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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JULIAN ALMAGUER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the prosecutor commit misconduct by referencing a hat that Mr. Almaguer wore to trial when testimony elicited during trial discussed the same or similar hat?
2. Did the trial court err in overruling Mr. Almaguer's hearsay objection to the bank teller's testimony when the teller did not testify to any statement made by a non-testifying individual?
3. Did the trial court comment on the evidence when it stated that the "record will reflect" a witness' in-court identification of the defendant?
4. Did cumulative error prevent a fair trial in this case?

II. STATEMENT OF THE CASE

On June 14, 2016, a Money Tree employee, Sara M. Scott¹ called Crime Check to advise that an individual named Julian Almaguer attempted to cash a stolen check at her place of business. RP 127-128. Spokane Police Officer Michele Kernkamp reviewed the complaint. CP 3.

Ms. Scott told Officer Kernkamp that Mr. Almaguer wanted to cash a Bank of America check for \$156.00. CP 2. She noticed the check appeared to have been altered; Mr. Almaguer's name on the "pay to" line, was written in heavy black ink, as if concealing the name of the check's original payee

¹ At the time of trial, the witness' legal name was Sara M. Barney.

and was written in Mr. Almaguer's own handwriting and that the 'memo' line of the check had been altered. RP 154. Ms. Scott then contacted issuer of the check, Becky J. Nance; after speaking with Ms. Nance, she concluded the check had been improperly altered. RP 154.

On July 1, 2016, the State charged Mr. Almaguer with one count of forgery. CP 1.

Officer Kernkamp testified that she reviewed security camera footage from the Money Tree, recorded on the day of the incident. RP 132. She testified to what she saw in the video, and confirmed that the individual in the video was Mr. Almaguer and that identity was confirmed with a copy of his driver's license. RP 132, 134. Officer Kernkamp made a positive identification of Mr. Almaguer as the person she had seen in the surveillance video. RP 135. She also testified, during cross-examination, that she compared the signature on the suspect check to Mr. Almaguer's signature on his driver's license. RP 137-138.

At trial, Ms. Scott also positively identified Mr. Almaguer in court as the man who attempted to pass the stolen check while she was employed at the Money Tree. RP 153. She testified that, at the time of the incident, he wore a black flat-billed hat. RP 150.

Though Mr. Almaguer did not testify, he presented an identity defense to the jury. RP 123-24, 167-168, 177.

The court instructed the jury that the lawyers' remarks are not evidence and that the constitution prohibits trial judges from commenting on the evidence. CP 13.

In its closing rebuttal, the following occurred:

[MR. JOLSTEAD for the State:] One of the things that's also interesting is the fact that ... is that Ms. Barney,² while she was up here speaking and talking about what Mr. Almaguer had worn that day, and she said that he had a black flat-billed cap. And the defendant in court has had possession of that exact same hat, whether or not you've noticed it.

MR. WHALEY: Your Honor, I object to that.

THE COURT: Sustained.

MR. WHALEY: That's inappropriate.

MR. JOLSTEAD: But look at the other similarities. We have had the birth dates are the same. The height is the same. The nationality is the same. The pictures, again, are the same. Mr. Whaley is right. Everything in this particular case rises and falls with whether or not this Mr. Almaguer is the same Mr. Almaguer that was in Moneytree.

RP 200.

On May 8, 2019, the jury found Mr. Almaguer guilty of forgery. CP 31.

On July 25, 2019, Mr. Almaguer moved the court for a new trial arguing prosecutorial misconduct in closing arguments when the prosecutor

² Referred to herein as Ms. Scott.

mentioned the black hat Mr. Almaguer had with him at trial, as that hat had not been admitted into evidence. CP 32-34. The motion was untimely filed, and the State was unable to brief the issue; nevertheless, the court permitted the parties to argue the motion prior to sentencing. CP 62.

