

FILED
JANUARY 14, 2016
Court of Appeals
Division III
State of Washington

33344-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL C. COLLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

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INDEX

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE.....	3
D.	ARGUMENT	6
1.	THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE.....	6
2.	THE COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE	8
a.	Irrelevant Evidence Likely To Confuse Or Mislead The Jury.....	9
b.	Evidence Of Uncharged Wrongful Conduct.....	10
3.	DEPUTY’S OPINION AS TO HONESTY OF DEFENSE WITNESS INVADED THE PROVINCE OF THE JURY	12
4.	THE EVIDENTIARY ERRORS WERE NOT HARMLESS	13
E.	CONCLUSION.....	15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. CALEGAR, 133 Wn.2d 718, 947 P.2d 235 (1997).....	13
STATE V. CASTANEDA-PEREZ, 61 Wn. App. 354, 810 P.2d 74, <i>review denied</i> , 118 Wn.2d 1007 (1991).....	12
STATE V. JACKSON, 102 Wn.2d 689, 689 P.2d 76 (1984).....	13
STATE V. JERRELS, 83 Wn. App. 503, 925 P.2d 209 (1996).....	12
STATE V. PADILLA, 69 Wn. App. 295, 846 P.2d 564 (1993).....	12
STATE V. RAY, 116 Wn.2d 531, 806 P.2d 1220 (1991).....	13
STATE V. RUSSELL, 104 Wn. App. 422, 16 P.3d 664 (2001).....	13
STATE V. STENSON, 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998).....	12
STATE V. SUAREZ-BRAVO, 72 Wn. App. 359, 864 P.2d 426 (1994).....	12
STATE V. THANG, 145 Wn.2d 630, 41 P.3d 1159 (2002).....	9, 11
STATE V. WEBER, 159 Wn.2d 252, 149 P.3d 646 (2006), <i>cert. denied</i> , 127 S. Ct. 2986 (2007).....	12

STATUTES

RCW 5.45.020 7

COURT RULES

ER 401 8

ER 402 9

ER 403 9

ER 404(b)..... 4, 6, 10

ER 801(c)..... 7

ER 802 7

ER 803 7

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting irrelevant hearsay evidence.
2. The court erred in admitting irrelevant evidence of uncharged wrongful conduct.
3. The court erred in permitting the deputy prosecutor to elicit from the deputy sheriff his opinion that the defense witness was not honest.

B. ISSUES

1. The defendant was arrested while in possession of a stolen vehicle in which a pack of cigarettes was found. Was a receipt purporting to show the very recent purchase of the same brand of cigarettes at a nearby store inadmissible hearsay evidence?
2. At the time of his arrest while driving a recently stolen truck bearing recently stolen license plates in which a pack of cigarettes was found, the defendant presented a recently stolen driver's license with the name of another person. The State presented evidence that a few days later law enforcement officers found abandoned in a nearby county a damaged car, containing a document that mentioned the

defendant's passenger, mail addressed to the person whose driver's license was presented, and a pack of the same brand of cigarettes found in the truck. The evidence was admitted as relevant to the element of possession. Did the court abuse its discretion in ruling the evidence was more relevant than prejudicial evidence?

3. The defendant was charged with identity theft, making a false statement and possessing a stolen truck with stolen plates and a stolen firearm. The deputy prosecutor asked the deputy sheriff whether he had found anything in the truck in which the defendant was arrested that could be used to conceal someone's identity. The deputy sheriff stated there was a ski mask in the truck. Did the court abuse its discretion in ruling the evidence more relevant than prejudicial?
4. The deputy prosecutor asked the deputy sheriff whether a defense witness was dishonest about her name. Did the question and answer invade the province of the jury?
5. Is it reasonably likely that the admission of hearsay evidence, irrelevant evidence of wrongful acts, and

evidence that invaded the province of the jury together affected the outcome of the trial?

