

FILED
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

29241-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH C. MILLER, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the prosecutor to introduce evidence that Mr. Miller had eleven prior arrests for driving under the influence.
2. The prosecutor committed misconduct by twice asking Mr. Miller on cross-examination if the police officers lied on the stand.

B. ISSUES

1. Does defense counsel open the door to introduction of defendant's eleven prior convictions for Driving Under the Influence?
2. Was admission of the multiple prior convictions unduly prejudicial such that a limiting instruction would be ineffectual?
3. Does a prosecutor commit misconduct while cross-examining the defendant when he asks if the officers who testified are lying?
4. Does a prosecutor's misconduct in provoking a defendant to state that the officers lied in their testimony carry a

greater potential for prejudice when the two felony convictions rests solely upon credibility?

C. STATEMENT OF THE CASE

Joseph C. Miller was driving from Auburn, where he worked, to Toppenish to attend a daybreak funeral ceremony. (RP 517; 525; 530) In the early morning hours of June 27, 2009, Former Yakima County Sheriff Deputy Ernie Lowry stopped Mr. Miller on the basis that Mr. Miller was traveling 80 miles per hour in a 60 mile per hour zone. (RP 215) Yakima County Sheriff Deputy Eric Wolfe quickly also arrived on the scene. (RP 349)

By the end of the contact with Mr. Miller, the deputies tackled Mr. Miller onto the gravel, shot him with a taser three times, and beat him repeatedly with their night sticks. (RP 234; 240; 245-48) Mr. Miller was arrested for two counts of third degree assault of a police officer, and one count of driving while under the influence. (CP 1)

At trial, the stories told by the deputies of the stop differed dramatically from Mr. Miller's version of events. Mr. Miller testified that he had been drinking earlier in the day, and was traveling to Yakima for a daybreak funeral when he became weary and pulled over to sleep. (RP 522-23)

He awoke, and drove on in the early morning hours. (RP 530) Mr. Miller mentioned that he had serious allergies, and he usually took medications to alleviate the symptoms. (RP 520)

Mr. Miller was stopped, and Deputy Wolfe asked him to step out of the car. (RP 532) He said he complied with the deputy's requests, but that his legs were cramping from sleeping in the car in the cold, and his shoulder has metal pins in it, so he has limited mobility. (RP 534-35)

Mr. Miller testified that Deputy Lowry hit his shin on the car when he was searching the car to get Mr. Miller's allergy medications. (RP 537) When Mr. Miller reached for his cell phone, the deputy tased him. (RP 542) When he came to, he was on the ground, and the deputy tased him again. (RP 542-43) He began to experience an asthma attack. (RP 545)

An EMT was called to scene and took Mr. Miller's vital signs. (RP 547-48) He eventually left, and shortly thereafter Mr. Miller sneezed on Deputy Wolfe. (RP 549) The Deputies then beat Mr. Miller, leaving him with several bruises. (RP 551) The Deputies drove Mr. Miller to the hospital. (RP 555-58; 562)

Deputy Lowry, on the other hand, testified that when he first contacted Mr. Miller, Mr. Miller ignored his taps on the window and was playing with his cell phone. Next the deputy testified that Mr. Miller fumbled with his wallet, and he smelled of alcohol. The deputy also said

he could see several empty beer cans on the floor behind the driver's seat.
(RP 221-23)

The deputy called in to dispatch and learned that Mr. Miller's license was suspended and warrants existed for his arrest. (RP 224)
Deputy Wolfe arrived on the scene. (RP 224)

Deputy Lowry testified that when Mr. Miller got out of the car, he was unsteady on his feet. (RP 228) The deputy reported that Mr. Miller was not compliant with his demands, and would not put his hands behind his back. Deputy Lowry testified that he and Deputy Wolfe struggled with trying to get Mr. Miller handcuffed. (RP 229-31) Deputy Wolfe picked Mr. Miller off his feet, and took him to the ground. (RP 240)

Deputy Lowry said that during this struggle, Mr. Miller kicked him. The deputy said he received a quarter-size bruise on his shin. (RP 235)

During the struggle, the deputies decided to shoot Mr. Miller with a taser. (RP 234) They applied the electrical current three separate times until Mr. Miller could not move. (RP 234-35)

Deputy Wolfe's story of what happened was very similar to Deputy Lowry's. Deputy Wolfe added that while he was wrestling with Mr. Miller on the ground, Mr. Miller spat in his face. (RP 243) He

reported that this was when he beat Mr. Miller with his metal baton. (RP 245-46)

At the jail, the corrections officers were concerned about Mr. Miller's condition, so they took several pictures of his injuries. (RP 504-08)

Mr. Miller was tried by a jury. The first trial resulted in a hung jury. (RP 89-94) The State tried him again.

