's case where the cumulative effect of the claimed errors involving prosecutorial misconduct materially affected the outcome of the trial."

"7. The trial court erred in not taking the case from the jury for lack of sufficient evidence".

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B. STATEMENT OF THE CASE

On August 12, 2004 defendant bought cocaine in a controlled buy from a confidential informant (CI) for the Thurston County Narcotics Task Force. (Vol. I, RP 24-33). This particular buy was what Detective Dale Elliott, who had seen hundreds of such buys, the majority of them in vehicles, described as a “buy-walk”: “We let the money walk”, meaning no arrest was planned. (Vol. I, RP 30). After an extensive, arguably intrusive, search of the CI’s person and vehicle, he was kept under intensive surveillance by several officers while he made a phone call to defendant and met him at an agreed location. Had anyone done anything more than talk to him before contact with the suspect, the buy would have been called off. The defendant arrived in the passenger seat of a car driven by an unnamed woman, exited and entered the CI’s car. The CI was “wired” and the entire transaction within the car between the CI and defendant Jones was also captured on videotape. Both audio and video were monitored “live”. After Jones left, the CI, still under continuous surveillance, met the officers at a prearranged location nearby. He handed them the “wire” and the cocaine handed to him by Jones. (Vol. I, RP 34-47). This was the essence of the State’s case accepted by the jury. The CI and his

car were “clean” when Jones got in. After Jones got out and left with the buy money, the CI had the cocaine which he handed over to the police.

The video which “captured” what the watching officers testified they saw was published, admitted in evidence without objection (Vol. I, RP 52), and played to the jury (Vol. I, RP 55). The audio (the body wire), which simply corroborated what the officers knew they were watching, was published and admitted in evidence without objection (Vol. I, RP 54). After modification of the audio to comply with the court’s pre-testimony ruling that references to the CI’s request for a future buy of heroin should not be played (Vol. I, RP 21), listening devices were passed out to the jury and the audio tape played, without objection (Vol. I, RP 52-57).

C.1 ARGUMENT

1. The inadvertent playing to the jury of a single unredacted sentence from a “body wire” on the State’s confidential informant constituted neither prosecutorial misconduct nor judicial error amounting to undue prejudice to defendant.

(Appellant’s Assignments of Error #1 and #2 quoted above)

Jones contends that it was misconduct for the prosecutor to play a previously redacted portion of the “body wire”, and that the

trial court erred in allowing her to do so and should have granted the motion for mistrial.

“To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney’s conduct was both improper and prejudicial (citations omitted). In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury’s verdict”.

State v. Korum, 157 Wn.2d 641, 650, 141 P.3d 13 (2006).

“A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial are prejudicial.” State v Bahl, 137 Wn. App. 709,719 (decided Feb. 26, 2007).

At the end of a day of testimony, after completed testimony of the officers and excusal of the jury, the court and counsel discussed the portion of the audio tape played. (Vol. I, RP 96-98). Apparently (inadvertently, according to the Prosecutor who candidly admitted her mistake), the tape didn’t get stopped until after the CI’s request for a future transaction. But it did get stopped before Jones’s response, and the question itself was not included in the

transcript given to the jury. The portion of the audio at issue is the following:

Jones: "Eight-fifty."

C/S (CI): "Eight-fifty. You know what I really need?"

Jones: "Huh? (The audio play should have stopped here.)"

C/S (CI): "My buddy wants heroin if you can do it." (It did stop here.)

Whether the jury even heard the question is questionable.

The court itself did not hear it during the playing to the jury, but only during the re-playing outside the presence of the jury. "I was listening intently and did not hear it at all." (Vol. I, RP 98) It therefore ruled there had been no prejudicial error and directed the prosecutor not to refer to the CI's request for a possible future transaction with Jones. She did not. No reference by anyone appears anywhere in the record.

The prosecutor's comment is of interest here. "I would submit that we could give a limiting instruction to the jury, but it would kind of highlight that area." (Vol. I, RP 97) Defendant's attorney apparently agreed because no such instruction was requested. Why call attention to an allegedly damaging comment the jury may well have not even heard?