C. STATEMENT OF FACTS

On December 30, 2013, Jose Graciola left his 2004 Silverado truck running outside his daughter's house in Othello. (RP 100) When he came back out, it was gone. (RP 101) A few months earlier Daniel Eilers had discovered that three of his firearms were missing, including a 40 caliber pistol, an SKS and a 12-gauge shotgun. (RP 56-58)

On New Year's Day Emiliano Martinez discovered the license plates for his 2006 Silverado truck had been taken. (RP 38-40, 43) (RP 42). Around this time, Christopher Brunetti learned his mailbox had been damaged, and various items, including the driver's license he had ordered from the Department of Licensing, were never received. (RP 48-53)

Deputy Clifton Conner was on patrol on New Year's Eve when he saw a Silverado with a defective headlight. (RP 69-70) He initiated a traffic stop and contacted the driver, Michael Colley. (RP 70-72) Mr. Colley initially identified himself as Carlos, then gave him Mr. Brunetti's driver's license. (RP 79)

Mr. Colley was arrested and eventually charged with making a false statement, identity theft, possession of a stolen firearm, possession of

a stolen vehicle and third degree theft. (CP 181-184) The truck was towed to a secure location. (RP 86)

Before trial the State moved to admit evidence relating to the discovery of a stolen¹ black Hyundai in a nearby county a few days after Mr. Colley's arrest. (RP 7) Defense counsel objected, citing ER 404(b). (RP 7) The State argued the evidence was relevant to show absence of mistake, or modus operandi, or proof of motive. (RP 9) The court granted the motion, stating the evidence was relevant to prove an element of the offense: possession. (RP 15)

Deputy Conner told a jury he searched the truck, finding a hat, a mouse item, a pill bottle, a backpack, an SKS rifle, a woman's headband, multiple sets of keys, a cell phone, two contact lens cases, an unidentifiable orange item, a Camel Crush cigarette pack, a large black purse, two different shopping bags, a rifle on the floorboard of the back seat, a black jacket, and a black semi-automatic handgun on the passenger side floorboard. (RP 125-28) [contents of backpack, bullets, etc. on ensuing pages (RP 145)]

Deputy Conner testified that he also found a receipt dated December 31, 2013, on the passenger side floorboard. (RP 147) It was admitted into evidence over defense counsel's hearsay objection. (RP

¹ The State did not present evidence at trial showing that the vehicle was stolen.

149) Deputy Conner told the jury that the receipt was from the Walgreen's store at 20th and Court, issued at 9:57 p.m., and that he stopped the Silverado driven by Mr. Colley about 3 minutes later at a nearby location. (RP 149-50) He testified the receipt listed purchased items including Camel Crush cigarettes, like the pack found in the console of the truck, the hat found on the driver's seat, a headband, a bottle of Jägermeister, Sunny Smile C/chip, Red Bull energy drink, TYJ Learning, and MSA-3-X. (RP 150)

The deputy prosecutor asked Deputy Conner whether he had found items in the truck that could be used to conceal someone's identity and, over defense counsel's objection, the deputy testified there was a black ski mask in the back seat. (RP 163)

Adel Estrada was a passenger in the Silverado when Deputy Conner stopped Mr. Colley. (RP 308-09) After asking the deputy whether the passenger was honest about her name, to which defense counsel objected, and eliciting additional information about the identification she provided, the deputy prosecutor again asked Deputy Conner, "Was Miss Estrada honest about her name?" and the deputy replied, "No." (RP 74-76)

Deputy Daryl Barnes was dispatched to the scene of an abandoned vehicle on January 3. (RP 208) The vehicle, which the deputy prosecutor

described as a black Hyundai, had a broken window and did not have a front license plate. (RP 209) The deputy told the jury that he had obtained the registered owner's consent to search the vehicle and the Hyundai did not belong to Mr. Colley. (RP 214)

