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No. 49882-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN TROY ABRAM III,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **The police officers were not qualified as expert witnesses, and it was error to instruct the jury to privilege their testimony as experts.**
 - a. The State erroneously characterizes patrol officers Maas and Nicodemus as experts.

As noted by the State, expert witness testimony serves a very specific purpose under ER 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

State v. Kalakosky, 121 Wn.2d 525, 540–41, 852 P.2d 1064 (1993). The State also cites to *State v. Flett* in support of the proposition that a trial court has the discretion to qualify a witness as an expert. *State v. Flett*, 40 Wn. App. 277, 284, 699 P.2d 774 (1985); Brief of Respondent (BOR) at 5. However, *Flett* addressed whether the trial court abused its discretion by qualifying an expert witness whose credentials the defense disputed at trial. *Flett* at 284-285. *Kalakosky* addresses whether the trial court erred in admitting test results the defense disputed as flawed. 121 Wn.2d at 541. The cited cases have no bearing on Mr. Abram’s case, where the issue is that the State never sought to qualify its patrol officers as experts, yet the jury was instructed to consider their lay testimony as expert opinion.

The State cites to *State v. Ortiz* for the proposition that the patrol officers in Mr. Abram's case were allowed to serve as experts based on their "practical experience." *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992). But *Ortiz* involved expert training that the patrol officers in Mr. Abram's case simply did not possess. In *Ortiz*, the border agent had been a "tracker" for 23 years, and had "been qualified as an expert by National Search and Rescue, which requires 8,000 to 10,000 hours of experience, as well as the United States Border Patrol, the United States Marshall's Service, and the Federal Bureau of Investigation. Courts in California and Washington have previously recognized his expert status." *Ortiz*, 119 Wn.2d at 310. The officers in Mr. Abram's case had no such specialized training that would qualify them as experts.

The State cites to the officer's description of their basic training, which, in Deputy Maas's case, meant that he graduated from the police academy, and worked routine patrol since 2007. BOR at 6-7. As a patrol officer, Officer Maas explained that his "main function" is to answer 911 calls. BOR at 7. When he is not responding to those calls, he is on patrol, which includes traffic enforcement, looking for "suspicious vehicles, youth thefts, that kind of thing." BOR at 7 citing RP 191-193.

Likewise, Officer Nicodemus was a patrol officer with Pierce County since 2003. BOR 8-9. He became a patrol supervisor. The State

tries to characterize the basic training and experience as laying the foundation for them to testify as experts. BOR at 5. But the officers did not testify about specialized training in estimating speed or cite to specific experience or training in vehicle pursuit or any other area that would elevate their testimony to that of an expert.

The State simply established that Officers Maas and Nicodemus were police officers, not that they had any particular expertise in speed estimation. Accordingly, the State never moved to have the officers qualified as experts for any purpose allowed by ER 702.

Nor would the State have been able to qualify them as experts where the officers did not rely on expert training to estimate Mr. Abram's speed. The State misconstrues the importance of calibration of the speedometer in *Mociulski*, which requires that when evidence of calibration is presented at trial, the witnesses must be qualified as experts. *City of Bellevue v. Mociulski*, 51 Wn. App. 855, 861, 756 P.2d 1320 (1988). Absent such technical evidence that requires expert qualification, estimation of car speed is a matter of lay opinion. *See State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985). Or, even without expertise in the tools used to measure speed, an officer can provide evidence that she has received specific training on speed, such as in the case in *State v. Farr-Lenzini*, where a trooper and vehicle instructor trained in accident

investigation with twenty years of experience, who had participated in fifty to eighty arrests for attempting to elude, qualified as an expert for purposes of police procedures, speed, vehicle dynamics, and accident reconstruction. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999).

The officers here did not rely on any specific tools or expertise in estimating Mr. Abram's speed. Thus they offered no expert testimony, even if the State had properly sought to have them qualified under ER 702.

- b. The expert witness instruction impermissibly granted deference to police officer testimony, which prejudiced Mr. Abram.

Because there is simply no basis to establish the patrol officers would have qualified as experts, it was error to allow the jury to consider their testimony as expert witness testimony. The State attempts to minimize the importance of erroneously instructing the jury to give deference to a police officer's testimony by referring to the erroneous instruction as a "cautionary" or "curative" instruction. BOR at 13-14. These are mischaracterizations that have no basis in law. The State cites to no support for the proposition that an expert witness instruction may be given out of a "surfeit of caution." BOR at 14. Likewise, the State attempts to characterize the erroneous instruction as "curative" because it instructs that the jury is the sole judge of witness credibility. BOR at 15.

The State cites no support for this absurd claim that the court can erroneously instruct the jury to consider the testimony of police officers as expert witnesses, but then “cure” this error through then telling the jury that it may disregard the court’s instruction.

There is no question that “the opinion of a government official, especially a police officer, may influence a jury.” *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004) (citing *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985)). The dispute in this case was whether Mr. Abram drove in a reckless manner in attempting to elude a police vehicle, and credibility of the witness description of Mr. Abram’s driving was central to the jury deciding the case. Privileging this officer testimony about the key dispute in the case was especially harmful in Mr. Abram’s case because of the deference courts recognize that juries already give to officer testimony.

The State’s efforts to minimize the import of this error are not supported by law. Reversal is required.

