

No. 36469-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ADAM MALMBERG,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

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

The Honorable Chris Wickham, Judge
Cause No. 06-1-00911-1

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the warrantless search of Romero's car was unconstitutional.

2. Whether Malmberg received ineffective assistance of counsel because his trial attorney failed to move to suppress evidence on the grounds that the search of Romero's vehicle did not follow a valid arrest.

3. Whether the failure of defense counsel to request a jury instruction regarding accomplice testimony can be used to elevate a nonconstitutional issue to constitutional status so that it can be raised for the first time on appeal as ineffective assistance of counsel.

4. Whether the prosecutor's closing argument impermissibly shifted the burden of proof to the defendant by telling the jury that it should find Malmberg guilty if it believed Romero's testimony, and whether the prosecutor expressed his personal opinion about the credibility of witnesses.

5. Whether there was cumulative error requiring reversal and dismissal.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The warrantless search of the car in which the defendant was a passenger was constitutionally permissible.

The State does not dispute that the search at issue in this case must satisfy both the Fourth Amendment and art. I, § 7 of the Washington Constitution. Nor does the State dispute that Malmberg

has standing to challenge the search of the vehicle owned and driven by David Romero, in which Malmberg was a passenger.

Malmberg's theory seems to be that the trial court was incorrect in concluding that there was sufficient probable cause to arrest Romero for DUI based upon the officer's observations of him, including his bloodshot eyes, the fact that he had made an improper turn, and that he had failed the gaze nystagmus test. [Conclusion of Law 3.1, CP 47] Therefore, the arrest being invalid, the search of the vehicle which produced the baggies of marijuana was, in turn, an invalid search incident to arrest. He argues that the marijuana pipe was located and seized in the absence of any exception to the warrant requirement and thus cannot be used to support probable cause for arrest.

A trial court's findings of fact must support the conclusions of law, which are reviewed de novo. Miles v. Miles, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). The findings of fact are reviewed for substantial evidence. State v. Hoggatt, 108 Wn. App. 257, 262-63, 30 P.3d 488 (2001). Here the court found that Officer Armitage administered the gaze nystagmus test, concluded that Romero had failed it, was informed of and observed the marijuana pipe in the vehicle, and attempted to resume giving the field sobriety tests to

Romero, who refused, saying it would be a waste of time, as he had been smoking marijuana. [Findings of Fact 1.4 – 1.6, CP 46] Although the testimony at the suppression hearing was often confusing, there is ample evidence to support the court's findings. Officer Armitage observed the car Romero was driving make an improper turn, and noticed at least one, and he thought two, equipment violations. [RP 9]¹ The officer noted that Romero's eyes were bloodshot and administered the gaze nystagmus test, which Romero failed. [RP 12, 39] After performing that test, and while Armitage was explaining the instructions for the walk-and-turn test, [RP 40] the back-up officer advised Officer Armitage that he had observed a pipe on the front seat of the vehicle. [RP 12] Armitage also observed it. [RP 18] Romero refused to do any further tests, [RP 41-42] but he did blow into the portable breath test instrument, which showed no alcohol in his breath. [RP 20] Romero was placed under arrest and given his *Miranda* warnings. [RP 20, 33] The search of the vehicle followed the arrest [RP 33] and the baggies of marijuana and the scale were discovered at that time. [RP 20-21]

Malmberg is, therefore, incorrect when he asserts, on page 15 of his opening brief, that there was no evidence presented at the

¹ Unless otherwise specified, all references to the Report of Proceedings are to the transcript of the suppression hearing held on March 5, 2007.

hearing that after the pipe was secured Romero told Armitage it would be a waste of time to continue the field sobriety tests, that he had been smoking marijuana, and that it would be found in the same location as the pipe. [RP 20-21]

Probable cause requires that the officer could reasonably believe that the person has committed the crime. It does not require proof beyond a reasonable doubt. A probable cause determination is to be based on a “practical, nontechnical” review of the totality of the facts. State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 539 (2002). The record in this case supports the court’s finding of probable cause to arrest.

Romero is also incorrect in his assertion that the pipe with marijuana residue could not be considered in determining probable cause because the discovery of the pipe occurred before the arrest. A search incident to arrest is not the only exception to the warrant requirement.

“As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution unless the search falls within one or more specific exceptions to the warrant requirement.” State v. Ross, 141 Wn.2d

304, 312, 4 P.3d 130 (2000). The State bears the burden of proving that an exception applies. State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). In the case of the marijuana pipe found in Romero's car, there was no search at all. It was in open view. Under the open view doctrine, contraband that is viewed when an officer is standing at a lawful vantage point is not protected. State v. Neeley, *supra*, at 109. In short, if an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses, no search has occurred. *Id.* (quoting State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127 (2002)). The open view exception applies to contraband that an officer sees from outside the window of a vehicle. Neeley, *supra*, at 109.

