

NO. 66095-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TYLER LJUBICH,

Appellant.

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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. The trial court admitted hearsay testimony for the limited purpose of explaining the officer's actions and investigations, and gave the jury a limiting instruction. The prosecutor referenced the hearsay in closing argument but clearly noted the testimony was not for the truth of the matter asserted. Did the prosecutor commit misconduct requiring reversal?

2. Does delayed entry of Findings of Fact and Conclusions of Law require reversal or remand when there has been no prejudice to the Appellant?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

The Appellant, Tyler Ljubich, was charged with robbery in the first degree. CP 1. The State alleged that Ljubich robbed the pharmacy of Michael Ng and Arlene Mark-Ng on September 16, 2009. CP 2-4. The jury found Ljubich guilty of robbery in the first degree as charged. CP 148. The court imposed a standard range sentence of 41 months' confinement. RP 178-86. The court sentenced Ljubich on October 10, 2010. CP 6.

Prior to trial, the court held a CrR 3.6 hearing to determine the admissibility of physical evidence and the witness identifications. The trial court found the evidence was admissible; however, the court did not enter findings of fact and conclusions of law until July 11, 2011. CP 189-92.

## 2. SUBSTANTIVE FACTS

Michael Ng and his wife Arlene Mark-Ng owned a pharmacy on California Avenue in West Seattle. RP 521, 618<sup>1</sup>. Ng had purchased the pharmacy from his father-in-law and ran the business for thirty-two years. RP 618. The couple sold the pharmacy and transferred all their files and inventory of prescription drugs to the new owners on September 15, 2009. RP 619. They were robbed the following day as they were clearing out the store. RP 522.

The Ngs were packing up the business on September 16, 2009. RP 522. All the drugs in the store had already been transferred to the new owners and they only had a few expired prescription medications and empty pill bottles in the store.

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<sup>1</sup> There are five consecutively paginated volumes of verbatim report of proceedings referenced as "RP."

RP 523. Ng was in the back area of the store and Mark-Ng was at the counter. RP 524, 603. The defendant, Tyler Ljubich, entered the store with a silver sub-nosed handgun. RP 524, 525. Mark-Ng was on the phone and Ljubich knocked the phone out of her hand. RP 620. At first, Mark-Ng thought Ljubich was a former employee playing a joke on them. RP 524. When Ljubich grabbed Mark-Ng, pushed her against the wall, and pointed the gun in her face demanding Oxycontin, Mark-Ng realized the defendant was serious and this was not her former employee. RP 522-54. Mark-Ng was able to get a good look at Ljubich. RP 525. At the trial, Mark-Ng described Ljubich as:

Sunglasses.  
Jacket with some kind of emblem on it.<sup>2</sup>  
Gloves.  
May have been wearing a hat.  
Dark or Brunette hair. RP 525, 529.

Mark-Ng called for her husband. RP 524. Ljubich demanded Oxycontin and Vicodin. RP 522, 526, 620. The couple told Ljubich that they had sold the store and no longer had drugs. RP 526, 621. Ljubich told them to open the safe. RP 623. Ljubich threatened to hit them and Ng offered to give him the contents of

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<sup>2</sup> Mark-Ng noted that her statement described the jacket as a hoodie or sweat shirt, but did not specifically remember at trial. RP 525.

his pockets. RP 623. Ng took out his cell phone and gave it to Ljubich. RP 526-27. Ljubich took a camera and expired medications from the counter and placed them in a white plastic garbage bag. RP 527, 529, 623-24. Ljubich told Ng to give him all the money from the till and Ng opened the till and gave him the money. RP 527, 624. Ng gave Ljubich approximately \$400. RP 624.