During direct examination of Mr. Miller, defense counsel asked Mr. Miller if he had been arrested previously for driving while under the influence:

Q. Okay. In your past life, have you ever been arrested for driving while intoxicated?

A. Yes.

(RP 529)

The trial court ruled that this question "opened the door" for the prosecutor to inquire about the number of driving while intoxicated convictions Mr. Miller had on his record. (RP 566-67) At the conclusion of cross-examination, the prosecutor told Mr. Miller he had been arrested on eleven different occasions for driving under the influence:

Q: Okay. Mr. Miller, earlier you had said that you had been arrested for DUI's. Our records indicate that from 1986 to December 11th 2008, you've been arrested for DUI 11 times, would you agree with that?

A: Yes.
Q: Some of those arrests have turned into convictions,
would you agree with that?
A: Yes.

(RP 661)

Also, during cross-examination of Mr. Miller, the prosecutor asked
Mr. Miller if the deputies were lying in their testimony:

Q: Okay. But when you got pulled over by Deputy Lowry,
you weren't speeding, is that your --
A: No, I was not.
Q: Okay. The officer said you were speeding, is that
correct?
A: They said I was, yes.
Q: Okay. So he would be being dishonest about that, is that
correct?
MR. COLBY: I'm going to -- What? I didn't, I didn't hear
the question.
THE COURT: Wait a minute. What? I didn't hear the
question. What was your --
MR. HOTCHKISS: I said, "So you're saying he's being
dishonest about that, is that correct?"
THE COURT: Who's being dishonest?
A: That's your opinion.
THE COURT: Just a second.
MR. HOTCHKISS: Correct.
THE COURT: Who was being dishonest?
MR. HOTCHKISS: Deputy Lowry.
THE COURT: Sustained. The jury will disregard that
question.
MR. HOTCHKISS: Okay.
Q: But you are, you are saying that the deputies made up a
reason to search your car, is that correct?
A: Yes.
Q: Okay. You are saying the deputies essentially made up
the entire assault on you, is that correct?
A: Yes.

(RP 586-87)

The jury found Mr. Miller guilty on all counts. (CP 144-47) He was sentenced to 22 months' incarceration. (CP 154) He appeals.

D. ARGUMENT

1. THE COURT'S ADMISSION OF EVIDENCE OF MR. MILLER'S PREVIOUS 11 CONVICTIONS FOR DRIVING UNDER THE INFLUENCE WAS AN ABUSE OF DISCRETION.

Under ER 609(a)(1), prior convictions are inadmissible until the party seeking admission affirmatively demonstrates that (1) the prior conviction is probative of the witness's veracity, and (2) the probative value outweighs the prejudicial affect of admitting the prior conviction. *State v. Hardy*, 133 Wash.2d 701, 711-12, 946 P.2d 1175 (1997).

Additionally, the trial court must conduct an on-the-record analysis of the probative value versus the prejudice. *Hardy*, 133 Wn.2d at 712. Such an analysis requires "an articulation of exactly how the prior conviction is probative of the witness's truthfulness." *Id.*

Evidence of other crimes, wrongs, or bad acts is presumptively inadmissible under ER 404(b) to show action in conformity therewith. *State v. Grant*, 83 Wn. App. 98, 105 (1996). The rule provides a non-exhaustive list of purposes for which the evidence of a prior conviction

may be admitted, including evidence of intent, and absence of mistake or accident. *Grant*, 83 Wn. App. at 105. A court may admit such evidence if it is relevant and necessary to prove an element of the charged crime, and if the probative value outweighs the prejudicial effect. *Grant*, 83 Wn. App. at 109.

A trial court's decision to allow cross-examination under the open-door rule is reviewed for abuse of discretion. *State v. Wilson*, 20 Wn. App. 592, 594, 581 P.2d 592 (1978). A party's introduction of evidence that would be inadmissible if offered by the opposing party "opens the door" to explanation or contradiction of that evidence. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995).

The "opening the door" doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008).

The term is used in two contexts:

(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed.2007). Because this "opening the door" doctrine

pertains to the admissibility of evidence, it must give way to constitutional concerns such as the right to a fair trial. *Jones*, 144 Wn. App. At 298; *citing State v. Frawley*, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (ruling that constitutional concerns trump strict application of court rules); and *see* ER 402 (allowing trial court to rule that otherwise relevant evidence is inadmissible if admission would violate constitutional protections).