An officer's act of observing the interior of an automobile through its windows while the vehicle is parked in a public place is not a search "in the constitutional sense." State v. Young, 28 Wn. App. 412, 417, 624 P.2d 725 (1981). Simply put, the "plain view" doctrine does not apply if the contraband can be viewed from outside the vehicle.

State v. Lemus, 103 Wn. App. 94, 103, 11 P.3d 326 (2000).

Here, the back-up officer saw the pipe while standing outside the vehicle and looking in. Officer Armitage could also see it without entering the car. [RP 15] The car was parked in a public place, [RP 9] and the officers were in a "lawful vantage point." Thus, the

pipe is not subject to suppression and could be considered by both the arresting officer and the trial court in determining whether probable cause exists. Although the court did not include the pipe in its determination of probable cause, it could have been considered then, it can be considered by this court, and it adds further support to the validity of the arrest of Romero.

Malmberg does not dispute that the search which revealed the baggies of marijuana followed the arrest, only that the arrest was invalid. A search incident to a valid custodial arrest is a “well-recognized exception to the warrant requirement. Neeley, supra, at 106. In this instance the search of Romero’s vehicle did follow his valid arrest.

2. Malmberg did not receive ineffective assistance of counsel for failure of his attorney to argue invalid arrest.

Malmberg correctly states the law as it applies to ineffective assistance of counsel. However, a review of the record shows that his trial counsel argued lack of basis to detain Romero. [RP 51-53, CP 12-14] If there was no grounds to detain, there would be no grounds to arrest; the arguments are very similar. Furthermore, because the arrest was valid, Malmberg cannot show that he would

have prevailed on that argument, and therefore he was not prejudiced.

3. Malmberg cannot raise for the first time on appeal the issue of the failure of the court to give the accomplice testimony jury instruction. The failure to give the instruction is not of constitutional magnitude, and cloaking it in a claim of ineffective assistance of counsel does not make it so.

A trial court does not err when it fails to instruct a jury to view skeptically the testimony of an accomplice of the defendant who testifies for the state. This instruction is not constitutionally required. State v. Hoffman, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991); State v. Pearson, 37 Wash. 405, 412-15, 79 P. 985 (1905). By failing to propose such an instruction, Malmberg waived the right to appeal his claim of nonconstitutional error. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-88, 689-91, 757 P.2d 492 (1988).

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a “manifest error affecting a constitutional right.” Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. “On the other hand, ‘permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is

wasteful of the limited resources of prosecutors, public defenders and courts.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

RAP 2.5(a) concerns errors raised for the first time on appeal:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

Malmberg cites to State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984), for the proposition that the accomplice testimony jury instruction, WPIC 6.05, which is quoted verbatim in the appellant’s opening brief at page 20, is required whenever other evidence does not substantially corroborate the accomplice’s testimony. In Harris, however, the defendant requested the instruction and it was refused. Id., at 151. Harris was in a much different posture than Malmberg, who did not request the instruction below and did not object to the court’s failure to give it.

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of

construction require that the term “manifest” in RAP 2.5(a)(3) be given meaning. . . . As the Washington Supreme Court stated in State v. Scott, [*supra*, at 687] “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992).

We agree with the court of Appeals that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can “identify a constitutional issue not litigated below.”

Scott, *supra*, at 687. The Lynn court described the correct analysis

in these steps:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. . . . “[M]anifest” means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. “Affecting” means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

Lynn, *supra*, at 345.

Where an element of the charged offense has been omitted from the jury instructions, or a requirement for conviction is not clearly stated, a constitutional due process issue is presented. State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn.2d 707, 887 P.2d 396 (1995). An error in defining terms used in the elements of a crime is not of constitutional magnitude as long as the instructions properly inform the jury of the elements of the crime charged. State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). If an instruction can be construed as relieving the State of its burden of proof, that can be a constitutional error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). As noted above, however, failure to give the accomplice testimony instruction is not, which is why Malmberg is cloaking it as an ineffective assistance of counsel claim, which is of constitutional magnitude. However, if the underlying claim is not of constitutional magnitude, it is not made so by calling it ineffective assistance of counsel, nor does counsel become ineffective because he failed to ask for the instruction below.

To demonstrate that counsel was ineffective, Malmberg must show that his counsel's performance was deficient, or fell below an objective standard of reasonableness under the circumstances, and

that he was prejudiced; in other words, he must show a reasonable probability that but for the error, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that a counsel's representation was effective. The burden is on the defendant to show from the record that the representation was deficient. McFarland, *supra*, at 335.

