

March 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LUIS RUBEN MEDEL SORIANO,

Appellant.

No. 50533-9-II

UNPUBLISHED OPINION

SUTTON, J. — Luis Medel Soriano appeals his conviction for attempting to elude a pursuing police vehicle with an endangerment sentencing enhancement. He argues that the trial court erred by admitting an officer’s speculative opinion testimony and by excluding evidence that, on prior occasions, Medel Soriano had properly pulled over when instructed to by law enforcement. Medel Soriano also argues that the State committed prosecutorial misconduct during closing argument. We disagree and affirm Medel Soriano’s conviction.

FACTS

The State charged Medel Soriano with one count of attempting to elude a pursuing police vehicle¹ with an endangerment enhancement.²

City of Castle Rock Police Officer Jeff Gann testified at trial. Officer Gann testified that he was on duty on August 20, 2016, when he received a call from his dispatcher informing him

¹ RCW 46.61.024(1).

² RCW 9.94A.533(11); .834.

that the Washington State Patrol was attempting to overtake two motorcycles heading northbound on Interstate 5 at a high rate of speed. Because Officer Gann was in the area, he proceeded to the freeway to attempt to intercept the motorcycles. Once on the freeway, Officer Gann saw two motorcycles approaching at a high rate of speed. As soon as the motorcycles passed Officer Gann, he activated all of his emergency lights and siren, and got behind them to attempt a traffic stop.

Officer Gann explained that his patrol vehicle was a large sport utility vehicle (SUV), which was more heavily marked with lights than most patrol vehicles in the county. The SUV was equipped with a 52-inch overhead light bar with multiple rows of flashing LED lights in red, blue, and white. The SUV also had red and blue lights in the grill, on the sides of the push bar, as well as on the back of the mirrors and the back of the vehicle. The SUV was also equipped with a 100-watt siren and says “Castle Rock Police” in large letters across both sides. 1 Report of Proceedings (RP) at 55.

When asked what happened after Officer Gann got behind the motorcycles and activated his lights and siren, he replied:

The lead motorcycle, a black motorcycle, increased its speed significantly and the driver – the rider of the motorcycle looked back over his shoulder. I’m assuming that he was looking back to see if I was actually behind him.

1 RP at 62. Medel Soriano objected to Officer Gann’s response as speculation. The trial court overruled the objection. The State nonetheless rephrased its question to clarify that the motorcyclist, who was later identified as Medel Soriano, looked over his shoulder just after Officer Gann activated his lights.

Officer Gann testified that he was about a hundred feet behind the motorcyclist at that point, and the rider dramatically increased his speed after Officer Gann activated his lights. RP

(6-15-17) 63. Officer Gann testified that the motorcycle then began swerving in and out of other cars, changing lanes without signaling, and passed between two cars that were side by side by riding along the dotted line between the two lanes. Officer Gann testified that despite traveling at over 100 miles per hour in his patrol vehicle, the motorcycle was outpacing him.

Officer Gann testified that the motorcycle swerved to exit off the freeway. Officer Gann testified that there is no gas station off that exit and no signs indicating a gas station. Officer Gann explained that he lost sight of the motorcycle as it proceeded up the exit ramp while Officer Gann tried to follow. When Officer Gann got to the top of the exit ramp, another driver pointed towards Burma Road, which is a two-lane, secondary county road that extends about three-quarters of a mile before ending at a Weyerhaeuser truck facility. The truck facility is blocked by a large, yellow, metal gate.

Officer Gann testified that when he got to the gate, he saw a 70-foot long skid mark on the road. The motorcycle had crashed, and Medel Soriano was located about 40 feet away from the motorcycle. Officer Gann testified that Medel Soriano was lying on the ground moaning and groaning. Officer Gann called a medic unit, and when the medic arrived and conducted an examination, she determined that Medel Soriano needed to be transported to a hospital via helicopter.