Appellant correctly cites the applicable test when prosecutorial misconduct is alleged: “In examining the entire record, the question to be resolved is whether there is a *substantial* (emphasis added) likelihood that the prosecutor’s misconduct affected the jury verdict, thereby denying the defendant a fair trial”. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)

In 2006 this test was recently set forth in more detail in State v. Korum, *supra*, at 650, where the Supreme Court rejected claims that the prosecutor improperly vouched for the credibility of a witness and improperly elicited testimony. It is respectfully submitted that there is no evidence of prosecutorial misconduct in this record. Even if there were, the facts in Davenport are far from analogous. There, the prosecutor in rebuttal referred to defendant as an “accomplice”, a legal theory neither set forth in the instructions nor supported by the evidence and therefore a clear misstatement of the law. The jury even sent a note asking the judge to clarify the term. He declined and defendant was convicted.

Two other cases discussing prosecutorial misconduct cited by Appellant are also based on facts so substantially different from this record that they could be in a different universe. In State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), the prosecutor himself

in oral argument admitted the impropriety of his heated comments to the jury: he called the defendant a liar four times, claimed the defendant had no case, and even personally attacked defendant's lawyer and expert because they drove fancy cars to his small town. In State v. Stephans, 47 Wn. App. 600, 736 P.2d 302 (1987), the prosecutor actually challenged the court's authority to order an evaluation of a child witness and instructed State's witnesses to refuse to comply.

Here there is absolutely no evidence that the playing of the single objectionable sentence was anything other than an inadvertence, certainly not anything that should be even called misconduct. The "stop" button was simply pressed a few seconds late. At the time, no one said anything about this in the presence of the jury. The court itself, although listening carefully, did not even hear the sentence at the time. If, as is certainly probable, the jury didn't hear it either, the time honored rule of "no harm, no foul" applies. It is to be noted that counsel did not ask for a curative instruction at the time, after the colloquy with the court and prosecutor or at the time of formal instructions.

In a recent case Division Three found four separate allegations of prosecutorial misconduct without merit, following the

test of Korum, *supra*. One of the allegations appears analogous to the allegation made here.

Mr. Sexsmith next asserts that the prosecutor committed misconduct by presenting edited versions of the tapes. However, the burden was on Mr. Sexsmith to object to the State's editing and request the complete tape be played at trial. (cite omitted) The record does not indicate that Mr. Sexsmith made any objection at trial. Therefore, this issue has been waived.

State v. Sexsmith, 138 Wn.App 497, 157 P.3d 901 (2007)

Here, in addition to the lack of any request for curative instructions, there is no indication in the record that defense counsel made any effort at all before the playing of the audio to make sure the State's editing was proper.

To the extent appellant's arguments may be construed as criticism of the trial court, Division Three's recent decision in State v Sivins, 138 Wn. App.52, 155 P.3d 982 (2007) is helpful. There the trial court erroneously read from the Information to the jury, mistakenly including references to items of evidence previously suppressed. Because, in the court's words, "the trial judge did nothing to convey his personal opinion of the facts or merits of the case during his inadvertent disclosure of the suppressed items, it found the error clearly harmless." Sivins, *supra* at 60. In this case,

Judge Casey said nothing at all about the tape segment nor did counsel request her to say anything about it to the jury.

2. The prosecutor did not, much less improperly, elicit testimony about the reason for the confidential informant's absence at trial.

(Appellant's Assignment of error #3 quoted above.)

Jones next contends that the prosecutor improperly elicited irrelevant testimony, specifically that the confidential informant did not appear to testify because he was frightened of Jones.

For the test applicable to allegations of improper prosecutorial conduct, see Korum and Sivins, *supra*. The following test applies to admission of allegedly irrelevant testimony.

"Admissibility lies within the sound discretion of the trial court; its determination will not be reversed absent an abuse of discretion. (cite omitted.) Such abuse occurs when, considering the *purpose* (emphasis added) of the trial court's discretion, it is exercised on untenable grounds or for untenable reasons." (cite omitted.) State v. Clark, 78 Wn. App.471, 477, 898 P.2d 854 (1995).

