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Supreme Court No. 102407-0
(COA No. 56582-0-II)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FINANDERS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Robert Finanders, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated June 6, 2023, amended by order dated August 28, 2023, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies of the decision and order are attached.

B. ISSUE PRESENTED FOR REVIEW

Failing to apprise a witness of the court's evidentiary rulings is a "serious irregularity."¹ The prosecution's central witness did not know about or adhere to the court's ruling prohibiting him from claiming Mr. Finanders stole a travel trailer, which was the crux of the case. The Court of Appeals disregarded this serious irregularity by inventing a requirement that the accused person must immediately request a mistrial. Does the Court of Appeals opinion conflict with *Taylor* and should this Court grant review to determine when a

¹ *State v. Taylor*, 18 Wn. App. 2d 568, 581, 490 P.3d 263 (2021).

prosecutor's failure to ensure its witness follows the court's pretrial rulings constitutes prejudicial misconduct?

C. STATEMENT OF THE CASE

Mr. Finanders was charged with possession of a trailer that had been stolen months earlier. CP 52. When found in possession of the trailer, he was openly living in the trailer with others, had not altered the trailer's appearance or license plate, and told the police he purchased it. RP 286-87, 290, 292.

The prosecution had to prove he knew the trailer was stolen. CP 63. Before the trial started, the court rejected the prosecution's request to elicit evidence Mr. Finanders took part in stealing the trailer from a storage lot, ruling the prosecution did not have evidence showing he did so. RP 90-91.

The first witness for the prosecution, Dean Anderson, told the jury the storage facility told him Mr. Finanders was the person who stole the trailer, and Mr. Anderson repeated this claim twice, over defense objection. RP 243-44.

The trailer was stolen by someone who used Mr. Anderson's key code to enter the storage lot. RP 270. The thief was driving a Ford truck that looked like the same truck Mr. Anderson had brought to the storage lot two days earlier. RP 252. Mr. Anderson denied he was the person who stole the truck, despite evidence connecting him to it.

The prosecution offered a grainy video from the storage lot but it did not show who stole the trailer. RP 254-58.

During closing argument, the prosecution told the jury, "Mr. Finanders was intimately tied to the initial theft of the trailer." RP 374. It also argued Mr. Finanders's knowledge the trailer was stolen is proven from "the fact that we have the defendant so intimately tied to the initial taking of the trailer." RP 387. It again told the jury, "what we do know is that Mr. Finanders was intimately tied to that theft and low and behold, he's the one that possesses it a couple months later." RP 389. The jury convicted him of knowingly possessing stolen property.

D. ARGUMENT

Despite the prosecution’s concession that it elicited evidence barred by the court’s pretrial ruling, the Court of Appeals refused to adhere to settled law assessing the resulting prejudice.

Parties must effectively communicate the court’s rulings to “their witnesses.” *State v. Taylor*, 18 Wn. App. 2d 568, 581, 490 P.3d 263 (2021). ER 103(c) states that in jury trials, the court and parties must “prevent inadmissible evidence from being suggested to the jury by any means,” when possible. *See also State v. Fisher*, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009) (it “constitutes misconduct” to introduce evidence “after receiving a specific pretrial ruling regarding this evidence”). The right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments and article I, sections 3 and 22 of the Washington Constitution.

Failing to apprise a witness of the court’s evidentiary rulings is a “serious irregularity.” *Taylor*, 18 Wn. App. 2d at 581. It undermines the fairness of the trial when it involves

evidence indicating the accused person committed additional misconduct. *Id.* at 581. It also causes unnecessary additional prejudice to the accused because counsel is forced to weigh the value of objecting and calling further attention to the improper testimony. *Id.* at 582.

Here, the first prosecution witness in this short trial repeatedly violated the court's ruling excluding testimony that Mr. Finanders stolen the trailer. The prosecutor never said he relayed this court ruling to the witness and never explained why he was repeatedly questioning Mr. Anderson on this topic.