Over defense counsel's ER 404(b) relevance objection, Deputy Barnes told the jury he had found a document in the abandoned car that he identified as "a consolidated homeless grant" for applicant Adel Estrada and a Camel Crush cigarette box. (RP 217, 219, 229) He also found mail addressed to Christopher Brunetti. (RP 230)

Adel Estrada was a passenger in the Silverado when Deputy Conner stopped Mr. Colley. (RP 308-09) After asking the deputy whether the passenger was honest about her name, to which defense counsel objected, and eliciting additional information about the identification she provided, the deputy prosecutor again asked Deputy Conner, "Was Miss Estrada honest about her name?" and the deputy replied, "No." (RP 74-76) Ms. Estrada testified for the defendant.

The jury found Mr. Colley guilty of making a false statement, identity theft, possession of a stolen vehicle and third degree theft. (CP 17)

D. ARGUMENT

1. THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE.

ER 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 802 provides that “[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 803 references an exception for business records set out in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The receipt was offered on evidence to prove the truth of the matters asserted therein, namely the time and place purchases were made and the identity of the items purchased. Deputy Conner related to the jury the information contained on a receipt found in the truck driven by Mr. Colley, specifically including the time and place of alleged purchases and the items identified on the receipt as having been purchased. In closing argument the deputy prosecutor relied on this information as evidence that

Mr. Colley had recently purchased, and thus likely smoked, Camel Crush cigarettes like those found in the abandoned Hyundai, thus linking him to the apparently criminal activity represented by the discovery of the damaged and abandoned Hyundai a few days after Mr. Colley's arrest. (RP 332-33)

The trial court admitted the receipt into evidence because the items listed on the receipt were consistent with items the deputy had described as having been found in the truck at the time of Mr. Colley's arrest. The fact that hearsay evidence tends to corroborate witness testimony is not a recognized exception to the rule excluding hearsay evidence. Although the receipt might have been a business record, no one identified it or testified as to its mode of preparation, or whether it was made in the regular course of business.

The receipt was not admissible under the business record exception, or any other exception, to the hearsay. Its admission into evidence was an abuse of discretion.

2. THE COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE.

Evidence Rule 401 provides: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.

“Evidence which is not relevant is not admissible.” ER 402. Even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

The trial court’s decision to admit evidence is reviewed for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

a. Irrelevant Evidence Likely To Confuse Or Mislead The Jury.

Evidence purporting to show that items found in the stolen truck had been recently purchased at a nearby store was utterly irrelevant. None of the purchased items related to any of the offenses with which Mr. Colley was charged. The most nearly relevant item was the cigarette pack, which was presumably offered to suggest a connection between Mr. Colley and the abandoned Hyundai found a few days later.

As will be shown below, the Hyundai evidence was itself inadmissible. Repeated reference to the cigarette brand and the discovery of the receipt tended to suggest that the purchases had some nefarious

significance that was not apparent to jurors, thus causing unfair prejudice and confusion.

The prosecutor asked Deputy Conner whether he had found anything in the truck that could be used as a disguise and the deputy responded that he had found a ski mask. This evidence was similarly irrelevant and potentially prejudicial. Mr. Colley was not charged with any offense that involved the use of a disguise, and there was no evidence he had been disguised when committing the alleged crimes. This evidence might have caused jurors to speculate about other uncharged crimes, crimes involving the use of a disguise, that Mr. Colley might have committed.

Precisely because the receipt and ski mask were irrelevant, they were likely cause the jury to speculate about their possible significance, thereby leading to confusion about the issues.

b. Evidence Of Uncharged Wrongful Conduct.

Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In order for a court to admit evidence of other wrongs, the court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d at 642.