The trial court found that the State had elicited facts about the black hat worn by the individual who attempted to pass the fraudulent check. CP 63. Therefore, discussion of the black flat billed hat during closing argument was not error and if it was, it was harmless error. CP 63-64.

Specifically, the court noted:

[T]he jurors are advised not only to disregard argument of the lawyers because argument and speculation is not evidence, they are also presumed to follow the Court's instructions. That's also the law. So it's already presumed that the jurors aren't paying attention to something that they hear in a closing if it's not evidence. It's just mere argument.

But all that said, regardless of whether the jurors did pay attention to this comment or not, this is just one piece of evidence that they heard, and they did hear about a black flat-billed hat. And really, Counsel, this is pointed -- the prosecutor pointed to the hat that Mr. Almaguer had. I presume it was sitting on the table in front of him, if I remember correctly, and I'm going to presume it was a black flat-billed hat or the prosecutor wouldn't have said anything. But, first of all, Mr. Almaguer is the one that chose to bring that hat into the courtroom. He didn't have to.

It strikes me this is really no different than a prosecutor doing what Mr. Jolstead was doing in the paragraph before he touched on the hat. He was pointing out the defendant sitting in the courtroom, saying he matches the description of the person that was the alleged perpetrator of this crime.

It's the same thing the State was doing regarding this hat. Look at that hat, it's the same kind of hat that was described by the victim at the time of the commission of the crime. So really not that much different than the State just pointing out the defendant that's sitting right there. The prosecutors do that all the time.

RP 237-238.

At sentencing, Mr. Almaguer and the State debated his correct offender score. The State presented evidence to the court, including certified copies of Mr. Almaguer's prior convictions, which did not become part of the court record. RP 241.

Mr. Almaguer timely appeals.

III. ARGUMENT

A. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY MENTIONING MR. ALMAGUER'S HAT

1. The prosecutor did not commit misconduct by mentioning the black hat that Mr. Almaguer wore at trial; the hat was demeanor evidence

A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

It is error to submit evidence to the jury that has not been admitted at trial. *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004). The “long-standing rule” is that “consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable

ground to believe that the defendant may have been prejudiced.” *Id.* at 555 n. 4.

However, demeanor evidence of the defendant is not extrinsic evidence. Courts have determined that consideration of demeanor evidence is constitutionally barred only if the demeanor is testimonial, or if it is merely the demeanor accompanying a defendant’s silence or failure to testify. *State v. Barry*, 183 Wn.2d 297, 305-06, 352 P.3d 161 (2015) (citing to *United States v. Clark*, 69 M.J. 438, 444–45 (C.A.A.R. 2011)). Webster’s defines “demeanor” as “behavior toward others: outward manner: CONDUCT” or, alternatively as, “BEARING, MIEN: facial appearance.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 599 (2002).

Consistent with constitutional jurisprudence and the plain meaning of the word, the Constitution does not protect evidence of a defendant’s actions or demeanor. *State v. Barry*, 183 Wn.2d 297, 305, 352 P.3d 161 (2015). This is especially true in a case where the defendant raises an identity defense. The identity of a criminal defendant must be proven beyond a reasonable doubt. *City of Bellingham v. Struthers*, 109 Wn. App. 864, 868, 38 P.3d 1021 (2001). To prove its case, the State is therefore permitted to make lawful argument that supports its theory.

While “a prosecutor who comments on the defendant’s demeanor is ‘strolling in a minefield’ strewn with both constitutional and evidentiary

hazards,” a comment on the defendant’s demeanor does not necessarily violate the defendant’s rights. *Barry*, 183 Wn.2d at 305 n.4 (citing *Borodine v. Douzanis*, 592 F.2d 1202, 1209 (1st Cir. 1979)).

Here, the prosecutor did not commit misconduct during the rebuttal portion of his closing argument. The State elicited witness testimony that Mr. Almaguer wore a black ballcap at the Money Tree on the day he passed the forged check.