As Ljubich was leaving, Mark-Ng asked for the camera and cell phone back. RP 527, 624. Mark-Ng explained that there were photos from a family wedding on the camera that she did not want to lose. RP 527. Ljubich retrieved the phone and camera and returned them to Mark-Ng. RP 527, 624. Mark-Ng followed Ljubich as he left and saw him turn left on California Avenue, then turn on Brandon, then go through some trees going north on 44<sup>th</sup> Avenue. RP 535, 538. Later, Mark-Ng was shown a photo montage and was able to identify Ljubich "without a doubt." RP 532, 546. She was also able to identify Ljubich in court as the robber. RP 547. Mark-Ng was one hundred percent certain Ljubich was the robber. RP 548.

Ng called 911 and described the robber. When the police arrived he described the robber as<sup>3</sup>:

Slender. RP 626.  
White male. RP 626.  
With a revolver. RP 621.  
Colored sweatshirt with a global logo on it. RP 626.  
20's. RP 626.  
Six foot two inches tall. RP 627.  
Long or slender face. RP 628.  
"Longish" hair. RP 643.  
160-180 pounds. RP 627.  
Deep set eyes. RP 638.  
Eyes were "skewed," meaning they looked in different directions. RP 640-41.

Ng was also shown a montage and indentified Ljubich with "95%" certainty. RP 633. Ng was able to indentify Ljubich in court as the robber and said he was 90% sure he was the robber. RP 634.

Officer Miguel Torres was the first police officer to respond to the scene of the robbery. He was dispatched at 2:19 pm and arrived within minutes. RP 443. He talked to both Ng and Mark-Ng. Both were upset. RP 441. He was given a description of Ljubich by Mark-Ng as follows:

White male. RP 444.  
Six foot two inches tall. RP 444.  
Approximately 170 pounds. RP 444.  
Athletic build. RP 444.  
Brown hair. RP 444.

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<sup>3</sup> Ng did not remember the color of the revolver or whether Ljubich was wearing sunglasses or a hat. RP 621, 626, 628.

Sunglasses. RP 444.  
Wearing work gloves. RP 444, 450-52.  
Black baseball hat. RP 444.  
Grey suit jacket. RP 444.  
Blue denim pants. RP 444.  
Shirt with a low bonnet. RP 444.

Officer Torres testified that he obtained a general description to broadcast for a search of the suspect. RP 459. Mark-Ng also told Officer Torres the direction in which Ljubich fled. She described the robber as taking a left out of the pharmacy on California Avenue, turning westbound on Brandon, and turning north on 44<sup>th</sup> Avenue. RP 457-58.

Officer Patchen was dispatched to the robbery at 2:20 pm and arrived at 2:37 pm. RP 474. Patchen was setting up a "containment" taking up a position near the pharmacy to look for suspects. RP 475-76. Patchen was located at 44<sup>th</sup> Avenue and Dawson Street, which to the northwest of the pharmacy. RP 474. 491-2. While Patchen did not see any potential suspects, he was approached by a citizen that wished to remain anonymous. RP 478. The citizen told Patchen that he saw a car parked south of 44<sup>th</sup> Avenue that was repositioned several times before the driver opened the trunk. RP 480. A second suspect ran up to the car and

threw a white plastic bag in the trunk, then got in the car and they drove off. RP 480, 486. The driver was described as:

Light skinned black or Hispanic male. RP 481.  
Curly hair. RP 481.  
Dark jacket. RP 481.

The suspect that ran up and placed the bag in the trunk was described as:

Six foot to six foot two inches tall. RP 485.  
Seventeen to twenty two years old. RP 485.  
180 pounds. RP 485.  
Skinny. RP 485.  
White t-shirt. RP 485.  
Baggy blue jeans. RP 485.  
Carrying a white plastic bag. RP 485.

The witness described the car as light gray with a blue or gray stripe on the door. The car was possibly a two-door. The car had damage on the right side quarter panel and the bumper. RP 482. The citizen was able to provide a partial license plate of 501 Z-B<sup>4</sup>. RP 484. The car drove off north on 44<sup>th</sup> then headed west. RP 494-95.

