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NO. 35708-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CALVIN D. OTT,

Appellant,

APPEALS
COURT OF APPEALS II
07 JUN -8 PM 11:53
STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Chris Wickham, Judge
Cause No. 06-1-01307-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence by Trooper Nelson concerning the activity of his drug dog and his conclusions regarding the items seized in Ott's vehicle.
02. The trial court erred in finding that Ott had opened the door to the testimony of Trooper Nelson.
03. The trial court erred in denying Ott's motion for a mistrial based on the testimony of Trooper Nelson.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in admitting evidence based on the testimony of Trooper Nelson and in denying Ott's motion for a mistrial based on the admission of the evidence where Ott had not opened the door to the admission of the evidence, which was not relevant, unduly prejudicial and had never been tested by the Washington State Patrol Crime Laboratory? [Assignments of Error No. 1-3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Calvin D. Ott (Ott) was charged by information filed in Thurston County Superior Court on August 7, 2006, with unlawful possession of methamphetamine, contrary to RCW 69.50.4013(1). [CP 2].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 12/18/06 10-11]. Trial to a jury commenced

on December 18, 2006, the Honorable Chris Wickham presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 12/18/06 27-29].

The jury returned a verdict of guilty as charged, Ott was sentenced within his standard range and timely notice of this appeal followed. [CP 18, 34, 47-57].

02. Substantive Facts

On July 24, 2006, at approximately 4:42 p.m., Trooper Kelly Gregerson activated the emergency lights on his patrol vehicle to stop a car driven by Ott for a traffic infraction. [RP 12/18/06 30-31, 33]. Ott's car, in which he was the sole occupant, initially slowed down for approximately a quarter mile before stopping, during which time Gregerson observed Ott throw "a small object, clear white in color, out the passenger side window." [RP 12/18/06 32].

Gregerson retrieved the thrown object, a small baggie, the contents of which subsequently tested positive for methamphetamine. [RP 12/18/06 33, 46-47, 55-56]. Ott told Gregerson that "he didn't throw anything out of his car." [RP 12/18/06 37].

Ott testified that the small baggie retrieved by Gregerson had actually come out of the car in front of him: "Yeah, something came floating right by my car, looked like a moth or something." [RP 12/18/06

61]. Ott further asserted that although the person driving the car in front of him had stopped and the passenger had approached the police, an officer other than Gregerson told her she could go. [RP 12/18/06 61]. The police then “called a dog, sniffing dog, and he put me in the back of his car.” [RP 12/18/06 62].

Trooper John Nelson arrived at the scene with his “drug dog for K-9 purpose.” [RP 12/18/06 73-74]. The dog, Tigger, who had just finished training to scent out certain controlled substances, alerted on a brown bag, which contained two pill bottles, found underneath the front passenger seat. [RP 12/18/06 77-78, 80; CP 16]. According to Nelson, in the brown bag “there was enough” of “an off white or crystalline substance to do a field test.” [RP 12/18/06 83]. Over objection, Nelson testified that a white crystal substance “would be methamphetamine” or “could be cocaine.” [RP 12/18/06 92].

D. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE BASED ON THE TESTIMONY OF TROOPER NELSON AND IN DENYING OTT’S MOTION FOR A MISTRIAL BASED ON THE ADMISSION OF THE EVIDENCE.

01. Procedural History

Prior to trial, knowing that Ott had given a statement to the police that “he didn’t throw anything out of his car [RP

12/18/06 7](,)” the court granted Ott’s motion in limine to preclude mention of items found in his car containing residue of suspected methamphetamine under ER 401, 402 and 403 and the fact that the items had never been tested by the Washington State Patrol Crime Laboratory. [RP 12/18/06 5-6].

There may be some marginal relevance to the items that are sought to be excluded, and these are items that were found in the car but were not tested, but it seems to me that under ER 403, the prejudice that could be suffered by the defendant is substantial because of the likelihood of the jury using the presence of those items to convict him, even if they were uncertain regarding the substance that was thrown out of the vehicle.

[RP 12/18/06 8].

At trial, following Ott’s five-word statement that the police “called a dog, sniffing dog [RP 12/18/06 62],” before placing him in the patrol vehicle, over the same objections raised by Ott at the hearing on the motion in limine [RP 12/18/06 69-71], the court ruled that Trooper Nelson could testify to the activity of his drug dog and his conclusions regarding the items seized inside Ott’s vehicle, as previously set forth herein at page 3.

(I)t seems to me that the jury is entitled to hear from both sides regarding the context of the stop. The defendant has already testified that there was a drug-sniffing dog on the scene, and it seems to me the State at this point should be entitled to

confirm that and explain what the dog did or did not find.

That evidence in and of itself, it is my belief, would not be sufficient to support a conviction, but it might - - it might assist the jury in corroborating or not corroborating the testimony of the officer, and so I will allow it for that purpose.

It is my belief at this point that, because the defendant opened the door, that the State should be permitted to present that evidence, so I will allow you to call the witness.

[RP 12/18/06 71-72].