Even after Mr. Anderson first violated the court's ruling by testifying he was evicted from the storage lot because Mr. Finanders stole a trailer from the lot, and the court sustained the objection, the prosecutor repeated almost the identical question. RP 244. And he received the same answer from Mr. Anderson, that he was told Mr. Finanders stole the trailer. *Id.*

A curative instruction is not a safeguard against improperly admitted evidence. *State v. Hager*, 171 Wn.2d 151,

160, 248 P.3d 512 (2011). The introduction of inherently prejudicial evidence will “likely impress itself upon the minds of the jurors” and will not be effectively cured by an instruction to disregard it. *Id.* (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The prejudice that results from a prosecutor’s failure to ensure its witness adheres to the court’s ruling includes the “impermissible burden” it places on the defense to repeatedly object and obtain curative instructions. *Taylor*, 18 Wn. App. 2d at 584. It “substantially increase[es] the prejudice” to the accused, “such that nothing short of a new trial can ensure that he is tried fairly.” *Id.*

The prosecution “eroded the overall fairness of the trial” by offering testimony that the trial court had excluded claiming Mr. Finanders was the otherwise indecipherable person seen on video stealing the trailer. *Id.* at 583-84.

This prejudice arises not only because the prosecution violated the court’s ruling several times, but because the

prohibited allegation went to the crux of the case. *See State v. Escalona*, 49 Wn. App. 251, 256, 742 P.2d 190 (1987) (holding prejudicial impact of witness's violation of pretrial ruling by saying defendant committed similar crime requires reversal despite court's curative instruction).

Mr. Finanders was living openly in the trailer visible from the road and told police he purchased it. RP 286, 292. The grainy video from the storage lot offered no insight into who stole the trailer. RP 254-58. The prosecution insisted Mr. Finanders was the person who stole it and therefore knew it was stolen. Several times, the prosecution told the jury, "Mr. Finanders was intimately tied to the initial theft of the trailer." RP 374; *see also* RP 387 (arguing the State proved Mr. Finanders's knowledge from "the fact that we have the defendant so intimately tied to the initial taking of the trailer"); RP 389 ("what we do know is that Mr. Finanders was intimately tied to that theft and low and behold, he's the one that possesses it a couple months later.").

The ultimate conclusion the jury was asked to make rested on the prosecution's repeated assertion that Mr. Finanders participated in the theft of the trailer and that is the reason he knew it was stolen.

The Court of Appeals decision tries to distinguish *Taylor* by claiming the decision in *Taylor* rested on the court's denial of a mistrial motion, while no mistrial motion was made here. Slip op. at 8-9. But this superficial distinction has no bearing on Mr. Finanders's overarching right to a fair trial and *Taylor*'s plain concern with the resulting fairness of a trial when a witness injects prohibited accusations about other criminal conduct.

This Court should grant review due to the conflict with *Taylor* and the importance of establishing clear rules regarding the prejudicial effect of violating a court's order barring unduly prejudicial, unreliable evidence.

E. CONCLUSION

Based on the foregoing, Petitioner Robert Finanders respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 1293 words and complies with RAP 18.17(b).

DATED this 20th day of September 2023.

Respectfully submitted,



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APPENDIX

August 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent,

v.

ROBERT JAMES FINANDERS,

Appellant.

No. 56582-0-II

ORDER GRANTING
RECONSIDERATION AND REMANDING

On June 16, 2023, Appellant filed a motion for reconsideration requesting this court address LFOs imposed on him in light of the recent amendments to RCW 7.68.035, RCW 10.82.090, and RCW 43.43.7541. The State responded on July 27, 2023, and it did not contest that the trial court previously found Finanders to be indigent for purposes of legal financial obligations. Rather than amending the opinion, by this order, we remand for the trial court to apply the statutory amendments that took effect July 1, 2023, strike the victim penalty assessment, strike the DNA fee, and reconsider the interest on the restitution. It is

SO ORDERED.


Glasgow, C.J.

We concur:

No. 56582-0-II

Cruser, J.

Cruser, J.

Che, J.

Che, J.

June 6, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent,

v.

ROBERT JAMES FINANDERS,

Appellant.

No. 56582-0-II

UNPUBLISHED OPINION

GLASGOW, C.J.— Police found Robert Finanders in possession of a stolen travel trailer. The State charged him with first degree possession of stolen property. Prior to trial, the trial court ruled that the State could elicit testimony showing Finanders had both access to the trailer prior to its theft and the opportunity to steal it. However, the court prohibited the State from eliciting testimony that Finanders had, as a matter of settled fact, committed the theft. Despite the trial court’s ruling, the prosecutor elicited testimony stating that Finanders stole the trailer himself. The trial court sustained objections and directed the jury not to consider this testimony. The jury convicted Finanders.