2. The court erred in admitting evidence of Mr. Abram’s warrant status as evidence of motive when there was no evidence that Mr. Abram even knew about the warrant.

There is no question that evidence of a person’s character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. ER 404(a). However, “when demonstrated,” such

evidence may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing ER 404(b)).

The State argues that there is no “authority requiring the State to prove defendant had knowledge of the warrants.” BOR at 18. But the State had to demonstrate that Mr. Abram had knowledge of what the State claimed induced him to act before the court could allow it as evidence of “motive.” “Motive” is defined as, “the moving course, the impulse, the desire that induces criminal action on part of the accused.” *Powell*, 126 Wn.2d at 260 (citing Black's Law Dictionary 1014 (6th rev. ed. 1990)). Because the State was unable to establish that Mr. Abram knew of this warrant, the evidence of his warrant status should not have been admitted as evidence of his motive to act.

Evidence is relevant and necessary if it tends to prove a fact of importance to the action. *Powell*, 126 Wn.2d at 259. Here, the trial court admitted evidence of the warrant “to show what may have been the mindset of Mr. Abram...” BOR at 18. But where the State failed to establish that Mr. Abram knew about the warrant, it could not have reflected his mindset, or motivation to act; thus, the court’s reasoning that this evidence could be used to establish Mr. Abram’s motive when there

was no evidence he knew of the very fact being used to establish his motive is clearly flawed.

The trial court acknowledged “the prejudicial effect” of hearing about an outstanding warrant “can be substantial.” RP 173. Because the Stated failed to demonstrate that this highly prejudicial evidence reflected Mr. Abram’s motive, or what could have induced him to drive away from police, it simply had no relevance to prove an element of the crime charged. *State v. Gunderson*, 181 Wn.2d 916, 923, 337, P.3d 1090 (2014). Thus, it was an abuse of discretion for the trial court to admit it; because of the court’s clear admission that it was prejudicial, reversal is required. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

3. It was constitutional error for the State to comment on Mr. Abram’s post-Miranda silence.

The State claims that its elicitation of Mr. Abram’s exercise of his right to remain silent in the face of specific police questions was “necessary evidence” for the jury to make an “informed decision” about Mr. Abram’s credibility. BOR at 22. This is not supported by the record, where the officer did not need to specifically say that Mr. Abram “decline[d] to answer those ones,” in recounting what Mr. Abram told him. BOR at 22; RP 222-23. There is nothing in the record that shows the officer could not have simply described what Mr. Abram told him without

commenting on his silence. This kind of commentary about a suspect's silence is precisely what *Miranda*'s warnings are meant to protect against. It would render them meaningless if a person is told that he has the right to remain silent, but that this silence could then be used as evidence against him at trial. This is why the error is of constitutional magnitude. *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The State mistakes the issue when it argues, based on *State v. Hodges*, 118 Wn. App. 668, 672-73, 77 P.3d 375 (2003), that Mr. Abram's silence in the face of police questioning was not a valid assertion of his right to remain silent. The issue is not, as it was in *Hodges*, whether Mr. Abram waived his rights under *Miranda*—the issue in Mr. Abram's case is the State's *comment* on his right to remain silent, which is not permitted at trial. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The court in *Lewis* highlights the sort of improper comment at trial on a defendant's exercise of his right to remain silent, noting that in that case, "there was no statement made during any other testimony or during argument by the prosecutor that Lewis refused to talk with the police, nor is there any statement that silence should imply guilt." *Id.* at 706.

Here, the officer's comment on Mr. Abram's silence in the face of particular questions was used as substantive evidence, where "credibility" was central to the State's argument to the jury that it should believe the

police officers and not Mr. Abram. RP 409-410. This constitutional error was not harmless; thus providing separate grounds for reversal.

4. The trial court's erroneous admission of Ms. Sandoval's hearsay statements prejudiced Mr. Abram.

The State claims that the defense failed to object to the entirety of the State's elicitation of hearsay testimony in claiming the error is not preserved. BOR at 26. But the court clearly denied the defense's objection to the officer's hearsay testimony; thus the defense's objection on hearsay grounds and the court's ruling were properly preserved. *See e.g. State v. Padilla*, 69 Wn. App. 295, 300, 846 P.2d 564 (1993) ("an objection must be sufficiently specific to inform the trial court and opposing counsel of the basis for the objection and to thereby give them an opportunity to correct the alleged error.")

As argued by the State in closing, Ms. Sandoval's statements were used to support the officer's account of events, and discredit Mr. Abram's: RP 407. Because Ms. Sandoval's testimony was used to advance the State's theory that Mr. Abram was not credible, and he was forced to call her as a witness to rebut this erroneously admitted testimony, there is a reasonable probability it affected the outcome of the trial. Reversal is required.

B. CONCLUSION

Reversal is required where the trial court impermissibly instructed the jury to give deference to police officer testimony, and allowed the jury to hear prejudicial evidence of Mr. Abram's warrant status that had no relevance to the charged offense. The court's additional errors of allowing the police officers to comment on Mr. Abram's post-*Miranda* right to remain silent and erroneous admission of hearsay provide additional grounds for reversal of Mr. Abram's conviction.

DATED this 14th day of November, 2017.

Respectfully submitted,

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