

NO. 49425-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH WOOD,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State misapplies doctrines to argue that Mr. Wood waived review of the improper admission of out-of-court statements. These arguments should be rejected..

The State relies on misinterpretations of several doctrines in an effort to argue Mr. Wood cannot appeal the overruling of his objections to hearsay evidence. The arguments are wrong and should be rejected.

First, the State argues appeal is foreclosed due to the law of the case doctrine. Resp. Br. at 8-9; *see* Resp. Br. at 26 (arguing evidence is relevant because limiting instruction said it was). The law of the case doctrine applies only where there is no objection below. *State v. Johnson*, 188 Wn.2d 742, 746, 754-55, 399 P.3d 507 (2017). The doctrine encourages timely objections, promoting fairness and efficiency. *Id.* at 757. Mr. Wood objected to the admission of Anna Hall's statements below. CP 14-18, 24-29; RP 18-30, 187-95. Thus, a timely objection occurred. The trial court overruled the objection, ruling the evidence was admissible for a limited purpose. In response to the court's ruling, Mr. Wood proposed a limiting instruction to comport with the court's ruling in an attempt to limit the prejudicial effect of the inadmissible evidence. The limiting instruction was simply the required subsequent result of the trial court's evidentiary

ruling. *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (“If the evidence is admitted [under ER 404(b)], an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose.”); *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (“If the evidence is admitted, a limiting instruction must be given to the jury”). Mr. Wood never agreed with the court’s ruling. The law of the case doctrine does not apply here.

Second, the State argues Mr. Wood invited the error by proposing a limiting instruction. Resp. Br. at 10-11. “The invited error doctrine precludes review of an error that the appealing party caused at trial.” *State v. Moreno-Valentin*, 190 Wn. App. 1022, 2015 WL 5724962, *5 (2015)¹ (citing *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008)). Mr. Wood “did not cause the trial court to err by requesting a limiting instruction following the trial court’s erroneous evidentiary ruling to which he had objected.” *Id.* Moreover, Mr. Wood does not argue there was any error in the limiting instruction per se, but that the error was in the court’s admission of the evidence. The invited

¹ This unpublished opinion, cited pursuant to GR 14.1, is cited only for such persuasive value as the court deems appropriate. It has no precedential value and is not binding on the court.

error doctrine also does not apply here. *See Moreno-Valentin*, 2015 WL 5724962, at *5 (holding invited error doctrine does not apply to bar review where defendant requested a limiting instruction after objection was overruled).

Finally, the State unpersuasively argues that Mr. Wood waived any objection to the admission of Ms. Hall's second 911 call. Resp. Br. at 22-26. The State advances a waiver argument although Mr. Wood objected to the evidence, twice, and moved for a mistrial. The State argues the court's ruling on Mr. Wood's first objection (and denial of his motion for a mistrial) was not final. Resp. Br. at 22-23, 25.

However, nothing in the court's overruling of Mr. Wood's objection indicates tentativeness. The court did not refuse to rule, did not state that its ruling was subject to how the evidence developed at trial, or otherwise indicate Mr. Wood was obligated to lodge an additional objection to preserve the error. *See State v. Powell*, 126 Wn.2d 244, 256, 93 P.2d 615 (1995) (relied on by the State with regard to tentative trial court rulings (Resp. Br. at 25)). As in *Powell*, the court did not indicate that any further objection would be necessary. *Id.*

Nevertheless, Mr. Wood did object again, albeit outside the presence of the jury. Finally, Mr. Wood did not waive his objection by inquiring

into the matter on cross-examination. The court had twice overruled Mr. Wood's objection to the evidence. It had been admitted and was before the jury. Mr. Wood accordingly properly cross-examined on the topic in an attempt to limit its prejudicial impact. He did not waive his prior objections in doing so.

For the reasons set forth in Mr. Wood's opening brief, the out-of-court statements were improperly admitted.

2. The State concedes it committed misconduct that was erroneously sanctioned when the trial court overruled Mr. Wood's objection.

The State concedes that the prosecutor improperly argued in closing that the jury could consider the testimony that Mr. Wood was wanted for a domestic violence misdemeanor for purposes beyond which the limiting instruction allowed. RP 350; Resp. Br. at 27-28. The limiting instruction provided that statements made by Anna Hall "may be considered by [the jury] only for the purpose of understanding why law enforcement officers were called to the Carlyle Court apartments, and were provided the name Randolph Wood." CP 44. The instruction explicitly provided the jury "may not consider [the

evidence] for any other purpose.” *Id.* The State’s argument exceeded this limited purpose. The Court should accept the State’s concession.

However, the State wrongly argues that the misconduct was not prejudicial. Resp. Br. at 28-29. The improper argument did not relate solely to whether the driver of the vehicle failed or refused to immediately bring the vehicle to a stop. *See id.* Rather, the prosecutor’s misconduct urged the jury to use Ms. Hall’s statements to identify Mr. Wood as the driver. By supplying a reason for Mr. Wood to attempt to elude police, the State tried to convince the jury that the driver was, in fact, Mr. Wood. In its brief to this Court, the State concedes that inference is logical. Resp. Br. at 30. Yet, it denies that was how the prosecutor intended it to be used. *Id.* However, the State can offer no proof of the prosecutor’s intention. Moreover, the effect on the jury is more relevant to prejudice than the prosecutor’s intent. Identity was the primary issue in the case. Therefore, the prosecutor’s misconduct, in arguing a logical but impermissible inference, was not without prejudicial effect.

3. The trial court erroneously admitted the database photograph.

As argued in Mr. Wood’s opening brief, the trial court erred in admitting the database photograph of Mr. Wood because it was based

on testimonial hearsay. Op. Br. at 25-27. The State again tries to argue that Mr. Wood waived the issue, despite his motion in limine argued before the court and rejected by it. *Compare* Resp. Br. at 31-32 with RP 199; CP 15. Objections made through motion in limine constitute a standing objection unless the court clearly indicates at the time of its ruling that further objections are necessary. *Powell*, 126 Wn.2d at 256. The trial court in no manner indicated its ruling was tentative or that Mr. Wood's objection needed to be renewed. The court did ask if Mr. Wood had any further objections when, before the jury, the State moved to admit the exhibit. RP 231. But there was no requirement that Mr. Wood reargue the motion the court had denied just minutes earlier. And counsel did not indicate he was abandoning his prior, rejected objection. The State's continual attempt to expand the waiver doctrine should be flatly rejected.

B. CONCLUSION

Standing alone or in the cumulative, Mr. Randolph Wood was denied a fair trial. Because the trial court admitted testimonial out-of-court statements and a prejudicial photograph based on hearsay statements, because the prosecutor committed misconduct, and because

the court's instruction on expert testimony bolstered the police officer witnesses, the Court should reverse and remand for a new trial.

DATED this 18th day of September, 2017.

Respectfully submitted,

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