FILED

FEBRUARY 5, 2015

Court of Appeals
Division III
State of Washington

No. 32318-8-III

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent

v.

WILLIAM P. MCBRIDE, Defendant/Appellant

BRIEF OF RESPONDENT

Attorney for Respondent

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RESTATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in permitting witness testimony about a prior crime for false statement beyond the scope of ER 609(a)?

2. Did the prosecutor commit misconduct by eliciting officer testimony as to the credibility of another witness?

3. Did the prosecutor commit misconduct by personally vouching for several witnesses during closing and rebuttal arguments?

4a. Did Mr. McBride receive ineffective assistance of counsel because his lawyer failed to object to opinion testimony from Deputy Jordan?

4b. Pursuant to Mr. McBride's Statement of Additional Grounds, did he receive ineffective assistance of counsel because his lawyer failed to provide a lesser included jury instruction for trafficking in stolen property?

5. Should the $100 DNA fee have been assessed?

BRIEF ANSWER

1. No. Evidence introduced fell properly within the scope of ER 608(b) and 609(a), which can be used in conjunction.

2. Yes. It should not have been done. However, it was harmless error because there was sufficient untainted evidence that a reasonable jury would have reached the same result even if the error had not occurred.

3. No. The prosecutor did not personally vouch for any witness, but rather drew conclusions based on evidence admitted during the trial.

4a. No. Mr. McBride's ineffective assistance of counsel claim fails because it doesn't meet the second prong of the

required test, as he can't demonstrate that actual prejudice occurred.

4b. No. Mr. McBride fails to demonstrate with the record there was substantial evidence to support a trafficking in stolen property jury instruction.

5. Maybe. There is evidence from the 2010 conviction that a sample was taken from the Defendant, but nothing to indicate the State Patrol has the sample.

STATEMENT OF THE CASE

Mr. McBride was convicted by a jury of Burglary in the Second Degree, and Theft of a Motor Vehicle, on February 25, 2014. CP 10-12, 40-41, 124-133; RP 299. The jury heard from two victim-witnesses, Fred Wagner and Dominic Petrovich. RP 34-53, 63-72.

Regarding the burglary, Mr. Wagner testified that his storage unit in the town of Tekoa was broken into. RP 36-56. Mr. Wagner stated that when he arrived on December 16, 2013, he noticed that someone had broken into his unit by cutting the bolt that held the door in two places. RP 40-41. Specifically, he spoke about a green camouflage backpack with a bungee cord that he wrapped around the frame (exhibit 26), a flight bag which initially had his name written on it in black permanent marker but which was blacked out

after he had last seen it (exhibit 25), and a large black duffel bag with a chemical suit inside (exhibit 27). RP 41-45. K

Kenneth Himes and Sheila Evans both testified that they entered Mr. Wagner's storage locker with Mr. McBride around 2:00-3:00 A.M. on December 16, 2013. RP 89-96, 135-145. They removed various items, including the backpack and duffel bags mentioned above. *Id.* All three then went back to Sheila Evans house where they divided up the items. *Id.* Mr. McBride took the backpack and the duffel bags as part of his share, and returned to his home. *Id.* These items were found at Mr. McBride's residence during a search by Whitman County Deputy Sheriff Michael Jordan. RP 54-56, 191-195. The backpack was found in the shed on Mr. McBride's property, to which only he had a key, and the duffel bags were both found at the foot of his bed. RP 191-195, 241-42.

Regarding the theft of a motor vehicle charge, Mr. Petrovich testified that two motorcycles he owned were stolen on the night of November 17, 2013 or in the early morning hours of November 18, 2013. RP 66-72. One was a larger motorcycle, a Kawasaki KLR 650, and a 2008 Yamaha 125 (a child's off-road motorcycle). RP 66. They had been stored under a carport at his home, which sat at the top of a small hill with the driveway rolling downhill. RP 68.

Ken Himes testified that he stole the smaller motorcycle earlier in the night from Mr. Petrovich's home, and then went to get Mr. McBride's help to steal the larger motorcycle. RP 77-85. Mr. McBride and a Donnie Rohr/Rower (proper spelling unknown in the record) went back to the town of Rosalia, from the town of Oakesdale. RP 77-85, RP 229, 240. Mr. Himes rolled the motorcycle coasting down the driveway, and Mr. McBride helped him load the motorcycle onto a trailer they brought for the purpose of stealing it. RP 77-85. Mr. Himes, Mr. Rower and Mr. McBride then took the large motorcycle to Lance Garrett's home. RP 86-88. Once at Lance Garrett's home, Mr. McBride and Mr. Himes hot-wired the motorcycle and rode it around. *Id.* Deputy Jordan found the motorcycle's on Lance Garrett's rented property at Stan Lowley's home. RP 175-77. Deputy Jordan learned of all three co-defendant's involvement in the burglary and theft from an interview with Ken Himes shortly after his arrest. RP 187.