The C.I. (Confidential Informant) did not testify. The record reveals no reference at all to the reason for the C.I.'s absence during the first direct examination of Detective Elliott nor did she

make any such reference during recall. (Vol. I, RP 92,93) It was the defendant who “opened the door” to this topic during cross-examination. He asked the officer why the C.I. (Wayne) wasn’t there to testify:

Q: (by defendant’s attorney) “So Wayne has actually dropped out of sight, hasn’t he?”

A: (by Detective Elliott) “Yes”

Q: “There’s a warrant out for his arrest?”

A: “Yes, there is.”

(Vol. I, RP 94).

Not surprisingly, and quite appropriately, the prosecutor then asked the detective on re-direct examination about his efforts to find the witness and his attempts to persuade him to appear and testify:

Q: “The last time that you saw him, did he appear excited about testifying?”

A: “He was very concerned and excited, yes.”

A: ”Meaning—what do you mean by that?”

Mr. Nagle: “I object”

The Court: “I’ll allow an explanation”

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(Vol. I, RP 95,16-21)

Defendant's counsel did not explain the reason for his objection, made no further objection, did not ask for mistrial, and did not ask for a cautionary instruction. The jury then heard the explanation he himself had just asked for. It is at least inconsistent for defendant now to argue that the explanation of a question he himself asked was irrelevant. In allowing the explanation, Judge Casey exercised her discretion on tenable grounds for tenable reasons and counsel let the matter rest. Admissibility lies within the sound discretion of the trial court. Clark, *supra* at 477.

In context, the prosecutor here did not even open the topic of why the C.I. was not present. She certainly did not improperly *elicit* testimony. She simply asked an obvious follow up question.

3. The prosecutor's references to the CI in argument were proper in context and were properly allowed by the court.

(Assignments of error # 4 and #5 quoted above.)

Jones next contends that it was improper for the prosecutor to argue in closing that the confidential informant did not testify because he was afraid of Jones, that this argued facts not in evidence, and that the trial court should not have allowed this argument.

A prosecutor's remarks must be placed in the context in which they are made. Even if improper they are not necessarily prejudicial under the particular circumstances of the case. Because it is presumed that the jury follows the court's instructions, curative instructions (not requested here) can remove any alleged prejudice. State v Kroll, 87 Wn.2d 829, 836-37, 558 P.2d 173 (1976), and State v Swan, 114 Wn.2d 613, 790 P.2d 610 (1990). Only errors affecting the outcome of the trial are prejudicial. State v Bahl, *supra*, at 719.

Again the record reveals a different picture than that suggested by Appellant's brief. The argument quoted at pages 6-8 of his brief occurred during the prosecutor's *rebuttal* argument, not during closing (Vol. II, RP 34-43), during which, as pointed out above, she made absolutely no reference to the confidential informant's absence at trial. It was defendant's counsel who "opened the door" when he asked in his own closing argument: "And when it comes time, what's the one piece of evidence you don't have here? You don't have Wayne (the C.I.) saying, yes, he handed me some drugs and he handed me some money. He apparently did something else wrong after this incident. Now there

is a warrant out for his arrest. And that in itself is reason to doubt.”
(Vol. II, RP 47, 24-48,4).

Not surprisingly and quite appropriately, the prosecutor responded in rebuttal to the reasonableness of the doubt raised. “Now, where is Wayne? There’s lots of discussion of where is Wayne today” (Vol. II, RP 54, 24-25) She was simply asking the detective for an explanation of the question raised by defendant’s counsel. He did object, but only on the basis that she was referring to matters not in evidence. Referring to the record, she was properly allowed to point out the reasonableness of her comments, and the case was submitted to the jury. (Vol. II, RP 54-57). Counsel made no motion for mistrial. nor did he request a curative instruction.

