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No. 37022-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas McBride,

Appellant.

Whitman County Superior Court Cause No. 19-1-00097-4

The Honorable Judge Pro Tem Gary J. Libey

Appellant's Reply Brief

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ARGUMENT

I. DEPUTY NEBE SHOULD NOT HAVE GIVEN HIS OPINION THAT MR. MCBRIDE “HA[D] CONTROL OVER THE BEDROOM” WHERE DRUGS WERE FOUND.

- A. The improper opinion testimony violated Mr. McBride’s right to an independent jury determination of the facts.

A witness may not provide an opinion on the accused person’s guilt. *State v. Quale*, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014).

Such opinions are improper whether made directly or by inference. *Id.*; *State v. King*, 167 Wn.2d 324, 331-332, 219 P.3d 642 (2009) .

The primary issue at trial was whether the state had proven the element of possession of drugs found in a garbage can. RP (7/8/19) 111. Deputy Nebe opined that Mr. McBride had “control” over the area. RP (7/8/19) 108.

This was an improper opinion on Mr. McBride’s guilt, and violated his constitutional right to a jury trial. *King*, 167 Wn.2d 324, 331-332; *see also State v. Farr-Lenzini*, 93 Wn.App. 453, 459-466, 970 P.2d 313 (1999). Nebe’s improper opinion was particularly prejudicial because it carried the special aura of reliability that attends law enforcement testimony. *See King*, 167 Wn.2d at 331.

Respondent does not suggest that Nebe's testimony was proper.¹ Instead, Respondent argues that the constitutional error was not manifest, and that any error was harmless. Brief of Respondent, pp. 13-14. This may be treated as a concession that constitutional error occurred. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Constitutional violations require reversal unless the State can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Even non-constitutional error is prejudicial unless it can be described as trivial, formal, or merely academic. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Here, the State cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic. *Lorang*, 140 Wn.2d at 32. Nor can it show that "any reasonable jury would have reached the same result without the error." *Jones* 168 Wn.2d at 724; *see also Lorang*, 140 Wn.2d at 32.

Mr. McBride was not in actual possession of the drugs when police entered. RP (7/8/19) 94, 111. The prosecution thus rested on proof of

¹ Respondent admits that the prosecutor's question about control was "not the wisest question." Brief of Respondent, p. 9.

constructive possession. CP 16. Deputy Nebe told jurors that Mr. McBride had “control” over the area, even though another person was seated on the bed near a scale and white crystals. RP (7/8/19) 90, 128-129, 148.

Even if some evidence showed that the bedroom belonged to Mr. McBride, this does not establish that he had control over the area at the time police entered and found drugs. Nebe’s improper opinion testimony tipped the scales in favor of conviction, violating Mr. McBride’s Sixth Amendment right to an independent jury determination of the facts. *Quaale*, 182 Wn.2d at 199.

The State cannot show beyond a reasonable doubt that the constitutional error was harmless. *Franklin*, 180 Wn.2d at 378. Mr. McBride’s conviction must be reversed, and the case remanded with instructions to exclude Nebe’s opinion. *Id.*

B. The error may be reviewed for the first time on appeal

A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3); *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Here, Respondent appears to concede that Mr. McBride’s argument raises a constitutional issue. Brief of Respondent, p. 9.

The only question, therefore, is whether the error is “manifest.” An error is manifest if it “resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial.” *Id.*

However, despite this formulation, the determination does not rest on the impact of the error.² *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010). The ‘actual prejudice’ determination “is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal.” *Id.*

Thus, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.* This approach “ensure[s] [that] the actual prejudice and harmless error analyses are separate.” *Id.*

An error is manifest if necessary facts appear in the record. *Id.* If facts necessary to adjudicate the error are not in the record, the error is not manifest. *Id.* The Supreme Court has settled on a formulation that focuses on the information available to the trial court: an error is manifest under RAP 2.5(a)(3) if, “given what the trial court knew at that time, the court could have corrected the error.” *Id.*, at 100.

² Likewise, the standard “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Lamar*, 180 Wn.2d at 583.

Respondent does not address this standard. Brief of Respondent, pp. 10-13. Instead, Respondent appears to conflate the test for “manifest error” with an analysis of the error’s impact on trial. Brief of Respondent, pp. 10-13.

This is the very problem warned of by the *O’Hara* court. Instead of focusing on the impact of the error, Respondent should have focused on whether necessary facts appear in the record. Because all facts necessary to adjudicate the error appear in the record, RAP 2.5(a)(3) is satisfied. *Id.*

The officer’s testimony included a nearly explicit opinion on Mr. McBride’s guilt. RP (7/8/19) 108. The trial court “could have corrected the error.” *Id.* Accordingly, the error is manifest and may be raised for the first time on appeal. *Id.*; RAP 2.5(a)(3).

II. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE AND VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

During the State’s case-in-chief, the trial judge directed Deputy Nebe to read jurors a specific portion of a transcript prepared by the prosecutor’s office. RP (7/8/19) 134. The judge announced that he had a copy of the transcript and specified the page and line numbers to be read. RP (7/8/19) 134-135. Deputy Nebe followed the court’s directive and read the specified lines to the jury, despite the absence of any question from the prosecutor. RP (7/8/19) 134-135.

The judge gave jurors the impression that he believed that the transcript was an accurate report of the “hard to hear” portions of the recording. RP (7/8/19) 134-135. He also implied that the evidence was significant. Furthermore, his actions suggested that he was aligned with the prosecution.

This violated the appearance of fairness doctrine and amounted to a comment on the evidence. *See State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007); Wash. Const. art. IV, §16.

A. Reversal is required because Respondent concedes that the court commented on the evidence.

Respondent concedes that the court commented on the evidence. Brief of Respondent, p. 15. This requires reversal of Mr. McBride’s conviction under the heightened standard for harmless error review of judicial comments. *Jackman*, 156 Wn.2d 743-745; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Respondent applies the wrong legal standard, arguing that the judge’s actions “did not prejudice the Appellant.” Brief of Respondent, p. 15. According to Respondent, a comment does not require reversal if the record affirmatively shows “that the Appellant was not prejudiced.” Brief

of Respondent, p. 15. This is incorrect: the issue is not whether the accused person was prejudiced.

Instead, reversal is required unless the record affirmatively shows that no prejudice *could have* resulted. *Jackman*, 156 Wn.2d 743-745; *Levy*, 156 Wn.2d at 725. In other words, the analysis turns on the mere *possibility* of prejudice, not on the presence or absence of prejudice.

Here, there is a possibility of prejudice. First, the court implied that the transcript (prepared by the prosecutor's office) was reliable and thus more helpful to the jury than the recording that was "hard to hear." RP (7/8/19) 134-135. Second, by directing Deputy Nebe to read specific lines from the transcript, the court suggested that those lines reliably reproduced those portions of the recording that were "hard to hear," and that the specified passages were significant. RP (7/8/19) 134-135. Third, by announcing that he had a copy of the transcript, by selecting the passages to be read, and by eliciting the testimony without any question from the prosecutor, the judge gave the impression that he was aligned with the State against Mr. McBride. RP (7/8/19) 134-135.

Respondent's harmless error analysis also reflects a misunderstanding of the judicial comment. Mr. McBride does not claim that the judge "indicate[d] what the lines stated." Brief of Respondent, p. 16. Nor does Mr. McBride argue that the court gave an opinion "as to the

truth or the context” of Mr. McBride’s statements. Brief of Respondent, p. 16.

Instead, taken as a whole, the court appeared to endorse the transcript, suggesting that jurors should accept it over what they could discern from the recording that was admitted into evidence. In addition, the judge appeared to align himself with the State, a fact that Respondent does not address. Brief of Respondent, pp. 15-16.

Finally, the problem is not solved by the court’s general instruction to disregard any unintentional judicial comments. *See* Brief of Respondent, p. 16. The record does not affirmatively show that the court’s instructions removed all possibility of prejudice, so that “no prejudice could have resulted.”³ *Jackman*, 156 Wn.2d at 743. Even a contemporaneous instruction would likely have been insufficient. *See, e.g., State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (“[T]he damage was done when the remark was made and it was not capable of being cured by a subsequent instruction to disregard.”)

Because the trial judge commented on the evidence, Mr. McBride’s conviction must be reversed. *Jackman*, 156 Wn.2d at 743-745. The case must be remanded for a new trial. *Id.*

³ Although “[j]urors are presumed to follow [their] instructions,” this presumption is not equivalent to an affirmative showing that they did in this case. *Matter of Phelps*, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018).

B. The court's violation of the appearance of fairness doctrine requires reversal.

A proceeding satisfies the appearance of fairness if "a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *Solis-Diaz*, 187 Wn.2d at 540. Any showing of "potential bias" violates the doctrine. *Id.*

Here, the court's actions suggest "potential bias," even if the judge had no actual bias. The court helped the prosecutor present a portion of the State's case. Without any request from the prosecution, the court instructed Deputy Nebe to read to jurors specific lines from a transcript that was not itself admitted into evidence. RP (7/8/19) 134-135. The transcript had been prepared by the prosecution. RP (7/8/19) 134-135.

A reasonable observer who knew and understood all the relevant facts would have concluded that the judge was helping the prosecution. *Id.* This violates the appearance of fairness doctrine, regardless of the court's actual motives.

Respondent does not address the standard outlined in *Solis-Diaz*. Brief of Respondent, pp. 17-18. Instead, Respondent appears to suggest that Mr. McBride cannot prevail unless he points to authority showing that the precise facts here are "evidence of actual or potential bias." Brief of Respondent, p. 18. This is incorrect.

Mr. McBride's argument is based on the test adopted by the Supreme Court: whether a reasonable prudent observer would conclude the trial had been fair and impartial. *Id.* He is not required to produce an appellate decision addressing the specific facts of this case.