Mr. McBride later admitted to Deputy Jordan that he had helped Mr. Himes "work on a motorcycle," after initially denying any involvement with the motorcycle at all. RP 190. Deputy Jordan was able to corroborate some of the facts that Ken Himes told him about, by verifying the stolen property that was located at Mr.

McBride's residence, Ms. Evans residence in Tekoa, as well as the residences of a Mr. Fuchs and a Mr. Shelton. RP 54, 95, 129, 186-187. The prosecutor did elicit from Deputy Jordan that he thought Mr. Himes had provided "real truthful information," which was not objected to. RP 187. Deputy Jordan also pointed out that Mr. Himes admitted to the bulk of the activity, including other burglaries and thefts, and only implicated Mr. McBride and Ms. Evans in certain portions. RP 187. This was corroborated by Mr. Himes' and Ms. Evans' testimony. RP 73-163.

During Ms. Baird's testimony, she testified that she had been Mr. McBride's girlfriend for 7 years. RP 217-18. She also testified that when she talked to Deputy Jordan about the burglary in December of 2013, she told him that "my other half was at home, yes" (referring the Mr. McBride), and that he couldn't have committed the burglary. RP 227-28. In addition, Ms. Baird stated that she told Deputy Jordan that Ken Himes and Donnie Rower were involved in the motorcycle theft, but denied implicating Mr. McBride. RP 229-30. Deputy Jordan later took the stand in rebuttal and stated that she had told him of the first two, and to look at Bill McBride as well. RP 230, 240. Ms. Baird also stated on direct, and a bit during cross exam, that "the shed" was accessible to

everybody including the co-defendants Mr. Himes and Ms. Evans. RP 219-20, 230-32. Though Ms. Baird also testified that Mr. McBride was the only one to have a key to the shed, but he was present when Mr. Himes dropped the backpack off which explained its presence in the shed. *Id.*

The prosecutor questioned Ms. Baird on all of the above items and inconsistencies when he asked her whether she was telling the truth that day. RP 234. The following exchange happened:

Q: Are you telling the truth today, Ms. Baird?
A: Yes, sir, I am telling you the truth.
Q: Do you only ever tell the truth?
A : Sir?
Q: Do you only tell the truth.
A: I do my level best.
Q: Do your level best.
Do you tell the truth to law enforcement?
A: I do my level best.
Q: Okay. Would lie for William McBride?
A: No, I would not.
Q: You would never lie for William McBride?
A: I didn't say I would never lie for him, but not when it comes to stealing, no.

RP 234. At this point, the prosecutor began to ask her about an incident that occurred 5 months prior to the trial, wherein she lied for Mr. McBride. RP 234-35. When Mr. McBride's trial attorney objected, he did so under ER 609.RP 235-36. The State responded

that it wasn't asking her about the conviction, but about a specific incident of conduct only 5 months earlier that she was answering freely, and stated that she was not impeached with the judgment and sentence (ER 608). RP 236-37. The Court overruled the objection, but on grounds of ER 609. At no time during closing arguments did the prosecutor refer to the prior actions of the witness or her conviction. RP 264-74, 287-96.

ARGUMENT

I. The trial court did not abuse its discretion by allowing testimony from Ms. Baird regarding the details of a prior conviction, as it was permissible under ER 608.

Cross-examination under ER 609(a) "is limited to the fact of the conviction, the type of crime, and the punishment." State v. Clark, 143 Wn.2d 731, 767 (2001). "Further, under ER 609, '[t]he details of the acts leading to the prior convictions are not admissible.'" Id., citing State v. Coles, 28 Wn.App. 563, 573 (1981). "However, these holdings are limited to an ER 609 analysis." Id. A judge could let misconduct in under ER 608(b) if the judge so chose. Id. Whether or not the judge chooses to do so would be subject to an abuse of discretion analysis. Id.

