

NO. 37136-7

FILED
COURT OF APPEALS
DIVISION II

03 NOV 26 PM 1:43

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY Cm
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER SCALES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 07-1-03462-7

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the defendant waive any objection to the alleged testimony regarding witness credibility and hearsay when no objection was raised, and was any error harmless?..... 1

 2. Did the prosecutor commit misconduct when statements concerning a witness' credibility and alleged hearsay were not so flagrant and ill-intentioned as to warrant reversal? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 4

 1. DEFENDANT FAILED TO OBJECT TO THE ADMISSION OF EVIDENCE AND THEREFORE WAIVES HIS RIGHT TO THE ISSUE ON APPEAL..... 4

 2. DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR'S STATEMENTS CONSTITUTED MISCONDUCT. 9

D. CONCLUSION. 14

Table of Authorities

State Cases

| | |
|---|-------|
| <i>State v. Binkin</i> , 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996) | 13 |
| <i>State v. Boehning</i> , 127 Wn. App. 511, 111 P.3d 899 (2005) | 12 |
| <i>State v. Davis</i> , 154 Wn.2d 291, 304, 111 P.3d 844, affirmed, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... | 8 |
| <i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001)..... | 6 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 840, 147 P.3d 1201 (2006) | 5 |
| <i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)..... | 4 |
| <i>State v. Hettich</i> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993) | 4 |
| <i>State v. Jerrels</i> , 83 Wn. App. 503, 508, 925 P.2d 209 (1996) | 9 |
| <i>State v. Kirkman</i> , 159 Wn.2d 918, 927, 155 P.3d 125 (2007)..... | 5-6 |
| <i>State v. Magee</i> , 143 Wn. App. 698, 180 P.3d 824 (2008)..... | 7 |
| <i>State v. McKenzie</i> , 157 Wn.2d 44, 53, 134 P.3d 221 (2006) | 9, 11 |
| <i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995) | 13 |
| <i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988) | 7 |
| <i>State v. Smith</i> , 148 Wn.2d 122, 139, 59 P.3d 74 (2002)..... | 8 |
| <i>State v. Stith</i> , 71 Wn. App. 14, 856 P.2d 415 (1993)..... | 6 |
| <i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990) | 9 |
| <i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987) | 4 |

Federal and Other Jurisdictions

Frye v. United States, 54 App. D.C. 46, 293 F. 1013,
1014 (D.C. Cir. 1923).....4

Rules and Regulations

ER 1036
ER 801(c).....7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant waive any objection to the alleged testimony regarding witness credibility and hearsay when no objection was raised, and was any error harmless?
2. Did the prosecutor commit misconduct when statements concerning a witness' credibility and alleged hearsay were not so flagrant and ill-intentioned as to warrant reversal?

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2007, the Pierce County Prosecutor's Office charged CHRISTOPHER MICHAEL SCALES, hereinafter "defendant," with the crime of unlawful delivery of a controlled substance. CP 1. The State filed an amended information adding a school zone enhancement to the underlying drug charge. CP 22-23. The case proceeded to trial on October 31, 2007, in front of the Honorable Stephanie A. Arend with defendant proceeding pro se. RP 5¹.

¹ The Verbatim Report of Proceedings is contained in 3 volumes which are paginated consecutively and shall be referred to as RP. The sentencing record of proceedings shall be referred to as SRP.

On November 2, 2007, the jury found defendant guilty of the crime of unlawful delivery of a controlled substance and answered yes to the special verdict form invoking a school zone enhancement. CP 24, 25; RP 182. Defendant had an offender score of 14 and was sentenced to 84 months on Count I, plus 24 months for the school zone enhancement, for a total of 108 months confinement. CP 30-42; SRP 9. Defendant filed a timely notice of appeal. CP 26.

2. Facts

In 2007, the City of Tacoma police department conducted an operation known as Operation Hard Rock. RP 68-70. In an effort to target street level narcotics dealers, the operation was run by undercover police officers who worked with confidential informants who would attempt to purchase drugs from dealers. RP 68. All the transactions were video and audio recorded by police nearby who would later arrest the dealers. RP 62, 68.

One such transaction occurred on April 24, 2007, when a confidential informant, James Josey, was sent out by Officer Larsen and Officer Quinn to purchase drugs in the hilltop area of Tacoma. RP 71-73, 101. Josey initially met the officers in a designated area. RP 103. The officers searched Josey and made sure he had no drugs or money on him.

RP 103-4. Josey was given money from the officers to purchase drugs.

RP 104.

Josey left the designated meeting spot in a vehicle equipped with audio and video surveillance and drove to the area of 21st and Martin Luther King Way where officers had told him to go. RP 104. He was followed by the officers listening and watching the situation the entire time. RP 71. That area is located 311 feet from McCarver Elementary School and within a thousand feet of four school bus stops. RP 85, 138-9.