That Mr. Almaguer wore the same or a similar hat to trial was demeanor evidence that the jurors could observe for themselves. The jury had been asked to decide Mr. Almaguer’s guilt or innocence and Mr. Almaguer raised an identity defense. Therefore, it was permissible for the State to ask the jury to consider Mr. Almaguer’s demeanor and bearing, including his appearance, when the jury weighed the credibility of the State’s two witnesses, who both identified Mr. Almaguer in court.

2. Mr. Almaguer is not entitled to a new trial; the trial court sustained his objection to the State’s mention of the black hat in the courtroom and jurors are presumed to follow instructions

Jurors are presumed to follow the court’s instructions. *Matter of Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018).

Here, the jury was properly instructed to disregard arguments, evidence, or testimony at the direction of the court. CP 13. Mr. Almaguer immediately objected to the prosecutor’s argument regarding the black hat

and that objection was sustained by the trial court. The prosecutor's argument then continued with no further reference to the hat.

Additionally, the jury was properly instructed that the lawyer's statements are merely argument, and not evidence and to disregard any comments that did not align with the evidence. There is no evidence that the jury failed to heed either of the court's instructions in this case.

Furthermore, the State's allegedly improper remarks, reviewed in context, demonstrate they were not so flagrant, ill-intentioned or of a magnitude that requires reversal. *Brown*, 132 Wn.2d at 561. There was a single reference to the hat, followed by Mr. Almaguer's objection, which was sustained and the prosecutor never referenced the hat again.

Additionally, prior to the verdict, Mr. Almaguer did not move for a mistrial. This suggests Mr. Almaguer did not find the comment so flagrant at the time and only moved the court for a new trial after waiting to hear the verdict. *State v. Webster*, 20 Wn. App. 128, 132–33, 579 P.2d 985 (1978).

3. The trial court properly denied Mr. Almaguer's motion for a new trial when it found there was no prosecutorial misconduct

The court on motion of a defendant *may* grant a new trial for misconduct by the prosecution when it affirmatively appears that a substantial right of the defendant was materially affected. CrR 7.5(a)(2) (emphasis added).

This court reviews a trial court's decision whether or not to grant a new trial for abuse of discretion. *State v. Hawkins*, 181 Wn.2d 170, 179–80, 332 P.3d 408, 412 (2014).

A trial court's wide discretion in deciding whether or not to grant a new trial stems from "the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record." *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

In his assignments of error, Mr. Almaguer takes issue with Finding III which reads, "That during closing arguments the State made mention of a Black billed had which was in the possession of the defendant during trial and which had been discussed during presentation of evidence." RP 61. He also objects to six of the trial court's conclusions of law that flow from Finding III. CP 62-64. However, each of the findings is proper, and properly understood when read in context.

Finding III indicates that Mr. Almaguer possessed a black hat during trial and that there was discussion of a black hat during trial. Because both statements are undisputed factually, this is a proper finding.

Likewise, the trial court's conclusions of law are also proper.

- Conclusion XI is a proper conclusion as the black hat was discussed at trial. RP 150.

- Conclusion XII is a proper conclusion; read in context, it is clear that when Ms. Scott was asked what the defendant is was wearing, she was asked what he was wearing at the time of the incident, not on the day of trial. RP 150.
- Conclusion XIII is a proper conclusion because the State, in questioning Ms. Scott, elicited testimony that he wore a black hat at the time of the incident. This testimony was in evidence. RP 150.
- Conclusion XV is likewise proper, though unartfully drafted. The trial court was stating that since Mr. Almaguer raised an identity defense, it should be expected that the State would point out similarities between Mr. Almaguer's appearance in court to the copy of his driver's license taken on the day of the incident. The court recognized that the black hat was just one such similarity, in addition to others.
- Conclusion XIX is also unartfully drafted. The testimony pertaining to the hat was in evidence; the hat was not in evidence itself. Nevertheless, the oral record makes clear that the trial court found that reference to the physical hat in court was fair game once the State had elicited testimony regarding the hat ("Mr. Almaguer is the one that chose to bring that hat into the courtroom. He didn't have to." RP 238).
- Conclusion XX is also correct, and ties in to the previous conclusion. Testimony regarding the hat was only one piece of evidence presented to the jury. Other evidence of identification included both witnesses' in court identifications as well as the copy of the forged check and Mr. Almaguer's driver's license.