"The admission or exclusion of relevant evidence is within the discretion of the trial court and its decision will not be reversed absent a showing of manifest abuse of discretion." State v. Wilson, 60 Wn.App. 887, 890 (1991), *citing* State v. Jones, 95 Wn.2d 616, 628 (1981). There are limits to the use of ER 608(b), the specific conduct that is the subject of the questioning must be probative of truthfulness and not remote in time. Id. at 893. Further, the trial court should apply an ER 403 and an ER 611 analysis, and the specific instance must be relevant to veracity. Id. Even if the evidence is allowed in error, the error is harmless if "'within reasonable probabilities'" it did not affect the outcome of the trial. State v. Russell, 104 Wn.App. 422, 434 (2001).

In the Wilson case, a victim witness testified that she moved in with her sister Billie Wilson, who was married to the defendant. Wilson, 60 Wn.App. at 889. The victim also testified that she was sexually and physically abused by the defendant Wilson. Id. Billie Wilson took the stand and stated that she lived with her husband during the alleged abuse and because of that she would have known if any abuse

occurred, and that she was not aware of any abuse. Id. at 891. The state cross-examined Billie Wilson in detail about a specific act where she stated under oath that her husband was *not* a member of her household at the time the abuse occurred. Id. Emphasis added. The Wilson court held that the cross examination was relevant and admissible, even in extreme detail, because they demonstrated the extent to which Billie Wilson was untruthful. Id.

In the Coles case cited by Mr. McBride, the objection to the prosecutor's questions was sustained, and the prosecutor went on to ask further questions in spite of the ruling against the State. State v. Coles, 28 Wn.App. 563, 569-70 (1981). The prosecutor also referred to those details in closing arguments. Id. at 571.

In the case at bar, the trial court did not conduct an ER 403 analysis, however, it was not an abuse of discretion to allow the questions of Ms. Baird. Ms. Baird was the 7-year girlfriend of Mr. McBride, and testified that the shed and Mr. McBride's home were accessible to everyone, including the co-Defendant's, thus alleging they could have planted the duffel bags in Mr. McBride's bedroom. RP 219-

20, 227-32. She also testified that Mr. McBride could not have committed the burglary because he was home with her, and denied telling Deputy Jordan that Mr. McBride was involved in the motorcycle theft. *Id.* Ms. Baird's prior false statement was probative of truthfulness, just as Billie Wilson's was. In addition, it was not far removed in time, at only five months. The evidence was properly admissible under ER 608(b).

Harmless error.

Finally, if there was an error, it was harmless as there was more than enough evidence to convict him of both crimes. Regarding the burglary, the backpack was found in the shed on Mr. McBride's property, to which Ms. Baird stated that only Mr. McBride had a key, and the duffel bags were both found at the foot of his bed. RP 191-195, 241-42. Kenneth Himes and Sheila Evans both testified that they entered Mr. Wagner's storage locker with Mr. McBride, around 2:00-3:00 A.M. on December 16, 2013. RP 89-96, 135-145. They both testified that all three removed various items, including the backpack and duffel bags mentioned above. *Id.* All three then went back to Sheila Evans house where they divided up

the items. *Id.* Mr. McBride took the backpack and the duffel bags as part of his share, and returned to his home where Deputy Jordan found them during a search warrant. *Id.* Finally Deputy Jordan was able to corroborate other locations that Mr. Himes had stored stolen items from by verifying stolen property was located at Ms. Evans residence in Tekoa, as well as the residences of a Mr. Fuchs and a Mr. Shelton. RP 54, 95, 129, 186-187. Mr. Himes admitted to the bulk of the activity, including other burglaries and thefts, and only implicated Mr. McBride and Ms. Evans in certain portions. RP 73-131. This was corroborated by Ms. Evans' testimony. RP 132-163.

Regarding the theft of a motor vehicle charge, Mr. Petrovich testified that two motorcycles he owned were stolen in the middle of the night from November 17-18, and had been stored under a carport at his home, which sat at the top of a small hill with the driveway rolling downhill. RP 66-72. Ken Himes testified that he rolled the motorcycles down the hill of the driveway, and that the theft occurred in the early morning hours, around 2:00-3:00 A.M. *Id.* Both Mr. Himes and Ms. Baird testified that Mr. Himes and Donnie Rower were involved in the motorcycle thefts. RP 77-85, RP 229, 240. Deputy Jordan rebutted Ms. Baird's testimony and stated that she implicated Mr. McBride as well as the other two men. RP 240.