Here Malmberg points to nothing in the record to support his assertion except for the fact that he was found guilty. He does not show that it is likely he would have been acquitted had the instruction been given. Nor does he show that he was prevented by the instructions from arguing his theory of the case, which is that Romero lied about Malmberg's complicity in obtaining and packaging the marijuana with the intent to sell it. The record shows that the defense counsel vigorously cross-examined Romero [03/21/07 RP 85-90] and argued forcefully in closing that Romero was lying. [03/21/07 RP 135-139]. The prosecutor talked at some length in closing and rebuttal arguments about Romero's veracity. [03/21/07 RP 129-130, 141-147, 148-151]. The jury was informed of all the reasons to question Romero's testimony and that it was the judge of the credibility of the witnesses. [CP 24-25]. There is

nothing in the record to show that had the instruction been given it would have added anything the jury did not already know. It simply is not of constitutional magnitude, nor is there a “manifest” error.

[I]t is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. The appellant must first make a showing how, in the context of the trial, the alleged error actually “affected” the defendant’s rights. Some reasonable showing of a likelihood of actual prejudice is what makes a “manifest error affecting a constitutional right.”

Lynn, *supra*, at 346.

Even if Malmberg had requested the instruction at trial and been refused, where there is substantial corroboration of the accomplice’s testimony the failure to request the instruction is not indicative of ineffective assistance of counsel. State v. Sherwood, 71 Wn. App. 481, 860 P.2d 407 (1993). Here Officer Armitage and Romero gave a consistent account, much different from Malmberg’s, and the marijuana was located within arm’s reach of the defendant. What evidence there was corroborated Romero. Malmberg points to no reason that Romero would falsely accuse him, but not Creech, of complicity in the crime, or that when Romero first told the police that Malmberg was involved in the crime he had

anything to gain. There was sufficient evidence to corroborate Romero that the instruction would not have been mandatory.

4. The prosecutor's closing argument did not shift the burden of proof to the defendant, nor did the prosecutor express his opinion about the credibility of the witnesses.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. Hughes, 106 Wash. 2d 176, 195, 721 P.2d 902 (1986). Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. Hoffman, supra, at 93; State v. York, 50 Wn. App. 446, 458, 749 P.2d 683 (1987), review denied, 110 Wash. 2d 1009 (1988)

State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)

Malberg argues that the prosecutor improperly shifted the burden of proof to the defense by telling the jury that “[i]f you accept Mr. Romero’s testimony that they both packaged the marijuana for sale, what makes me say that he is guilty under the elements of this crime? For that we need to go back to the law the judge gave you.” [03/21/07 RP 130]; and “You consider all the doubts that a reasonable person might have to say, I doubt it, and if after you do that you believe that Mr. Romero was telling the truth and they packaged the marijuana together so that it could be sold then you are convinced beyond a reasonable doubt.” [03/21/07 RP 133].

Malmberg cites to State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), for the assertion that the prosecutor presented the jury with a false choice, i.e., it could find Malmberg not guilty only if it believed his testimony or that Romero was credible and Malmberg was guilty unless he proved he was not. This is not an accurate characterization of the prosecutor's comments, as quoted above. In Miles, the court held that to the extent that the prosecutor's argument told the jury that it could acquit only if it believed Miles's evidence, it was misconduct. Id., at 890. That is not what the prosecutor in this case did.

“In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence.” State v. Hoffman, *supra*, at 95. “When the State's evidence contradicts a defendant's testimony, a prosecutor may infer that the defendant is lying or unreliable.” Miles, *supra*, at 890, cites omitted. Where Malmberg and Romero gave diametrically opposed testimony, the State did not have to pretend that both were telling the truth. Here, rather than telling the jury it could not acquit Malmberg unless it believed him, the prosecutor instead argued that if it believed Romero, it would be convinced beyond a reasonable doubt that Malberg was guilty. “. . . I'm going to tell you

why under the evidence Mr. Romero is a credible witness and Mr. Malmberg—actually I say Mr. Romero and Officer Armitage are very credible witnesses and Mr. Malmberg is not.” [03/21/07 RP 133-34]. The prosecutor did not offer the jury a “false choice”. He argued from the evidence why Romero and Officer Armitage should be believed and Malmberg should not.

Malmberg also argues that the prosecutor expressed his personal opinion regarding the credibility of the witnesses. It is reversible error for a prosecutor to do so. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). However:

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during argument, and the court’s instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. State v. LaPorte, 58 Wn.2d 816, 365 P.2d 24 (1961). Here, the entire argument in context reveals the deputy prosecutor merely called the jury’s attention to those facts and circumstances in evidence tending to support the credibility of Mr. and Mrs. Papadopoulos.