In this case, the evidence of Mr. Miller's prior convictions was inadmissible under both ER 609(1)(a) and ER 404(b). None of the exceptions apply, and thus the evidence is admissible only if the defense opened the door to the number of past convictions.

In this case, the trial court erred by allowing the State to introduce multiple instances – eleven – of prior arrests for drunken driving. While Mr. Miller mentioned the fact that he had been previously arrested for driving under the influence, the evidence of the eleven prior stops and convictions did not explain, clarify or contradict Mr. Miller's simple admission that he had been previously arrested on this charge.

The evidence of the significantly large number of prior arrests in the past twenty years for the same offense as was being prosecuted in this case was highly prejudicial. Mr. Miller should receive a new trial.

2. THE PROSECUTOR'S MISCONDUCT IN PROVOKING MR. MILLER TO TWICE COMMENT ON THE DEPUTIES' CREDIBILITY ENTITLES MR. MILLER TO A NEW TRIAL.

A prosecutor commits misconduct by asking a witness whether that witness thinks another witness is lying. *State v. Jerrels*, 83 Wn. App. 503, 507, 83 Wn. App. 503, 925 P.2d 209 (1996). Such questioning invades the province of the jury and is both unfair and misleading. *Jerrels*, 83 Wn. App. at 507.

The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Misconduct constitutes prejudicial error if a substantial likelihood exists that the misconduct affected the jury's verdict. *Stenson*, 132 Wn.2d at 718-19.

Some of the factors considered in determining whether the misconduct likely affected the verdict are: (1) whether the prosecutor was able to provoke the defense witness to say that the State's witness must be lying; (2) whether the State's witness's testimony was believable and/or corroborated, and (3) whether the defense witness's testimony was believable and/or corroborated. *State v. Padilla*, 69 Wn. App. 295, 300,

846 P.2d 564 (1993); *State v. Casteneda-Perez*, 61 Wn. App. 354, 364, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991).

Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *Padilla*, 69 Wn. App at 300. An objection to a prosecutor's question is inadequate unless it calls the trial court's attention to the specific reason for the impropriety of the question. *Id.*

In this case, it appears that defense counsel was going to object – he asked the prosecutor to repeat his question, and the court intervened with “sustained.” (RP 475)

The lack of articulated objection is vague, but it appears, given the context of the improper question, that the court pre-empted the objection and instructed the jury to disregard the improper question and answer. Given these circumstances, the issue should be deemed preserved for review. “[T]he propriety of [a ruling on a general objection] will be examined on appeal if the specific basis for the objection was ‘apparent from the context.’ ” 5 K. Tegland, *Wash.Prac. Evidence*, § 10 at 33 (1989) (*quoting* ER 103(a)(1));

This case rested largely on credibility. Applying the *Padilla* factors, this case favors reversal: the prosecutor was able to provoke Mr. Miller into twice commenting that the deputies were lying. The deputies' testimony was corroborated only by each other, and Mr. Miller's version of events was not incredible.

In *Padilla*, the court reversed and remanded for a new trial based solely upon the prosecutor's misconduct in asking the defendant if the officer was lying. In that case, the court held that prosecutor was able to provoke the defendant into stating on the stand that the officer must have lied in his testimony, "the improper questioning carried a greater potential for prejudice." *Padilla*, 69 Wn. App. at 301. This case is quite similar.

Mr. Miller testified to a series of events that was dramatically different than the story told by the deputies. As a result, the prosecutor's questions – asked despite the court's sustaining of an objection – was blatant misconduct. The court instructed the jury to disregard the first question related to whether the deputies were lying about speeding, only to ask a follow up question related to whether the deputies were lying about why they needed to search the car.

The prosecutor's questions of Mr. Miller, demanding that he comment on the veracity of the deputies, was misconduct. Because the elements of the third degree assault of the deputies came down to the word

of the deputies versus that of Mr. Miller, the error was prejudicial and the court cannot conclude that this misconduct did not affect the jury's verdict. In all likelihood, this misconduct did in fact prejudice Mr. Miller and affect the jury's verdict. Therefore, Mr. Miller is entitled to a new trial.

E. CONCLUSION

Because Mr. Miller was prejudiced by both the court's admission of evidence that he had eleven prior arrests and convictions for driving under the influence, and the prosecutor's misconduct in provoking him to state that the deputies were lying on the stand, Mr. Miller is entitled to a new trial.

Dated this 22nd day of February, 2011.

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DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29241-0-III
)	
vs.)	CERTIFICATE
)	OF MAILING
JOSEPH C. MILLER, JR.,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on February 22, 2011, I sent a copy of Appellant's Brief by email to the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on February 22, 2011, I mailed a copy of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on February 22, 2011.


Julia A. Dooris #22907