Finanders appeals, arguing that the prosecutor committed misconduct by eliciting testimony prohibited by the pretrial order, depriving Finanders of his right to a fair trial. We affirm Finanders’s conviction.

FACTS

I. BACKGROUND

Dean Anderson rented a storage unit in Gresham, Oregon during the fall of 2020. Anderson shared his unit with Finanders and gave Finanders his access code to get into the facility. In September 2020, a travel trailer was reported stolen from the facility. Officer Nathan Still investigated the theft. Still reviewed surveillance video showing that the trailer was stolen by two individuals driving a black pickup truck. Surveillance video captured two days before the theft also showed a similar pickup truck accessing Anderson's storage unit. The storage facility manager determined that Anderson's access code was the one used to get into the facility when the trailer was stolen.

Gresham police notified Skamania County police that the stolen trailer might be located in the area. In November 2020, a Skamania County officer noticed a trailer matching the description of the stolen trailer in a disbursed camp. Police knocked on the trailer door and found Finanders's girlfriend's daughter. While the police were talking with the daughter, Finanders drove up. The officer told Finanders that the trailer had been reported stolen. Finanders said that he had purchased the trailer and had paperwork documenting the purchase in Portland, but couldn't remember who he bought it from. The daughter later explained that she had been living in the trailer with Finanders and her mother for at least a month. The State charged Finanders with first degree possession of stolen property.

II. TRIAL

A. Pretrial Motion

To convict someone of first degree possession of stolen property, the State must prove that the defendant knew the property was stolen. RCW 9A.56.140(1), .150(1). Prior to trial, the State moved to offer evidence under ER 404(b) suggesting that Finanders himself had stolen the trailer, in addition to later possessing it, to show he had knowledge the trailer was stolen. This testimony was going to be offered, in part, through testimony from Anderson. Finanders simultaneously sought to exclude evidence suggesting that Finanders stole the trailer from the Oregon storage facility, arguing that it was more prejudicial than probative under ER 403 and it was not admissible under ER 404(b).

The trial court conducted an ER 404(b) analysis and ultimately ruled the State could elicit testimony showing Finanders “had the opportunity to commit this theft and had access to [the trailer].” Verbatim Rep. of Proc. (VRP) at 90. The trial court also allowed testimony that Finanders was later found in possession of the trailer after it was reported stolen. But the court concluded, “[S]tating that Mr. Finanders committed the theft is . . . a step too far.” *Id.* The trial court excluded “the final conclusion that Mr. Finanders actually committed the theft without any kind of actual evidence of somebody saying they observed him commit that theft.” VRP. at 91.

B. Trial

At trial, the State called Anderson as its first witness. When asked why his relationship with the storage facility ended, Anderson responded that the facility called him and told him he was being evicted. He continued, “I had no idea until I got there and they told me that . . .” VRP at 243. Defense counsel interrupted, objecting to hearsay. The trial court overruled the objection,

and told Anderson, “Go ahead and answer.” VRP at 244. Anderson then stated, “They had told me that Mr. Finanders had taken a trailer from the property.” *Id.* The trial court sustained the objection and instructed the jury to “[d]isregard the statement,” but allowed Anderson to “explain why he was getting evicted.” *Id.*

The prosecutor then asked, “[W]hat was the reason that you were being evicted?” *Id.* When Anderson started with, “Because Mr.,” the prosecutor interrupted and rephrased to ask whether, “a theft had occurred at that location?” *Id.* Anderson stated, “Yes, they told me that . . . a trailer [had been] removed by Robert Finanders.” *Id.* Defense counsel objected a third time and the trial court sustained the objection, then instructed the jury to “[d]isregard the last statement about . . . who may have allegedly done that.” *Id.* Defense counsel did not move for a mistrial.

Anderson otherwise testified that he shared the storage unit with Finanders and that Finanders was the only person with whom he shared his entry code for the storage facility. Next, the investigating officer testified, describing what he saw on the facility’s surveillance videos captured from the night of the theft, as well as two days before. The officer stated that the truck used to steal the trailer appeared to be the “same Ford pickup truck” used to previously access Anderson’s unit. VRP at 252.