During Nelson's testimony, the court overruled Ott's continuing objections to the admission of the evidence found in his vehicle [RP 12/18/06 83], to Nelson's qualifications regarding drug identification [RP 12/18/06 87-90] and to Nelson testifying that a white crystal substance as found in the vehicle "would be methamphetamine" or "could be cocaine." [RP 12/18/06 92].

At the close of the evidence, the court denied Ott's motion for a mistrial based on the testimony of Trooper Nelson.

The Court has ruled on this issue throughout the day as it has been presented in different contexts, and initially the court's decision was to not admit it on the grounds of prejudice, but, as I say, the defendant through his testimony, it is my belief, opened the door to the State to allow presentation of this evidence in that the defendant testified regarding a K-9 dog on the scene.

At that point, it seems to me the State is entitled to explain what the K-9 dog was doing or not doing on the scene, so that the jury can have the benefit of that information.

I still believe that the evidence alone would not be sufficient to support a conviction, but it can be used for corroboration, particularly when the defendant has opened the door for it. So I will deny the motion for a mistrial....

[RP 12/18/06 95].

02. Ott Did Not Open The Door To
The Admission Of The Evidence

While inadmissible evidence may be admitted if a witness “opens the door” during direct examination and the evidence is relevant to some issue at trial, State v. Tarman, 27 Wn. App. 645, 650-51, 621 P.2d 737 (1980), Ott did not open the door to the testimony at issue with his more than brief comment that the police “called a dog, sniffing dog....” [RP 12/18/06 62]. Ott never said the dog arrived at the scene, and the trial court mischaracterized his comment by emphasizing that Ott “testified that there was a drug-sniffing dog on the scene.” [RP 12/18/06 71-72]. Never did. See State v. Avendano-Lopez, 79 Wn. App. 706, 713-14, 904 P.2d 324 (1995) (passing reference that defendant had been released from jail does not open door for State to present evidence of defendant’s prior crimes); see also State v. Stockton, 91 Wn. App. 35, 40,

955 P.2d 805 (1998) (passing reference to a prohibited topic during direct examination does not open door for cross examination about prior misconduct). The trial court's rationale for admission of the evidence is troubling.

03. Evidentiary Rulings

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403. Simply, in admitting evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

In admitting the evidence based on the testimony of Trooper Nelson, the trial court reasoned that the evidence was relevant because it might assist the jury in corroborating or not corroborating the testimony of Trooper Nelson. [RP 72]. This rationale is unpersuasive. First, it takes more than idle imagination to determine how Nelson's testimony that Tigger the drug dog alerted on the bag in Ott's car, which contained a

white crystal substance, much like the substance that Ott had thrown out of the car that subsequently tested positive for methamphetamine by the crime lab, and which was the kind of substance that “would be methamphetamine” or “could be cocaine(,)” in any way would work to his disadvantage. Impossible.

What is more, the only logical relevancy of this evidence, which is further suspect due to the lack of testing by the crime lab, see State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892 (2006), is to show propensity to commit similar acts. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). For example, in Pogue’s trial for possession of cocaine, the court allowed the State to elicit Pogue’s admission that he had possessed cocaine in the past on the issue of knowledge and to rebut his assertion that the police had planted the drugs. The conviction was reversed. The appellate court held:

The only logical relevance of (Pogue’s) prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident.

Pogue, 104 Wn. App. at 985.

Similarly, here, the only logical relevancy of the evidence at issue was through a propensity argument; i.e., since Ott had drugs in the car, he

threw what was found outside the car. Done deal, as the State argued in closing:

But still these drug dogs have their use, and the drug dog found something in there that by appearance appeared to be similar to what was in the baggie that was thrown out of the car. So that corroborates essentially what was found outside the car.

[RP 12/19/06 118].

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence here at issue, the jury would have acquitted Ott, especially since the case came down to whom the jury was going to believe: Ott or Trooper Nelson. As the trial court noted in initially granting the motion in limine, the prejudice that could be suffered by Ott as a result of the introduction of the evidence was substantial. [RP 12/18/06 8].

The prejudice resulting from the introduction of the evidence denied Ott his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Oughton, 26 Wn. App. 74, 612 P.2d

812 (1980). This, and not the trial court's asseveration that it believed that the evidence found inside the car "alone would not be sufficient to support a conviction(,)" is the test. [RP 12/18/06 95]. The error was of major significance and not harmless under State v. Bourgeois, *supra*, since it is within reasonable probability that it materially affected the outcome of the trial.

04. Mistrial

A trial court's decision whether or not to grant a mistrial is reviewed for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In making this determination, this court applies a three-step test to determine if the trial irregularity may have influenced the jury: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

The serious irregularity of the admission of the evidence based on the testimony of Trooper Nelson as previously set forth herein cannot be denied, which was exacerbated by the prosecutor's closing argument, with the result that the irregularity could not be cured by an instruction to

disregard the evidence at issue. Ultimately, this case turned on whether the jury found Trooper Gregerson's account of Ott throwing something from the vehicle credible, which was bolstered by the admission Nelson's testimony, and the remaining evidence was not sufficient to mitigate the seriousness of the irregularity.

E. CONCLUSION

Based on the above, Ott respectfully requests this court to reverse and dismiss his conviction consistent with the arguments presented herein.

DATED this 7th day of June 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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