The trial court did not abuse its discretion when denying Mr. Almaguer's motion for a new trial because it was clear to the trial court that it was not prosecutorial misconduct for the State to point out the hat that Mr. Almaguer brought to court. *See Hawkins*, 181 Wn.2d at 179–80. The court correctly concluded that if it were error to mention the hat in closing

argument, it was harmless error, when viewed with all the other evidence presented by the State in regards to the identity of the individual who presented the altered check at the Money Tree on June 14, 2016.

B. THE TRIAL COURT DID NOT ERR IN OVERRULING MR. ALMAGUER'S HEARSAY OBJECTION BECAUSE MS. SCOTT DID NOT TESTIFY TO ANYONE'S OUT OF COURT STATEMENTS

1. The testimony to which Mr. Almaguer objected at trial was not a "statement" and, therefore, not hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. This Court reviews whether or not a statement was hearsay de novo. *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014). This Court reviews the admission of evidence under hearsay exceptions for abuse of discretion. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008).

Mr. Almaguer relies on the case of *State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991). The *Johnson* court held that a police officer's testimony recounting statements provided by a non-testifying informant were hearsay; during trial, the officer testified that based on a search warrant affidavit containing the informant's statement, the police determined that a certain house was the location of drug dealing, that the defendant would be

at the residence, and that she was involved with drug trafficking. *Johnson*, 61 Wn. App. At 544

As noted in *State v. Melland*, 9 Wn. App.2d 786, 452 P.3d 562, 574 (2019),

In *Johnson*, the court allowed a police officer to testify that based on statements in the affidavit of a confidential informant, the officer “had reason to suspect” the defendant was involved in drug trafficking. The court held the improper inference from the testimony was that the affidavit provided evidence of guilt.

Melland, 9 Wn. App. 2d at 810, n.9.

Here, unlike in *Johnson*, Ms. Scott made no reference to what Ms. Nance said in response to the questions she asked. There were no statements proffered, therefore, there was no hearsay. The jury was provided with the information that Officer Kernkamp called the issuer of the check to verify the payee. If this had not been done, it would constitute a substantial investigatory omission on the part of Officer Kernkamp; it was proper for the State to provide the jury with the facts surrounding the investigation.

2. The trial court did not err in overruling Mr. Almaguer’s objection to Ms. Scott’s testimony

This Court reviews evidentiary decisions for an abuse of discretion: “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001), *as amended* (July 19, 2002). Evidentiary error is grounds for reversal only if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Here, there is no doubt the trial court properly exercised its discretion in allowing Ms. Scott to answer the question as posed by the State. Ms. Scott did not testify to any non-testifying person’s out of court statements. She stated that in her capacity as an employee of Money Tree she called the issuer of the check. She then stated that based on her investigation she concluded the check was fraudulent. Her testimony also included facts from her investigation that the check appeared altered in a number of ways, including the fact that the name “Julian Almaguer” on the “pay to” line of the check was written in Mr. Almaguer’s own handwriting, in very heavy ink to disguise what was written beneath it and that the “memo” line of the check had been defaced so what had been written there was unreadable. For these reasons, the testimony was not admitted in error, was not prejudicial, and does not require reversal of the jury’s verdict.