Josey drove down the street and, after making a street sign indicating he was looking to buy drugs, was approached by an individual. RP 105. The man, known as a “middler” who connects the dealer to the buyer, got into the vehicle and directed Josey to drive a short distance. RP 105-106. When the man got out of the vehicle, another person, later identified as defendant, got into the car. RP 105-106, 110. Defendant sold Josey rock cocaine for between \$20 and \$40. RP 104, 106, 130.

Defendant got out of the vehicle and Josey drove back to the designated meeting spot where he met Officers Quinn and Larsen. RP 107. Josey turned over the drugs to the officers. RP 77, 108. Josey wrote a statement and the officers searched him and the vehicle again. RP 108. Defendant chose not to testify during trial.

C. ARGUMENT.

1. DEFENDANT FAILED TO OBJECT TO THE ADMISSION OF EVIDENCE AND THEREFORE WAIVES HIS RIGHT TO THE ISSUE ON APPEAL.

Failure to object precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a *Frye*² objection on appeal because he did not make a *Frye* objection at trial.

- a. Defendant's argument that a statement concerning a witness's credibility was improper is an evidentiary issue that should have been objected to below.

In the case before the court, the defendant argues on appeal that the admission of testimony during cross examination relating to the confidential informant's credibility was improper by way of prosecutorial misconduct.³ The allegedly improper statement occurred while the prosecuting attorney was questioning Officer Larsen about the history of

² *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923)

³ Defendant fails to cite to the record the specific instances of prosecutorial misconduct alleged in his brief, therefore the State is limiting its arguments to exchanges it believes the defendant is alleging constituted misconduct.

the department's relationship with the confidential informant, James

Josey. RP 86. The following exchange took place:

PROSECUTOR: Officer Larson, had you ever worked with the informant that was utilized in this investigation on April 24, 2007, before?

LARSEN: Yes.

PROSECUTOR: Have you ever had any difficulties with that informants credibility or veracity?

LARSEN: No.

PROSECUTOR: Have you ever had any difficulty with that informant failing to follow protocol or instructions?

LARSEN: No.

PROSECUTOR: To your knowledge, has the informant been used successfully in past investigations?

LARSEN: Yes.

RP 86.

The admission of this testimony is an evidentiary issue that should have been addressed at the trial court level by an objection from defendant. *State v. Gregory*, 158 Wn.2d 759, 840, 147 P.3d 1201 (2006). Because defendant failed to object during cross examination, the issue of whether the testimony was admissible is waived on appeal. *Id.*

Furthermore, the cases defendant uses to support his brief involve different circumstances than is the situation here. In *State v. Kirkman*,

159 Wn.2d 918, 927, 155 P.3d 125 (2007), the court stated “the testimony at issue did not directly address credibility” but rather found the case concerned whether a witness may testify to the defendant’s guilt.

Kirkman, 159 Wn.2d at 927. Again, the court in *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), discussed the admissibility of testimony by a witness relating to the defendant’s guilt. *Demery*, 144 Wn.2d at 30. Defendant cites *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993), saying “it is improper for a prosecutor to express a personal opinion or vouch for the credibility of a witness.” Brief of Appellant at 10; *Stith*, 71 Wn. App. at 21-23. In this case, the prosecutor did not express any personal opinions by his questions. The cases cited by the defendant concern a prosecutor’s actions during closing argument which is addressed below. The defendant is asserting error, but failed to object below. The defendant failed to comply with ER 103 and this alleged error has not been preserved for review.

- b. Defendant has failed to prove part of the prosecutor’s questioning constituted inadmissible hearsay.

In the second instance of alleged prosecutorial misconduct, the defendant again fails to cite to the specific instance alleged. The State believes defendant is referring to a statement when the prosecutor was questioning Officer Larson regarding the events of the day. The following exchange took place:

PROSECUTOR: Okay. The individual who sold the informant the controlled substances in this case, was that individual identified?

LARSON: Yes, he was.

PROSECUTOR: Was that individual identified by an officer involved in the investigation who was on scene that day?

LARSON: Yes.

RP 75-6.

This statement is not hearsay. Hearsay is defined as an out of court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). For example, in *State v. Magee*, 143 Wn. App. 698, 180 P.3d 824 (2008), a police officer testified that a dispatcher had told him that a citizen had called and seen the defendant driving the wrong way on the road. *Magee*, 143 Wn. App. at 700-01. The court found that because the officer had not personally seen the defendant driving the wrong way, his statement that the citizen said he had seen this constituted inadmissible hearsay. *Id.* Clearly, Officer Larson responding to a yes or no question by the prosecutor cannot be considered hearsay when looking at its definition and comparing it to cases discussing inadmissible hearsay.

Appellate courts do not review issues that were not objected to by defendant during trial as a failure to object constitutes a waiver. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Therefore, because

defendant failed to object to the elicited testimony during trial, the issue is not reviewable on appeal.

- c. If the court does find that the trial court committed error in admitting such evidence, any error was harmless.