On the second day of trial, the parties and the trial court revisited Medel Soriano's objection from the prior day to Officer Gann's testimony that he saw Medel Soriano look back over his shoulder and assumed he was looking back to see if Officer Gann was behind him. Medel Soriano argued:

I think any time a witness says “I am assuming” or “I think that” it leads right in to him being – making a speculative statement, which is what my – what *my objection was, was speculation*. And so he’s, again, trying to assume what is in my client’s head by saying I think he was looking back for whatever, dot, dot, dot.

2 RP at 121 (emphasis added). The trial court upheld its previous ruling, explaining, “It appears to be an observation and a process that he was going through at that time, so – in his head of what he was thinking.” 2 RP at 122.

Medel Soriano sought to admit five photographs of himself with law enforcement officers after being pulled over on prior occasions. He explained that he would testify that on each prior occasion he pulled over as instructed and that his habit was not to flee. The State opposed the photographs and potential testimony, arguing that it was irrelevant character evidence. The trial court ruled that the photographs were irrelevant character evidence and inadmissible under the rules of evidence. The State also made a motion to exclude any testimony “along the lines of we always pull over when the cops signal us to.” 2 RP at 130. The State argued that such testimony would be irrelevant character evidence. The trial court ruled that the testimony would “go to character and propensity” and granted the motion to exclude. 2 RP at 131.

Medel Soriano testified at trial on his own behalf. Medel Soriano testified that his peripheral vision was limited by his helmet, and at no point during his motorcycle ride did he see any police lights or hear any sirens. Medel Soriano recalled that he was going about 75 miles per hour and that his ability to hear was very restricted. He testified that he exited the freeway because he was thirsty and needed to get gas. Medel Soriano testified that upon exiting the freeway he realized there was no gas station off the exit; he stopped to check his phone to look at a map, then

attempted to reenter the freeway but took the wrong road. He testified that when he was going down the wrong road he was going 35 to 40 miles per hour.

Medel Soriano testified that as he rode up a small hill, he saw a car sitting in the road and not moving. He tried to pass the car but discovered there was a gate across the road in front of the car. Medel Soriano testified that he attempted to go to the left of the gate but bumped into a tree and was knocked off his motorcycle. Medel Soriano characterized his injuries as a broken thumb and a “sliver” in his stomach from a small piece of a branch. 2 RP at 161. Medel Soriano testified that ten minutes after his accident he was still on the ground when a police officer arrived.

The State called Officer Gann as a rebuttal witness. Officer Gann testified that he came upon Medel Soriano about thirty seconds to a minute after Medel Soriano’s crash. Officer Gann testified that there were no cars in the road near the gate, and if there had been, he would have contacted the driver as a witness. Officer Gann testified that the ambulance crew decided Medel Soriano needed to be transported for medical treatment.

In closing argument, the State reviewed the evidence presented in the case and argued that Medel Soriano’s version of events was not credible. In his closing argument, Medel Soriano argued that he did not know an officer was pursuing him. In its closing rebuttal, the State argued that Medel Soriano’s explanation for exiting the freeway was not credible. The State said:

He took Exit 52, that a – that’s a fact. And the explanation out of the Defense side of that is it’s just a bunch of baloney. Gas station. No gas station there, no signs there. I mean, come on.

2 RP at 224.

The jury found Medel Soriano guilty and returned a special verdict of “yes” as to the endangerment enhancement. Clerk’s Papers at 20. Medel Soriano appeals.

ANALYSIS

I. EVIDENTIARY RULINGS

A. SPECULATIVE OPINION TESTIMONY

Medel Soriano argues that the trial court erred by allowing Officer Gann to testify that Medel Soriano looked behind him and that Officer Gann assumed it was to see if Officer Gann was behind him. On appeal, Medel Soriano argues that Officer Gann's testimony was impermissible opinion testimony regarding the essential element of knowledge. We hold that this issue is not preserved for appeal.