No evidence established that the Hyundai was stolen. Evidence that the same brand of cigarettes was found in the Hyundai and in the truck Mr. Colley was driving, even combined with evidence that some of Mr. Brunetti's mail was found in the truck and Mr. Colley possessed Mr. Brunetti's driver's license, does not support any inference that Mr. Colley possessed the truck, license plates or firearm which were the basis for the three possessory offenses with which he was charged. Certainly no rational fact-finder could infer from this evidence that Mr. Colley knew that Mr. Graciola's truck and Mr. Martinez's license plates were stolen. The evidence was utterly irrelevant to any issue in this case, yet because it was presented to the jury, the clear implication was that the State had some information implicating Mr. Colley in an uncharged crime which suggested he was a thief and had acted in conformity with such a character trait.

3. DEPUTY'S OPINION AS TO HONESTY OF
DEFENSE WITNESS INVADED THE
PROVINCE OF THE JURY.

“To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney’s conduct was both improper and prejudicial.” *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), *cert. denied*, 127 S. Ct. 2986 (2007).

“A prosecutor commits misconduct when [he or she] seeks to compel a witness’ opinion as to whether another witness is telling the truth.” *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (citing *State v. Suarez–Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993)). Weighing the credibility of the witnesses is the jury’s province; witnesses may not express their opinions on whether another witness is telling the truth. *State v. Casteneda–Perez*, 61 Wn. App. 354, 360, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991).

If the defendant does not object to alleged misconduct at trial, he generally waives the issue of prosecutorial misconduct, unless the misconduct 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. Stenson*, 132 Wn.2d 668, 726–27, 940 P.2d 1239 (1997) (citations omitted), *cert. denied*, 523 U.S. 1008 (1998).

Here, defense counsel objected twice, reminding the court that the issue of dishonesty was for the jury. (RP 74-75) By asking the deputy to state his opinion that Ms. Estrada was not honest the deputy prosecutor prejudiced the jury against the only witness to testify on behalf of the defendant.

4. THE EVIDENTIARY ERRORS WERE NOT HARMLESS.

The admission or exclusion of evidence is reviewed under an abuse of discretion standard and thus is regarded as harmless if, “within reasonable probabilities,” it did not affect the trial outcome. *State v. Russell*, 104 Wn. App. 422, 434, 16 P.3d 664 (2001) (citing *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997); *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)).

The deputy prosecutor commenced her closing argument by reminding the jury that the items found in the truck at the time of the arrest were identical to the items listed on the receipt. (RP 332-33) She referred to the discovery of the Hyundai “under suspicious circumstances” and the possible relationship between a couple of items found therein and items in the defendant’s possession at the time of his arrest. (RP 334) She

acknowledged that the evidence supporting the charges of possessing stolen property were circumstantial, and rested her argument in large part on the evidence that they were actually stolen. (RP 339-42, 359-61) The element of knowledge was implied by evidence of uncharged crimes, including items of Mr. Brunetti's mail and a pack of Camel cigarettes, similar to one allegedly purchased moments before Mr. Colley's arrest, having been found in a "suspicious" car, his possession of items which could arguably be used for a disguise, and the deputy's opinion that Mr. Colley's companion was dishonest.

In short, in order to prove an essential element of two of the offenses of which Mr. Colley was convicted, the State relied heavily on evidence improperly admitted over defense counsel's objections. Absent the inadmissible evidence one might reasonably conclude that the circumstantial evidence of mere possession of a stolen vehicle and license plates was sufficient to support an inference that Mr. Colley had actual knowledge they were stolen.

E. CONCLUSION

Mr. Colley's convictions for possessing a stolen vehicle and stolen license plates were the product of improperly admitted irrelevant evidence, hearsay evidence, and innuendo and should be reversed.

Dated this 14th day of January, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33344-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MICHAEL C. COLLEY,)	
)	
Appellant.)	

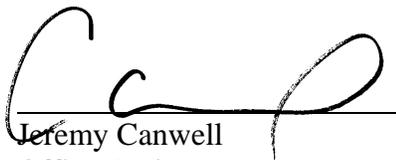
I certify under penalty of perjury under the laws of the State of Washington that on January 14, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on January 14, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Missoula, Montana on January 13, 2017.



Jeremy Canwell
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