Mr. Himes stated that they took the motorcycles to Lance Garrett's home, and that is where Deputy Jordan found them. RP 86-88, 175-77. Finally, Mr. McBride made a contradictory statement that he had nothing to do with a motorcycle, but then admitted he had helped Mr. Himes work on one when confronted about possible fingerprints on the motorcycle. RP 190.

II. The prosecutor committed misconduct by eliciting officer testimony about the veracity of another witness, however, it was harmless error.

The State does not dispute that the prosecutor committed misconduct by eliciting the testimony from Deputy Jordan that Mr. Himes had provided "real truthful information." RP 187. State v. Saunders, 120 Wn.App. 800, 812-13 (2004). This should not have been done. In addition, though the Defendant's attorney failed to object to this issue, it is of a constitutional magnitude and can be raised for the first time on appeal. Id. at 813. "But even a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error." Id., *citing* State v. Guloy, 104 Wn.2d 412, 425-26 (1985). The State has the burden of proving harmless error. Id.

In the case at bar, the untainted evidence was so overwhelming that a reasonable jury would have reached the same result in the absence of the error. There is no need to restate all the same facts from the "harmless error" analysis described in issue number one above, the state incorporates it by reference.

III. The prosecutor did not personally vouch for any witness, but rather drew conclusions based on evidence admitted during the trial.

"It is improper for a prosecutor personally to vouch for the credibility of a witness." State v. Brett, 126 Wn.2d 136, 175 (1995), *citing* State v. Sargent, 40 Wn.App. 340, 344 (1985). "The Defendant bears the burden of "establishing both the impropriety of the prosecutor's conduct and its prejudicial effect.'" Id., *citing* State v. Furman, 122 Wn.2d 440, 445 (1993). Prosecutors can argue an inference from the evidence, "and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." Id. *Citing* Sargent, 40 Wn.App. at 344.

The Sargent court found that the prosecutor committed misconduct when he made the statement "I believe Jerry Lee Brown, I believe him..." Sargent, 40 Wn.App. at 343. However, the

Washington Supreme Court in State v. Brett found that the prosecutor did not commit misconduct because the prosecutor did not set forth a statement of personal belief. Brett, 126 Wn.2d at 175. "Rather, the prosecutor was drawing an inference from the evidence as to why the jury would want to believe one witness over another." Id. In another case, the Washington Supreme Court again found that the "badge of truth" theme and statements that the victim's testimony bore a "ring of truth" from the prosecutor during closing did not amount to misconduct. State v. Warren, 165 Wn.2d 17, 30 (2008). In fact, the court noted that the prosecutor's argument was a response to defense counsel's attack on the credibility of the witness during both opening statements and cross-examination. Id. In both Brett and Warren the Supreme Court differentiated the conduct of the prosecutor in those cases from the one in Sargent.

Finally, in another case from the Washington Supreme Court, once again the prosecutor used the "ring of truth" theme in referring to a paramedic's observations regarding the defendant's lack of grief. State v. Stenson, 132 Wn.2d 668, 727 (1997). However, the Court once again found that the "prosecutor was

within proper bounds in drawing inferences from" facts in evidence. Id. at 728.

In the case at bar, the prosecutor did not once state "I believe" or "I think so and so lied" or "I know so and so told the truth." In each instant, it was a statement based on facts in evidence from the trial.

The brief of appellant cites the record wherein the prosecutor stated: "But she was upset with him and she told them the truth," (referencing Amy Baird's testimony). RP 269. However, in the two paragraphs preceding that, the prosecutor argued from the following facts admitted during the trial: that Ms. Baird was arrested on December 14, 2013, that she'd been fighting with Mr. McBride and thought he was cheating on her, that she informed Deputy Jordan that Ken Himes and Donnie Rower were involved with the motorcycle thefts, and "maybe Bill." Id. That she had been dating Mr. McBride for 7 years. Id. The prosecutor immediately follows the "she told them the truth statement" with the fact that Mr. Himes also implicated himself, Donnie Rower, and Mr. McBride. Id.

During closing argument on behalf of Mr. McBride, his attorney stated that Mr. McBride was a "convenient scapegoat" for Mr. Himes and Ms. Evans. RP 277. He also stated that Mr. McBride

was "not trying to hide anything," and that had he been involved in the burglary he would have "denied, denied, denied." RP 283. The prosecutor was responding directly to this argument when he stated that "Mr. McBride does lie when confronted by Deputy Jordan." RP 294. The Prosecutor then goes on to argue facts in evidence for the next page and a half of argument. RP 294-95.

