

FILED
August 5, 2015
Court of Appeals
Division I
State of Washington

No. 73144-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MAHAMED M. ABDI,

Appellant.

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

The Honorable Julie Spector

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting the irrelevant testimony of Officer Collier regarding uncontrolled substances.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Testimony that is not relevant is not admissible. Even otherwise admissible testimony is inadmissible if its prejudicial impact outweighs its probative value. Here, over repeated defense objections, the police officer who acted as an undercover buyer of controlled substances testified generally about the dangers of selling an uncontrolled substance in lieu of a controlled substance and why this particular activity was illegal. Did the trial court err in admitting this irrelevant testimony whose sole purpose was to inflame the passions of the jury thus urging them to convict on emotion?

C. STATEMENT OF THE CASE

On June 6, 2014, while conducting an undercover buy/bust activity, Seattle Police Officer Wesley Collier saw Mahamad Abdi standing at the intersection of Third Avenue and Virginia Street. 1/6/2014RP 23. Collier yelled at Mr. Abdi who angrily turned and asked Collier what he wanted. *Id.* at 24-25. Collier asked in what he termed drug terminology for two rocks of cocaine for \$20. *Id.* at 29.

Mr. Abdi told Collier he wanted him to place the \$20 on a nearby window ledge and walk up the street with Mr. Abdi where presumably the drugs would be exchanged. 1/6/2014RP 30. Mr. Abdi and Collier engaged in negotiations about this exchange with Collier refusing to go along with Mr. Abdi's conditions. *Id.* at 29-32. Collier stated Ms. Abdi opened his mouth revealing rocks of suspected cocaine his mouth to Collier. *Id.* at 33.

Collier continued to refuse Mr. Abdi's conditions for the transaction, so Mr. Abdi spit a rock of suspected cocaine at Collier's feet, but instructed him not to touch it and to walk with him up the street. *Id.* at 34-35. Mr. Abdi allegedly did this two more times before snatching the \$20 out of Collier's hand. 1/6/2014RP 35-39. Mr. Abdi was subsequently arrested. *Id.* at 46. Subsequent tests of the rocks revealed they did not contain any controlled substances. 1/7/2014RP 57-65.

Mr. Abdi was charged with delivery of a substance in lieu of a controlled substance. CP 9.¹ At trial and during his direct examination of Officer Collier, the prosecutor asked:

¹ Mr. Abdi was also charged with felony harassment based upon statements he made to Collier during the transaction. CP 9-10. Mr. Abdi was acquitted of this count. CP 41.

Q: Um, so Officer Collier, I'll move on from that. Um, with regards to, um, controlled substances, why are, um, uncontrolled substances a risk in the community?

A: Uh, my personal opinion, I –

MR. BURKLAND (defense counsel): Objection. Foundation, speculation and relevance.

THE COURT: Well, I don't know if we want his personal opinion. So maybe you should rephrase the question.

Q: In – in your training and experience, Officer Collier, why are, um, uncontrolled substances a risk in the community?

MR. BURKLAND: Objection. Foundation and hearsay, if he's learning it from someone else.

THE COURT: He can testify to his knowledge if it's based on his training.

A: Uh, can you get the question one more time please?

Q: Um, in your training and experience why are uncontrolled substances a risk in the community?

A: Uh, because you don't know the – whoever's taking that substance does not know, uh, what the actual drug is. That drug can cause 'em to do, pretty unpredictable things, get them sick, uh, kill them, um, and make irrational decisions.

Q: Are there also repercussions from those drug transactions?

A: Uh, yes, for both parties.

Q: And what would those be?

A: Uh, if a addict is trying to get high and a drug dealer sells them, uh, bunk, which is, uh, fake drugs, that user tries to smoke it and doesn't get his fix, doesn't get his high, he can try to seek revenge on the person who just sold him that drug and –

MR. BURKLAND: Objection. Speculation.

THE COURT: It's overruled.

A: -- seeks revenge and, uh, try to cause harm to that drug dealer who is, uh, more dominant than him or – but often – and then that drug dealer try to protect himself and we have violence there. Uh, and then you have the user who is using fake drugs that probably has bleach in it or some other substance that –

MR. BURKLAND: Objection. Speculation.

THE COURT: Insofar as bleach, that's sustained and it's stricken. But go ahead.

A: -- an unknown element in it that can, uh, cause 'em significant damage.

1/6/2015RP 68-69.

D. ARGUMENT

The admission of irrelevant testimony by Officer Collier over defense objections was prejudicial to Mr. Abdi and requires reversal of his conviction.

1. *Only relevant evidence is admissible at trial.*

“Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402.” *State v. Rice*, 48 Wn.App. 7, 11, 737 P.2d 726 (1987). Irrelevant evidence is inadmissible, even if offered by a criminal defendant in his defense. ER 402; *State v. Maupin*, 128 Wn.2d 918, 925, 913 P.2d 808 (1996); *State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009).