Id. A review of the closing argument and rebuttal here shows that the prosecutor offered reasons why the jury should find the State

witnesses credible [03/21/07 RP 129, 133-34, 142-45, 147, 151], reviewed the factors the jury should consider in making credibility determinations (which tracked the jury instruction, CP 24-25) [03/21/07 RP 142-150], and discussed the apparent motive, or lack of motive, for the witnesses to lie. [03/21/07 RP 146-47] He specifically explained to the jury that “My belief or non-belief in a witness is immaterial.” [03/21/07 RP 148] The prosecutor did not personally vouch for the credibility of the witnesses, and any comments that seem to be such are taken out of context.

During the State’s closing and rebuttal arguments, defense counsel made two objections. One was an unspecified objection to the prosecutor’s remark that the jurors had taken an oath, and while the court seemed to know where defense counsel was going, and overruled the objection, it is not apparent from the record. [03/21/07 RP 125] The other was an objection that the prosecutor was telling the **jury** that to acquit Malmberg, it would have to find that the officer was lying, which the court noted but did not sustain. [03/21/07 RP 148]. As explained above, a review of that portion of the argument shows that the prosecutor was arguing reasons to conclude that the officer had no motive to falsely accuse Malberg.

[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, supra, at 93, York, supra, at 458-59. In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Lord, 117 Wash. 2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L. Ed. 2d 112, 113 S. Ct. 164 (1992); State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541, *review denied*, 107 Wash. 2d 1011 (1986).

Russell, *supra*, at 86. Malmberg did not object at trial to the remarks he now challenges, and thus waived any error. The remarks of the prosecutor here fall within the boundaries of permissible argument, and are not only not improper, but certainly not “flagrant and ill intentioned.”

To determine if the prosecutor’s argument denied the defendant a fair trial, a reviewing court must determine whether the comments were in fact improper. If they were, then the court considers whether there was a “substantial likelihood” that they affected the jury, “for, although the Sixth Amendment and Const. art. 1, § 22 grant defendant’s the right to trial by an ‘impartial jury’, the right does not include a right to an error-free trial.” State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Had the

prosecutor's remarks been improper, Malmberg should have asked for a curative instruction, which he did not.

Malmberg argues that the case is very close and the outcome depended on which witnesses the jury believed. That is true in a great many cases. The prosecutor did indeed bolster Romero's and Armitage's testimony while attempting to weaken Malmberg's. That is the function of an advocate. However, he did so by basing his argument on the evidence, reminded the jury that it was the sole judge of credibility of the witnesses, and that his opinion was immaterial. There was no prosecutorial misconduct, and even if there had been, Malmberg did not properly preserve the issue for appeal by objecting and requesting a curative instruction. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Case, 49 Wn.2d 66, 72-73, 298 P.2d 500 (1956).

5. There was no cumulative error materially affecting the outcome of the trial.

The cumulative error doctrine is not applicable to this case for two reasons. First, as argued above, there were no errors.

The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial.

State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003); see also State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Where there are no errors, they cannot be cumulative. There appear to be no guidelines as to how many errors must accumulate to justify reversal, but if, for example, this court found one error that does not require reversal, there would certainly not be cumulative error.

Secondly, if the errors claimed by Malmberg had actually occurred, they would, standing alone, be sufficient to warrant reversal and the cumulative error doctrine would not be determinative. It is true that this court has applied the doctrine even where valid grounds for reversal existed, "in the hope that such errors will not be repeated on remand." State v. Oughton, 26 Wn. App. 74, 85, 612 P.2d 812 (1980). However, in that case the court pointed out that it could have reversed on one error alone, but listed others for purposes of guidance during retrial, as courts often discuss issues for which they are not reversing. For example, see In re pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). In Malmberg's situation, either there is reversible error or not, but the cumulative error doctrine would not apply.

D. CONCLUSION.

The trial court did not err in refusing to suppress the pipe, marijuana, and scale, trial counsel was not ineffective, the prosecutor's closing and rebuttal arguments were not improper, and there was no cumulative error. The State respectfully asks this court to affirm Malmberg's convictions.

Respectfully submitted this 12th of June, 2008.

Carol La Verne
Carol La Verne, WSBA# 19229
Attorney for Respondent

A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on June 12, 2008.

Thomas E. Doyle
P. O. Box 510
Hansville, Washington 98340-0510
Attorney for Adam Malmberg

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 6/12/08

Signature: [Signature]