A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844, *affirmed*, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (citations omitted). To determine whether error is harmless, this court utilizes “the ‘overwhelming untainted evidence’ test.” *Davis* at 305 (citing *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.*

Based on the overwhelming evidence presented in this case, if this court were to find that the trial court erred in admitting what the defendant asserts to be hearsay, any error is harmless. First, a confidential informant testified that he purchased drugs from the defendant. RP 104, 106, 130. Second, multiple officers listened to the transaction as it occurred. RP 71. Finally, the confidential informant was given money and searched by officers before the transaction to ensure he had no drugs, and it was after the transaction with defendant that the confidential informant produced the

drugs he had purchased from defendant and gave them to the officers. RP 103-4, 108.

2. DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR'S STATEMENTS CONSTITUTED MISCONDUCT.

Within his arguments, defendant contends prosecutorial misconduct occurred during the questioning of Officer Larson and during closing arguments. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006)(quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). In order to determine whether the misconduct warrants reversal, the court considers its prejudicial nature and cumulative effect. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

In the present case, defendant failed to object to both instances of alleged prosecutorial misconduct and must therefore show that the statements made were: (a) flagrant and ill-intentioned, and (b) constituted enduring prejudice that could not have been cured by an instruction. RP 75, 86; *McKenzie*, 157 Wn. 2d at 53. Because defendant failed to object

during trial, the burden is on the defendant to show that such statements were flagrant and ill-intentioned by the prosecutor. *Id.* at 52.

- a. Defendant has failed to prove prosecutorial misconduct occurred during the prosecutor's closing argument.

Defendant's assertion that the prosecutor's statements during closing arguments were used to "drive home the point that Mr. Josey was credible because Officer Larsen said so" is entirely without merit.

Appellant's brief at 10. First, the court's instructions clearly describe the jury's role in the trial and explain how they are the sole deciders of the credibility of witnesses. The instructions read:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 3-21, Instruction No. 1.

Second, during closing arguments, the prosecutor reminded the jury twice that they are the sole judges of credibility and the only

statement involving both Officer Larson and Mr. Josey discussed the history and nature of their relationship. The prosecutor stated:

Ryan Larson testified that while Mr. Josey has been used as an informant for quite a number of years and he's been used quite successfully with reliability and no problems, that if any informant were ever to be deceptive, misleading, and anything less than being forthcoming and candid with the officers as a witness or informant for the State, they would be prosecuted.

RP 146.

Courts recognize there is a “distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*” ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006)(emphasis in original).

While it is improper for a prosecutor to express his personal opinion, arguments made in closing arguments sometimes appear as such if not looked at in light of the entire case. ***McKenzie***, 157 Wn.2d at 53-4. By looking at the total argument, it may become apparent that counsel is arguing an inference from the evidence and trying to convince the jury to reach such a conclusion. *Id.* Such is the case here as it is clear that the prosecutor is merely describing the relationship between Officer Larsen and Josey. Nowhere does the prosecutor say the jury should believe Josey because Officer Larsen told them to.

- b. Defendant has failed to prove prosecutorial misconduct occurred during the prosecutor's questioning of Officer Larson.

Defendant improperly cites *State v. Boehning* in furtherance of their improper hearsay argument. Appellant Brief at 11. That case discusses out of court statements made by a minor alleging sexual abuse testified to at trial by multiple persons. *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). In *Boehning*, throughout his questioning and during closing arguments, the prosecutor asked the jury to infer that the defendant's three dropped rape charges showed that the minor's hearsay statements were credible and evidence that more serious acts were committed which she was too frightened to testify about. *Id.* at 521-23. The court held that "the prosecutor was not raising reasonable inferences and arguments based on the evidence at trial" and had committed a flagrant and ill-intentioned error. *Id.* at 522. The present case is distinguishable as the prosecutor never asks the court to infer anything from anyone's statements. The issue, as addressed above, concerns the testimony of Officer Larson and the admissibility of such statements. Therefore, the two cases cannot be compared as *Boehning* discusses statements made by the prosecutor and the present case concerns the testimony of a witness.

Rather, the issue of hearsay in the present case is similar to *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995). In *Powell*, the court held that testimony concerning personal observations of witnesses was admissible and allowed the victim's friends to testify about fights they witnessed between defendant and the victim. *Powell*, 126 Wn.2d at 266. In the present case, the testimony given by Officer Larson was a personal observation of an identification of the defendant by another police officer. As such, like in *Powell*, the evidence was properly admissible.

But, even if the court finds the argument to be improper, any prejudice from the alleged misconduct could have been eliminated by a curative instruction that repeated instructions previously given, and the defendant failed to request one. *State v. Binkin*, 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Defendant's argument that this alleged misconduct is so egregious as to constitute reversal is meritless.

As argued above, because of overwhelming evidence, the defendant cannot show prejudice.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: NOVEMBER 26, 2008.

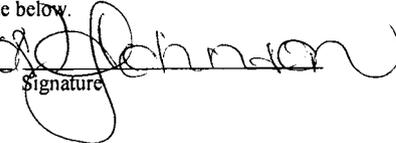
GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Chelsey McLean
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/26/08 
Date Signature

STATE OF WASHINGTON
BY  em
DEPUTY
NOV 26 2008
11:43
COMMUNICATIONS
DIVISION