On appeal, a party may raise only objections that are properly preserved, unless the party demonstrates manifest constitutional error. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). Courts will not reverse a trial court's decision to admit evidence where the defendant argues for reversal based on an evidentiary issue not raised at trial. *Powell*, 166 Wn.2d at 82. "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." *Powell*, 166 Wn.2d at 82. The defendant has the initial burden of showing that an alleged error was manifestly unconstitutional. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A defendant cannot simply assert that an error occurred at trial and label the error constitutional; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

Here, Medel Soriano did not object to Officer Gann's testimony on the grounds that it was impermissible opinion testimony. Rather, he argued that the testimony was impermissible speculation. Because we will only consider on appeal the specific objection raised in the trial

court, Medel Soriano failed to preserve his objection to the testimony as improper opinion testimony. Further, because Medel Soriano makes no argument that the admission of Officer Gann's testimony constitutes a manifest constitutional error, we do not address the issue for the first time on appeal.

B. HABIT EVIDENCE

Medel Soriano also argues that the trial court abused its discretion by excluding evidence that on prior occasions Medel Soriano had properly pulled over when instructed to by law enforcement. He argues that the evidence should have been admitted under ER 406. We disagree.

ER 406 provides that “[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit.” “Caution is essential in dealing with habit evidence, because it verges on inadmissible evidence of character.” *Norris v. State*, 46 Wn. App. 822, 826, 733 P.2d 231 (1987). The admissibility of alleged habit evidence is within the trial court's discretion. *Norris*, 46 Wn. App. at 826. We defer to a trial court's evidentiary ruling unless no reasonable person would take the view adopted by the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Here, Medel Soriano's proffered evidence amounted to no more than admissions that on five previous occasions Medel Soriano had been pulled over by law enforcement. This evidence falls short of describing the ““semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli”” required for habit evidence under ER 406. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 325, 858 P.2d 1054 (1993) (alteration in original) (*quoting* Comment, ER 406; 5 K. Tegland, *Wash. Prac., Evidence* 459 (3d ed. 1989)). “It is the notion of the invariable regularity that gives habit evidence its probative

force.” *State v. Thompson*, 73 Wn. App. 654, 659 n.4, 870 P.2d 1022 (1994) (internal quotation mark omitted). Given our deference to the trial court’s evidentiary decision, we hold that the trial court did not abuse its discretion by not admitting the evidence.

II. PROSECUTORIAL MISCONDUCT

Medel Soriano also argues that the State committed prosecutorial misconduct when it used the word “baloney” during closing argument to describe Medel Soriano’s testimony. Br. of Appellant at 12. We disagree.

To prevail on his prosecutorial misconduct claim, Medel Soriano must demonstrate that in the context of the entire record and trial circumstances that the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To demonstrate prejudice, Medel Soriano must show a substantial likelihood that the improper conduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442–43. Because Medel Soriano did not object to the alleged misconduct at trial, he must also show that any misconduct was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a jury instruction. *Thorgerson*, 172 Wn.2d at 443. We review a prosecutor’s comments at closing in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). “The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility.” *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017).

Here, the State’s closing argument focused on the credibility of Medel Soriano’s testimony. The State argued that Medel Soriano was not a credible witness, referencing logical gaps in his

story and arguing that Officer Gann’s version of events was more credible. Taking the State’s comment in the context of its closing argument, the State’s comment that Medel Soriano’s explanation for exiting the freeway was “baloney” was not improper. Moreover, Medel Soriano cannot show that any misconduct was so flagrant and ill-intentioned that it caused incurable prejudice. Consequently, we hold that the State did not commit prosecutorial misconduct.

We affirm Medel Soriano’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.

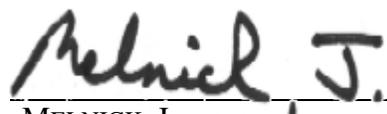


SUTTON, J.

We concur:



WORSWICK, P.J.



MELNICK, J.