C. THE TRIAL COURT DID NOT MAKE A COMMENT ON THE EVIDENCE WHEN IT INDICATED THE RECORD WOULD REFLECT THE WITNESSES' IN-COURT IDENTIFICATIONS OF THE DEFENDANT

A judge may not comment on evidence. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996) (citing WASH. CONST. art. IV, § 16). “An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Swan*, 114 Wash.2d 613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

Here, Mr. Almaguer argues that because the court replied, “the record will reflect the same,” when both Ms. Scott and Officer Kernkamp identified Mr. Almaguer in court that this somehow is a comment on the evidence. In *State v. Jones*, 171 Wn. App. 52, 55, 286 P.3d 83 (2012), this identical argument was summarily dismissed:

Here, the trial court simply stated for the record a fact that had just occurred at trial, namely that Officer Telford had identified Jones in court as the driver of the vehicle he stopped. This statement was not a comment on the evidence, it was not impermissible, and it is not a ground for reversal.

Jones, 171 Wn. App. at 55.

Mr. Almaguer encourages this Court to reach a different conclusion just because it can, pursuant to *Matter of Arnold*, 190 Wn.2d 136, 410 P.3d

1133 (2018). Nevertheless, the State asks this Court to dismiss this meritless argument as the *Jones* court did. For the record to reflect the actions that take place in court which may not be evident in a trial transcript, such as a witness identifying a defendant by the color of his shirt, is a necessary practice for trial courts to ensure the witness' testimony is accurately captured by the court reporter. Such a notation is not reflective of a trial judge's opinion on the evidence or testimony. Even if it were, the jury was provided an instruction that said the trial judge's opinions or comments on the evidence are to be ignored. Jurors are presumed to follow the court's instructions. *Phelps*, 190 Wn.2d at 172. There is no evidence here that they did not.

D. MR. ALMAGUER HAS FAILED TO ESTABLISH ANY ERROR, THEREFORE, THERE IS NO CUMULATIVE ERROR

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless and the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006).

As discussed above, Mr. Almaguer has failed to prove how each alleged instance of misconduct affected the outcome of his trial. Similarly, Mr. Almaguer has not indicated how the alleged instances of misconduct combined to affect the outcome of his trial beyond his bald assertion that

they did so. This court should deny Mr. Almaguer's request for reversal on this basis.

E. MR. ALMAGUER'S OFFENDER SCORE IS 9+ AND HE WAS SENTENCED ACCORDINGLY; HOWEVER, REMAND IS NECESSARY TO ESTABLISH THE PROPER RECORD

The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. *State v. Arndt*, 179 Wn. App. 373, 378, 320 P.3d 104 (2014).

The State concedes that the evidence that Mr. Almaguer's prior convictions did not "wash out" was not before the trial court at sentencing. The State requests this Court remand to the trial court for a resentencing hearing so the State can prove Mr. Almaguer's offender score beyond a reasonable doubt.

A standard range sentence is determined through a mathematical formula, the inputs for which are a defendant's offender score and the offense seriousness level of the crime of which he was convicted. RCW 9.94A.530(1). The offender score is a sum of points, representing past and current offenses, accrued by the defendant as determined by the trial court at the date of the sentencing hearing pursuant to RCW 9.94A.525. The first subsection of that statute provides that a prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. RCW 9.94A.525(1).

RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in a person's offender score. That statute provides, in relevant part:

[C]lass C prior felony convictions ... shall not be included in the offender score if, since the last date of release from confinement ... pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

Here, though the trial court was presented with some documentation of Mr. Almaguer's criminal history, including certified copies of judgment and sentence documents from his prior convictions, these documents are not in the record and the oral record is insufficient to show that the State proved Mr. Almaguer's offender score by a preponderance of the evidence. Resentencing is required.

IV. CONCLUSION

For the foregoing reasons, the State requests this Court affirm the decisions of the trial courts in all respects, ultimately affirming Mr. Almaguer's conviction and remanding to the trial court for a resentencing hearing.

Dated this 23rd day of July, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in blue ink, appearing to read "Steph J. Richards", is written over a horizontal line.

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SPOKANE COUNTY PROSECUTOR

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