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Division III
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No. 36995-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JULIAN ALMAGUER,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The prosecutor's misconduct in citing extrinsic evidence during the rebuttal portion of closing argument was grievous misconduct requiring a new trial.

Julian Almaguer's defense to the charge of forgery was identity. He contended the prosecution had not proved beyond a reasonable doubt that he was the person in the Moneytree who three years earlier tried to cash a fraudulent check for \$156. Defense counsel made this argument to the jury during closing arguments. RP 195-99.

Following defense counsel's argument, the prosecutor attempted to persuade the jury that Mr. Almaguer was in fact the perpetrator by citing to extrinsic evidence. Specifically, the prosecutor asserted that Mr. Almaguer had possession of a hat in court during the trial, and that this was the "exact same hat" that Ms. Barney, the teller at the Moneytree, testified the perpetrator had worn. RP 200.

As argued, any hat that Mr. Almaguer had present with him in the courtroom during the trial was not evidence that could be considered by the jury. Br. of App. at 12-16. No witness testified about a hat in the courtroom. Mr. Almaguer did not testify, let alone testify wearing a hat. Any hat was extrinsic evidence. Consequently, it was both prosecutorial misconduct and serious constitutional error for the prosecutor to invite the jury to consider the hat. In re Pers. Restraint of Glasmann, 175 Wn.2d 696,

704-06, 286 P.3d 673 (2012); State v. Pete, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004).

The prosecution contends there was no misconduct or constitutional violation. In support, the prosecution contends the hat was “demeanor evidence” and that demeanor evidence is not extrinsic evidence. Br. of Resp’t at 6-7. But under the prosecution’s definition of demeanor evidence, possessing a hat is “not behavior toward others.” Br. of Resp’t at 6 (quoting Webster’s Third New International Dictionary 599 (2002)). Neither does it have anything to do with one’s “facial appearance.” Id. Possessing a hat does not constitute “demeanor evidence.” The prosecution’s argument is meritless and should be rejected. See State v. Newbern, No. 79519-8-I, 2020 WL 2843503, at *4 (Wash. Ct. App. June 1, 2020) (unpublished) (rejecting argument that defendant had a right to present “demeanor evidence” by standing up to show height and that the trial court’s ruling was reasonable because the defendant “sought to allow the jury to consider something beyond either the testimony of witnesses or the admitted exhibits.”).¹

The constitutional right to the assistance of counsel includes the right to have counsel make a closing summation to the jury. Herring v.

¹ Cited for persuasive value. GR 14.1(a).

New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Here, the prosecution's argument was especially improper in that it was made during the rebuttal portion of closing argument, which did not give Mr. Almaguer any opportunity to respond through counsel. See United States v. Wilson, 135 F.3d 291, 299 (4th Cir. 1998) (prosecutor's argument "was highly improper because it was not supported by the evidence and it was sprung at the last minute, when [the defense] had no chance to investigate the charge or to offer any evidence in defense"). As defense counsel later argued, the prosecutor's argument was a "surprise" and he "would have done something different possibly if [the hat] had been brought up by a witness." RP 226. In other words, the defense was "blindsided when it was too late to investigate the matter and present a defense." Wilson, 135 F.3d at 299.

The prosecutor's contention that the hat was the same hat worn by the perpetrator was essentially an improper propensity based argument. It invited the jury to conclude that Mr. Almaguer liked wearing black flat-billed hats, and therefore he was likely the man in the Moneytree who also wore a black flat-billed hat. In other words, the prosecutor used the extrinsic evidence to prove the character of Mr. Almaguer "in order to show action in conformity therewith," improper under ER 404(b)." State v. Salas, 1 Wn. App. 2d 931, 946, 408 P.3d 383 (2018) (citing State v.

Everybodytalksabout, 145 Wn.2d 456, 468, 39 P.3d 294 (2002)). This was extremely prejudicial and unfair.

Accordingly, the prosecutor's submission of extrinsic evidence to the jury requires reversal because there is a reasonable ground to believe that Mr. Almaguer may have been prejudiced. Glasmann, 175 Wn.2d at 705; Pete, 152 Wn.2d at 555 n.4. Neither has the prosecution met its burden to prove harmless beyond a reasonable doubt this constitutional violation. See Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980).

That the court sustained Mr. Almaguer's objection did not eliminate the prejudicial effect. As in Pete, where the jury received extrinsic evidence, no instruction could cure the resulting prejudice. 152 Wn.2d at 555. Our Supreme Court has warned parties "to avoid drawing the jury's attention to subject matter outside the scope of admitted exhibits and the testimony of witnesses." State v. Barry, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015). The prosecutor's action was in flagrant disregard of the law. State v. Jones, __ Wn. App. 2d __, 463 P.3d 738, 748 (2020) (argument is flagrant if it violates a rule set out in a published opinion). And it was especially prejudicial because it occurred during rebuttal, where Mr. Almaguer had no opportunity respond. State v. Lindsay, 180 Wn.2d 423, 444, 438 326 P.3d 125 (2014). The only remedy was a new

trial, as Mr. Almaguer requested. The prosecution's contrary argument should be rejected. This Court should reverse and remand for a new trial.

2. Over Mr. Almaguer's hearsay objection, the prosecution improperly elicited that the maker of the check stated she had not written the check to Mr. Almaguer and that it was fraudulent.

"Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003); accord United States v. Check, 582 F.2d 668, 679-80 (2d Cir. 1978).

Here, a man claiming to be Mr. Almaguer presented a check to cash at a Moneytree. Sara Barney, the teller, testified that after *she spoke* to the maker of check, Becky Nance, she concluded the check was fraudulent. As explained, this testimony was hearsay because the inescapable inference was that Ms. Nance had said to Ms. Barney that she did not write the check or authorize payment to M. Almaguer. Br. of App. at 22-24; State v. Johnson, 61 Wn. App. 539, 547, 811 P.2d 687 (1991); State v. Hudlow, 182 Wn. App. 266, 277-81, 331 P.3d 90 (2014). Had Ms. Nance said otherwise, Ms. Barney would have concluded the check was

not fraudulent. Accordingly, Mr. Almaguer's hearsay objection to Ms. Barney's testimony should have been sustained.

The prosecution contends that no out-of-court "statement" was elicited from Ms. Barney and therefore the testimony did not violate the general rule that hearsay is inadmissible. Br. of Resp't at 22-23. But this Court has placed substance over form in analyzing whether testimony constitutes hearsay. Martinez, 105 Wn. App. at 782; Johnson, 61 Wn. App. at 547. The prosecution's superficial argument should be rejected.

Further, the prosecution confusingly argues the testimony was admissible because "Officer Kernkamp called the issuer of the check to verify the payee" and that "[i]f this had not been done, it would constitute a substantial investigatory omission on the part of Officer Kernkamp." Br. of Resp't at 12. But the objection concerned testimony from Ms. Barney, not Officer Kernkamp. And the prosecution cites no authority that hearsay becomes admissible if the hearsay tends to show that the police conducted an adequate investigation. This unwritten exception would eviscerate the general rule that hearsay is not admissible. ER 802.

The prosecution has not argued the error is harmless. This Court should hold that the error was prejudicial and reverse Mr. Almaguer's conviction. Br. of App. at 24-25.

3. The trial court twice commented on the evidence by telling the jury that two witnesses had in fact identified Mr. Almaguer as the perpetrator of the forgery.

At the prosecutor's invitation, the trial court stated that the record would reflect that the two witnesses called by the prosecution identified Mr. Almaguer as the perpetrator of the forgery. Br. of App. at 26-27. By doing so, the court commented on the evidence twice. Br. of App. at 28-30. This is because the court's comments conveyed to the jury that the two witnesses had in fact identified Mr. Almaguer as the perpetrator of the forgery. See State v. Ratliff, 121 Wn. App. 642, 647, 90 P.3d 79 (2004). But whether the witnesses actually identified Mr. Almaguer as the perpetrator of the forgery was an issue for the jury, not the trial court.

The prosecution contends this argument is "meritless." Br. of Resp't at 15. Contrary to the prosecution's contention, there is no need for the trial judge to say anything if a party in a jury trial asks that the record "reflect" that the witness has identified someone in the courtroom. Br. of Resp't at 15. For example, in this case, the prosecutor could have simply asked if the person sitting next to the defense attorney is the same person the witness saw in the Moneytree or on the surveillance footage. Moreover, as transcripts from other cases show, trial judges usually remain silent when a party asks that the record reflect that a witness has

identified a person in court. Those judges correctly recognize that to answer yes or no constitutes a comment on the evidence.

The prosecutor contends that the prejudicial effect of any comment on the evidence was neutralized by the court's instructions. Br. of Resp't at 15. The instruction the prosecution refers to is a standard instruction that is given in virtually every case. Yet Washington courts regularly hold that judicial comments on the evidence are prejudicial. This makes sense because the harmless error standard for judicial comments is rigorous. State v. Sinrud, 200 Wn. App. 643, 651, 403 P.3d 96 (2017); Br. of App. at 30-31. Here, the jury was not instructed to specifically disregard the judicial comments. And given that Mr. Almaguer's defense was identity, the prosecution cannot not meet its burden to show that no prejudice resulted. Br. of App. at 30-31. The conviction should be reversed.²

4. The prosecution correctly concedes that it did not meet its burden to prove Mr. Almaguer's offender score. The concession should be accepted, and the case remanded for a new sentencing hearing.

The prosecution failed to prove that Mr. Almaguer's prior class C felony convictions did not "wash out." In other words, the prosecution did not prove that these prior convictions should count in Mr. Almaguer's

² Mr. Almaguer reiterates that reversal is warranted under the cumulative error doctrine. Br. of App. at 32.

offender score. The remedy is remand for a new sentencing hearing. Br. of App. at 33-35.

The prosecution correctly concedes error and agrees the remedy is remand for a new sentencing hearing. Br. of Resp't at 16-17. The concession should be accepted.

B. CONCLUSION

The prosecutor committed serious misconduct by inviting the jury to consider extrinsic evidence. For this and the other reasons advanced, this Court should reverse and remand for a new trial. Alternatively, the Court should remand for a new sentencing hearing.

Respectfully submitted this 20th day of August, 2020.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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)	
RESPONDENT,)	
)	
v.)	NO. 36995-1-III
)	
JULIAN ALMAGUER,)	
)	
APPELLANT.)	

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