The same is applicable to the statements regarding Amy Baird and Deputy Jordan, and Ken Himes, in both instances the prosecutor was arguing facts in evidence. RP 288-89, 295-96. Mr. McBride fails to meet the burden of proving that misconduct was committed or prejudicial.

IVa. Mr. McBride's ineffective assistance of counsel claim fails to meet the two prong test.

Mr. McBride claims ineffective assistance of counsel due to his lawyer's failure to object to the improper testimony by Deputy Jordan regarding Mr. Himes giving "real truthful information." RP 187. To prevail on a claim of ineffective assistance of counsel, Mr. McBride must overcome the presumption of effective representation and demonstrate 1) that his lawyer's failure to object was so deficient that he was deprived of Counsel for 6th

amendment purposes, and 2) there is a reasonable probability that the deficient performance prejudiced his defense. State v. Thiefault, 160 Wn.2d 409, 414 (2007), *citing* Strickland v. Washington, 466 U.S. 668, 687 (1984).

The State will not contend that Mr. Monson should have objected to that evidence, and therefore the first prong has been met. However, as stated in issues number I and II above, there is not a reasonable probability that the deficient performance prejudiced Mr. McBride's defense. There was ample evidence for a jury to render the same verdict had the error not occurred.

IVb. Mr. McBride's ineffective assistance of counsel claim regarding failure to offer a jury instruction does not meet the two prong test once again.

In order to find that Mr. McBride received ineffective assistance of counsel for a failure to request a jury instruction, this Court must find three things. First, that Mr. McBride was entitled to such an instruction, second, that his lawyer's performance was deficient in failing to request the instruction, and third, that said failure prejudiced Mr. McBride. State v. Johnston, 143 Wn.App. 1, 21 (2007).

In order to meet the first prong of the test, Mr. McBride must demonstrate that he was entitled to a trafficking instruction, and he proposes trafficking in stolen property in the second degree. "Whether to give a particular instruction to the jury is a matter within the discretion of the trial court." State v. Block, 130 Wn.2d 486, 498 (1996). "A trial court is required to instruct the jury on a theory only where there is substantial evidence to support it." Id. Mr. McBride's claim must fail because the statement of additional grounds does not show anywhere in the record that the defense to the burglary was trafficking in stolen property rather than actual burglary. In fact, in a review of the record, the only mention of "traffic" in any form is when Mr. Himes is on direct examination and refers to a car going by during the motorcycle theft. RP 85. Further, in closing arguments, as the Statement of Additional Grounds points out, his counsel repeatedly states that Mr. McBride had nothing to do with the burglary, as the backpack was placed in the shed by Mr. Himes, and he already owned bags like those found. RP 274-287. There is nothing herein to demonstrate that Attorney Monson failed to perform to the standards of the profession by not asking for the trafficking instruction, as there was not sufficient evidence for the trial court to grant it.

V. The DNA sample fee was not necessarily collected in error.

RCW 43.43.754(1) states the following:

> A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony...

RCW 43.43.754(2) states:

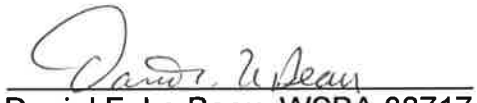
> If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a a subsequent submission is not required to be submitted.

Mr. McBride had a DNA sample collected on June 25, 2010, pursuant to a felony conviction for burglary second degree. CP 43-50. RCW 43.43.754(4) only states that samples submitted to the forensic laboratory services bureau *may* be retained. It may be silly not to presume that samples that are received are retained, and that the sample is on file with the Washington State Patrol. However, there was no evidence to demonstrate that Mr. McBride's prior sample was properly taken, properly transferred to the lab, and properly retained by the lab. This is an issue of first impression, and the State largely defers to the Court's discretion in this matter.

CONCLUSION

For the above reasons, the State respectfully requests that this court deny Mr. McBride's appeal issues and affirm the decision below.

Dated this 5th day of February, 2015.



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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. William Patrick McBride, Defendant,	Court of Appeals No. 32318-8-III No. 14-1-00002-7 AFFIDAVIT OF DELIVERY

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

JODI LANIUS , being first duly sworn, deposes and says as follows: That on the 5th day of February, 2015, I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

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DATED this 5th day of February, 2015.

JODI LANIUS

SIGNED before me on the 5th day of February, 2015

NOTARY PUBLIC in and for the State of Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2015

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