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). ER 401; *Davidson v. Metropolitan Seattle*, 43 Wn.App. 569, 573, 719 P.2d 569 (1986), *review denied*, 106 Wn.2d 1009 (1986). Irrelevant evidence is not admissible. ER 402. Facts that are ‘of consequence’ have some tendency to prove, qualify, or disprove an issue in the case. *State v. Peterson*, 35 Wn.App. 481, 484, 667 P.2d 645 (1983). The relevance of evidence depends on the circumstances of each individual case and the

relationship between the facts and the ultimate issue. *Davidson*, 43 Wn.App. at 573.

The determination of relevance is reviewed for an abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). A court abuses its discretion when its discretionary decision is manifestly unreasonable or based on untenable grounds. *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d 520, 7 A.L.R.5th 1014 (1990).

2. *Even if relevant, unfair prejudice may result from evidence whose probative value is substantially outweighed by its prejudicial impact.*

Relevant evidence may still be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. A danger of unfair prejudice exists “[w]hen evidence is likely to stimulate an emotional response rather than a rational decision.” *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011), *quoting State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” *Powell*, 126 Wn.2d at 264.

3. *The prosecutor's questions of the police officer were about irrelevant matters which were not admissible.*

The prosecutor's general questions of Officer Collier regarding uncontrolled substances, admitted over defense objections, involved irrelevant and prejudicial evidence which should have been excluded.

Instructive on this issue is the decision in *State v. Suarez-Bravo*, 72 Wn.App. 359, 864 P.2d 426 (1994). In that case, Mr. Suarez-Bravo was charged with possession of cocaine with the intent to deliver based upon a controlled purchase by a paid informant. *Suarez-Bravo*, 72 Wn.App. at 360-61. At trial, the prosecutor asked Mr. Suarez-Bravo whether his neighborhood where the incident occurred was a high crime area. *Id.* The defense objected on the basis of a lack of relevancy and lack of foundation, similar to here. *Id.*, at 365. The Court of Appeals found the prosecutor's questions were designed to elicit irrelevant evidence:

The transaction here took place in a pharmacy parking lot, away from Suarez-Bravo's apartment. Whether his apartment building is in a high crime area has no logical relevancy to any element of the charge against Suarez-Bravo. At trial, the State explained it wanted to show how unusual it was for Suarez-Bravo to allow strangers to come to his door. But another more probable and troublesome inference is that Suarez-Bravo was more likely to have committed the crime charged because he lives in a building where other crimes have been committed.

Suarez-Bravo, 72 Wn.App. at 364-65.

Here, like in *Suarez-Bravo*, the evidence elicited by the prosecutor from Collier was irrelevant because it did not have a tendency to prove any fact that was of consequence at trial. The issue at trial was whether Mr. Abdi delivered to the officer a substance that he portrayed as a controlled substance. What the potential risk was for delivering substances in lieu of controlled substances did nothing to prove whether Mr. Abdi delivered the items to Collier. Whether this act was dangerous was a question for the Legislature when it made this act a criminal offense. *See State v. Prather*, 30 Wn.App. 666, 670, 638

P.2d 95 (1981):

“A statute is within the scope of the police power if it tends to correct some evil or promote some interest of the state, and if it is reasonably and substantially related to the statutory purpose. [Citation omitted] The statute does not make the sale of a non-narcotic substance a crime; rather it makes the contracting for delivery of a controlled substance, which is completed as a criminal offense by delivery of some substitute, a crime. The risks to public health safety and welfare from such conduct are obvious and ample justification for legislative action.”

In addition to being irrelevant, the evidence of the potential for risk of delivering a substance in lieu of a controlled substance was more prejudicial than probative since it raised the

specter of danger into this alleged delivery of uncontrolled substances.

4. *There was a reasonable probability the irrelevant questioning by the prosecutor materially affected the outcome of Mr. Abdi's trial.*

An erroneous evidentiary ruling is grounds for reversal where, within reasonable probabilities, it materially affected the trial's outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997); *State v. Nelson*, 131 Wn.App. 108, 117, 125 P.3d 1008 (2006).

The issue in this case was whether Mr. Abdi delivered an uncontrolled substance to Officer Collier when the negotiations were for a controlled substance. The introduction of gratuitous testimony regarding why this particular activity is illegal and the dangers associated with it was designed to inflame the passions of the jury so that it decided the issue not on the evidence but on its emotion. *See generally United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir.1991):

“A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden

for the individual criminal defendant to bear.” (internal quotation marks omitted).

Given the prejudicial nature of the officer’s testimony, the error in admitting this testimony was not harmless; it prejudiced Mr. Abdi, and must result in reversal of his conviction.

E. CONCLUSION

For the reasons stated, Mr. Abdi asks this Court to reverse his conviction and remand for a new trial.

DATED this 5th day of August 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 73144-1-I
)	
MAHAMED ABDI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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