The trial court admitted the surveillance video and the jury watched the video of the theft while the officer explained what happened. The owner of the storage facility also testified. He confirmed that the truck used to steal the trailer appeared to be the same truck that he had personally seen access Anderson’s unit, explaining that the shape of the truck, and the taillights “just made it stand out.” VRP at 272.

C. Jury Instructions and Closing Argument

The trial court's instructions to the jury included the pattern instruction to not consider evidence that the trial court had ruled was inadmissible or evidence the court told the jury to disregard. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02 (5th ed. 2021). The trial court also provided a to convict instruction that required the jury to find beyond a reasonable doubt that Finanders "acted with knowledge that the property had been stolen." Clerk's Papers (CP) at 63. With regard to that element, the trial court instructed the jury that "[c]ertain evidence has been admitted in this case for only a limited purpose. This evidence consists of all evidence concerning events that may have occurred in Gresham, Oregon and may be considered by you only to the extent that you find it relevant to the issue of knowledge." VRP at 359.

During closing argument, the parties agreed that the only contested issue was whether Finanders knew the trailer was stolen. However, the prosecutor instructed the jury that the State had the burden to prove all the elements of first degree possession of stolen property. When discussing whether the defendant knew the trailer was stolen, or the "crux of the matter," the prosecutor directed the jury to the instruction about evidence that was admitted for a limited purpose. VRP at 369. The prosecutor reminded the jury to consider evidence of the theft "only to the extent that you find it relevant to the issue of knowledge," an element of first degree possession of stolen property. VRP at 372.

The prosecutor then listed the evidence from Gresham, including Anderson's testimony that he had allowed Finanders to use his unit and access code, the storage manager's testimony that a similar truck used to commit the theft had accessed Anderson's unit a few days earlier, and

the jury's own observations from watching the surveillance video of the theft. The prosecutor argued that, based on the evidence, Finanders was "intimately tied to the initial theft of the trailer and therefore had clear knowledge that the trailer was stolen when he had it in here in Skamania County." VRP at 374. The prosecutor did not reference Anderson's testimony that the facility blamed Finanders for stealing the trailer. Finanders made no objections during the State's closing arguments.

The jury convicted Finanders of first degree possession of stolen property. Finanders appeals.

ANALYSIS

Finanders argues that prosecutorial misconduct deprived him of his constitutional right to a fair trial. Finanders contends that the prosecutor committed misconduct by not effectively conveying the court's pretrial ruling to Anderson before he testified, repeatedly asking questions targeting this prohibited evidence, and then capitalizing on the improper testimony in closing arguments. Finanders argues that because the improper statements were centered on the one contested issue, whether he knew the trailer was stolen, the misconduct had a substantial likelihood of affecting the jury's verdict.

The State acknowledges that Anderson's testimony violated the pretrial order but argues that the testimony had no substantial likelihood of affecting the jury's decision. Even assuming without deciding that the prosecutor failed to adequately convey the trial court's pretrial ruling to Anderson before he testified, we agree with the State that Finanders cannot show sufficient prejudice to warrant reversal.

A. Prosecutorial Misconduct

The right to a fair trial in a criminal case is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by article I, section 22 of the Washington Constitution. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Where there has been prosecutorial misconduct in obtaining a conviction, the criminal defendant may have been deprived of the constitutional right to a fair trial. *Id.* at 703-04. A defendant alleging prosecutorial misconduct has the burden of proving that the conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Where, as here, the defendant objected at trial, the defendant must show that the prosecutor's improper conduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.* at 760. In analyzing prejudice, we do not look at the prosecutor's conduct in isolation, but rather in the "context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). A correct and thorough curative instruction may cure prejudice against the defendant as we presume that juries follow the trial court's instructions. *Id.*

Finanders relies on *State v. Taylor*, 18 Wn. App. 2d 568, 490 P.3d 263 (2021), to argue that Anderson's testimony requires reversal. In *Taylor*, Division One considered whether the trial court abused its discretion by denying a defendant's motion for mistrial after an expert witness violated three pretrial orders in limine. The expert witness violated the pretrial orders by referencing Taylor's criminal history, stating that Taylor had a "lengthy history" of substance abuse, and mentioning that Taylor requested an attorney when he was arrested. 18 Wn. App. 2d at 579. The trial court issued curative instructions in response to the testimony about Taylor's criminal history

and his request for an attorney, but not in response to the testimony about his history of substance abuse. *Id.* at 582. After the comment about Taylor’s history of substance abuse, the trial court decided not to give a curative instruction because it “may have called more attention to the statement such that it would have countered the desired curative effect.” *Id.* at 583.