Allegedly prejudicial prosecutorial arguments have often been addressed by our appellate courts. For example, examining in context closing arguments which it characterized as a “heated battle” (Defendant’s counsel interrupted eight times during the State’s closing, moved for a mistrial four times and asked the court to admonish the jury to disregard the prosecutor’s statements.), our Supreme Court made the following observation:

“Clearly the prosecutor’s remark was improper, but not prejudicial under the particular circumstances of this case. Though reprehensible, an improper juror argument is not of necessity prejudicial... The remark must be placed in the context in which it was made... The jury was instructed to disregard the prosecutor’s statement. It is presumed that the jury follows the court’s instructions”. State v Kroll, supra, at 37.

The rebuttal to Jones’s attorney’s argument in this case was clearly not in the same universe as the argument in Kroll, supra. See also State v. Sengxay, 80 Wn. App. 11, 906 P.2d 368 (1995) and State v. Belgarde, 110 Wn.2d 504,507, 755 P.2d 164 (1988). Nor was the argument in another significant case where neither the Court of Appeals nor the Supreme Court in affirming the trial court saw error in its discretionary allowance of what might appear on its face to have been an expression of personal belief, “[The witnesses] have testified honestly before you” and,...”that “[T]he gist of what they have said has been the truth”. Swan, supra, at p. 664 In context it simply wasn’t.

“Even were we to view the arguments as error, however, it was not of such an egregious sort that a curative instruction could not have removed any resulting prejudice.” Swan, supra, at 665.

Absence of motion for mistrial at time of argument strongly suggests that the argument or event in question did not appear critically prejudicial to the appellant in the context of the trial. Counsel may not remain silent, speculating upon a favorable verdict and then, when it is adverse, use the claimed misconduct as a life preserver in a motion for new trial or on appeal. State v. Swan, *supra*.

Even had a proper objection been made and sustained, and a cautionary instruction given, a following motion for mistrial would have been properly dismissed because mistrials should be granted only when nothing short of a mistrial can insure a fair trial, and only errors affecting the outcome of a trial are prejudicial. Bahl, *supra* at 719.

4. The evidence submitted to the jury was sufficient to support the verdict and free of cumulative error.

(Appellant's Assignments of error #6 and #7 quoted above)

Jones finally argues that the trial court should have been taken from the jury because there was insufficient evidence to support the charges and because of the cumulative effect of isolated incidents of prosecutorial misconduct. The applicable legal test when prosecutorial misconduct is alleged is set forth in cases

cited in arguments 1-3 above. The test when the evidence is alleged to have been insufficient is set forth in State v Williams, 96 Wn.2d 215, 634 P.2d 868 (1981), and State v. Elmi, 138 Wn. App. 306 156 P.3d 281 (2007).

The entire transaction that led to the charge of delivery of cocaine was watched by detectives who monitored and recorded it on videotape and monitored the “wire” on the Confidential Informant. Both video and audio were placed in evidence and given to the jury (with some redaction on the audio). According to law enforcement testimony, the informant and his car were “clean” when defendant Jones got into it. When Jones got out and left the scene, the informant had the cocaine he delivered to the officers along with the “wire” that was on his person. Q.E.D.

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe or disbelieve any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting, evidence properly submitted to it, is final.

State v. Williams, *supra*, at.221.

Evidence is sufficient if, after reviewing it in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. A sufficiency claim admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Intent may be inferred from conduct, and this court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence State v. Elmi, *supra*.

For the reasons stated above, any errors of the trial court were *de minimis* or invited and clearly harmless. The evidence supporting conviction was not just substantial; it was compelling.

C. CONCLUSION

Based upon the record and the foregoing arguments and authorities, the State respectfully requests this court to find that :

1. The playing of one redacted sentence from the audiotape which the jury may have never heard at all did not unduly prejudice the jury.
2. The prosecutor neither elicited improper testimony nor offered improper argument.
3. The evidence submitted to support the jury's verdict was substantial.

4. The trial court's rulings and exercises of discretion should be affirmed.
5. The record suggests no legal issues of precedential value.
6. The jury's decision finding appellant guilty should be affirmed.

Respectfully submitted this 24th of August, 2007.

for Carole Lullerme 19229
George Oscar Darkenwald WSBA #3342
Attorney for Respondent