The trial court violated the appearance of fairness doctrine. Mr. McBride's conviction must be reversed, and the case must be remanded for proceedings before a different judge. *Id.*

III. THE TRIAL COURT VIOLATED MR. MCBRIDE'S CONFRONTATION RIGHT.

Respondent concedes that "reading from the transcript constituted double hearsay," and appears to agree that the error violated Mr. McBride's confrontation right. Brief of Respondent, p. 23. This requires reversal unless Respondent can prove that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 378.

Respondent's harmless error argument rests on the assumption that the transcript was accurate, and that it provided no information beyond what jurors would discern from listening to the recording. According to Respondent, "the evidence before them would be the same whether read from a transcript or heard on the recording." Brief of Respondent, p. 24.

But the court described the recording as “hard to hear.” RP (7/8/19) 134. It is possible that the prosecutor’s transcriptionist made errors in the transcript.

In the absence of the transcript, jurors might have reached a different conclusion regarding what was said. Indeed, without the use of technology to slow the recording or to repeat segments of it, the jury may have been unable to determine the words used by each speaker.

The State cannot show the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 378. Accordingly, Mr. McBride’s conviction must be reversed, and the case remanded for a new trial. *Id.*

IV. MR. McBRIDE’S CONVICTION VIOLATED DUE PROCESS BECAUSE IT WAS BASED IN PART ON PROPENSITY EVIDENCE.

Evidence that Deputy Nebe had served three search warrants at Mr. McBride’s house and that he’d “contacted Mr. McBride numerous times in [his] career” suggested that Mr. McBride had a propensity to engage in criminal activity. RP (7/8/19) 120, 123. Jurors were permitted to consider the testimony as substantive evidence of guilt. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

This violated Mr. McBride’s Fourteenth Amendment right to due process because there were no permissible inferences to be drawn from the

evidence.⁴ U.S. Const. Amend. XIV; *see McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993).

Respondent claims that the error cannot be reviewed. Brief of Respondent, pp. 18-19 (citing *State v. Diaz*, 190 Wn.App. 1028 (2015) (unpublished)). Respondent is correct that any rule-based objection under ER 403 or ER 404(b) is waived.

However, the due process argument is available as a manifest error affecting Mr. McBride's constitutional right to due process. RAP 2.5(a)(3). The unpublished opinion cited by Respondent does not address the application of RAP 2.5(a)(3) to the due process argument raised by Mr. McBride. *See Diaz*, at *7 (unpublished). It does not appear that the appellant in *Diaz* made a due process argument relating to the admission of propensity evidence.

The due process error here is "manifest" because the facts necessary for its adjudication appear in the record. *O'Hara*, 167 Wn.2d at 99-100. The error is available on review despite the absence of any objection in the trial court.

Because Mr. McBride makes a due process argument, the violation must be reviewed under the standard for constitutional harmless error.

⁴ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Franklin, 180 Wn.2d at 378. Respondent contends otherwise, citing *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986). Brief of Respondent, p. 21.

Respondent is incorrect, and the State's reliance on *Smith* is misplaced. The appellant in *Smith* did not make a due process argument. *Id.* The same is true for the case cited by the *Smith* court. *Id.*, at 780 (citing *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984)). Both *Smith* and *Jackson* stand for the unremarkable proposition that an argument based solely on ER 404(b) is not a constitutional argument.

Mr. McBride's argument is not based on ER 404(b). Instead, he contends that the improper admission of propensity evidence violates his due process right to a decision based on the evidence, rather than on his "suspicious character and previous acts." *McKinney*, 993 F.2d at 1385.

Here, the propensity evidence was admitted without any limitation. Jurors heard that police had served three prior warrants at Mr. McBride's house, and that Deputy Nebe had numerous prior contacts with him. RP (7/8/19) 120, 123. Jurors were allowed to consider the propensity testimony as substantive proof of Mr. McBride's guilt. *Myers*, 133 Wn.2d at 36.

This violated Mr. McBride's Fourteenth Amendment right to due process. *McKinney*, 993 F.2d at 1384. The conviction must be reversed, and the case remanded for a new trial. *Id.*

V. MR. MCBRIDE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. McBride rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

Mr. McBride's conviction was based on improper opinion testimony, propensity evidence, and testimonial hearsay admitted in violation of his confrontation rights. In addition, the trial judge commented on the evidence and violated the appearance of fairness. Finally, defense counsel's deficient performance prejudiced Mr. McBride and deprived him of his right to the effective assistance of counsel.

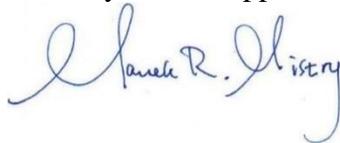
His conviction must be reversed, and the case must be remanded to the Superior Court for a new trial before a different judge.

Respectfully submitted on July 20, 2020,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 20, 2020.



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