Division One reversed Taylor’s conviction, concluding that “[i]n isolation, each of these irregularities likely could have been resolved or mitigated with curative instructions, but the misstatements here accumulated quickly over the course of direct examination of a single key witness.” *Id.*

B. Analyzing Prejudice in this Case

Unlike in *Taylor*, we must apply the prejudice standard applicable in cases involving claims of prosecutorial misconduct because here, defense counsel objected but there was no motion for mistrial. Even if we assume the prosecutor failed to adequately discuss the trial court’s pretrial order with Anderson, there was not a substantial likelihood that Anderson’s two improper statements affected the jury’s verdict. The trial court’s curative instructions and the weight of the other evidence sufficiently mitigated any prejudice.

The trial court sustained objections to Anderson’s testimony that Finanders stole the trailer, and orally instructed the jury to disregard the statements each time. Specifically, the trial court twice instructed the jury to disregard Anderson’s reference to the storage facility’s accusation that Finanders, himself, had stolen the trailer. This is unlike *Taylor*, where the trial court decided not to instruct the jury to disregard a witness’s statement regarding the defendant’s “lengthy history” of substance abuse. 18 Wn. App. 2d at 582. Here, in addition to the immediate oral instructions, the trial court gave the jurors a written instruction directing them to avoid considering evidence

that the trial court had told them to disregard. The trial court also instructed the jurors to consider evidence related to events in Gresham “only to the extent that you find it relevant to the issue of knowledge.” CP at 61. We presume the jury followed the court’s oral and written instructions. *Warren*, 165 Wn.2d at 28.

We recognize that an instruction to disregard will not always cure the prejudice from improper testimony. However, the capacity of Anderson’s improper testimony to cause prejudice was slight when compared with the other properly admitted circumstantial evidence that Finanders knew the trailer was stolen. Here, in its pretrial order, the trial court ruled that the prosecutor could use the evidence about the theft of the trailer to argue that Finanders “had the opportunity to commit this theft and had access to [the trailer].” VRP at 90. The trial court only excluded “the final conclusion that Mr. Finanders actually committed the theft.” VRP at 91.

The State presented evidence that Finanders had an access code to the facility, that same access code was used to enter the facility when the trailer was stolen, the truck used to steal the trailer was seen at the storage unit that Finanders shared with Anderson, Finanders was found living in the stolen trailer, and Finanders did not have paperwork to prove his assertion that he had bought it legally. Due to the extent of the properly admitted evidence showing knowledge and the immediate and correct curative instructions, Finanders cannot show that Anderson’s improper testimony, stating that the facility manager had accused Finanders of the theft, had a substantial likelihood of affecting the jury’s verdict.

Finanders also argues that although the prosecutor’s closing arguments may have been permissible, they exacerbated the prejudicial impact of Anderson’s testimony by focusing on the defendant’s responsibility for the theft. During closing argument, prosecutors have wide latitude

to argue reasonable inferences from the evidence. *Glasmann*, 175 Wn.2d at 704. In closing argument, the prosecutor listed all of the evidence from the theft in Gresham before arguing that “it’s clear when you . . . piece everything together, that the defendant is intimately tied to the initial theft of the trailer and therefore had clear knowledge that the trailer was stolen.” VRP at 374. The prosecutor never referenced Anderson’s improper testimony, but instructed the jury to consider the evidence of the theft “only to the extent that you find it relevant to the issue of knowledge.” VRP at 372. Given the strength of the State’s evidence and the trial court’s instructions to the jury, we conclude there is no substantial likelihood that Anderson’s improper testimony, coupled with the prosecutor’s closing arguments, prejudiced Finanders. Accordingly, we hold that Finanders’s claim of prosecutorial misconduct fails.


CONCLUSION


We affirm Finanders’s conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Glasgow, C.J.

We concur:


Cruiser, A.C.J.


Che, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56582-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Adam Kick
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Skamania County Prosecutor's Office
- petitioner
- Attorney for other party



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Washington Appellate Project

Date: September 20, 2023

WASHINGTON APPELLATE PROJECT

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