Detective Healy from Seattle Police Department was assigned to investigate the robbery on September 18, 2009. RP 666. The detective reviewed the reports, including the

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<sup>4</sup> The defense pointed out that there was a full license plate listed in the CAD, but Officer Patchen was clear he only received a partial plate from the witness. RP 504-05.

information Officer Patchen received from the unidentified witness. RP 666-67. He searched a department of licensing database for the partial license plate given to Officer Patchen. RP 672.

Detective Healy discovered there was a 1980 Buick La Sabre that was gray and dark blue with a license plate 501 ZDB registered to Mario Clark. RP 676. Mario Clark lived at 2028 53<sup>rd</sup> Avenue in West Seattle, near the scene of the robbery. RP 676. Due to the similarity to the description of the car noted in Officer Patchen's report, and the proximity to the robbery, Detective Healy went to Mario Clark's residence to continue his investigation. RP 678.

When Detective Healy arrived he saw the blue and gray Buick with damage to the right front. RP 679. There were three people standing in front of the car looking at the engine, including Ljubich<sup>5</sup> and Mario Clark. RP 679-80. Detective Healy described Ljubich as:

Six foot two inches tall. RP 680.  
Thin build. RP 680.  
Light complexion. RP 680.  
Dark colored hair. RP 680.

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<sup>5</sup> Ljubich was a neighbor of Clark's. He lived on the same street two houses away. RP 796.

Detective Healy described Clark as:

Hispanic male. RP 680.  
Early 20's. RP 680.  
Five foot eight inches tall. RP 680.  
Curly black hair. RP 680.

Detective Healy approached the group and identified himself as a police officer. RP 682. He made eye contact with the men and said he would like to talk to them. RP 682. Ljubich became wide eyed and ran. RP 682. Other officers were called to the area and arrested Ljubich a short time later. RP 682-83.

Detective Healy prepared a photo montage including Ljubich to present to the Ngs. RP 683-85. When the detective showed the Ngs the montage they both made "immediate and confident" picks of Ljubich. RP 688.

Detective Healy obtained search warrants for Clark's car and Ljubich's home. RP 689. Police found several dark baseball caps at Ljubich's home. The police found a white plastic bag and sunglasses in Clark's car. RP 691-93.

At trial, the defense objected to admission of hearsay from the unidentified witness to Officer Patchen. CP 53; RP 78. The trial court ruled the statement was admissible for the limited purpose of explaining what the officers did to investigate the

robbery. RP 85. The trial court suggested a limiting instruction would be appropriate. RP 86. The State acknowledged that the hearsay evidence would not be admitted for the truth of the matters asserted but only offered to explain the police investigation and how they arrived at Clark's house and found Ljubich. RP 207. The prosecutor repeatedly suggested that a limiting instruction be given. RP 211, 212, 214. The trial court agreed that a limiting instruction should be given. RP 215, 222.

During the testimony, the trial court gave the jury a limiting instruction at the defense request. When Officer Patchen testified about the information he received from the unidentified witness, the court gave the following instruction:

I am allowing the evidence, but only for a very limited purpose.

You may consider the testimony that this witness gives as to the statements of someone outside of court, only for determining what the officer did next, what he or other officers did when they heard or learned of that information.

It is not – that statement is not admitted as evidence for the truth of what might be contained in the statement, and you may not consider the statement for any purpose other than the limited one I have given you.

RP 479. When Detective Healy testified about information that he received from Officer Patchen from the unidentified witness, the trial court again instructed the jury:

I have permitted certain testimony to come in as to out-of-court statements made by other persons. This comes in only as to what the detective knew or thought he knew at the time. It doesn't come in for the truth of the matter asserted.

He is permitted to say what he understood at the time, and you can judge whether the steps that he took are consistent with that information.

Again, that information is not admitted for the - - statements are not admitted for the truth of what was said, the falsity of what was said; they only come in as to what the officer does next.

RP 673-76. The court's final instructions to the jury also repeated the limiting instruction. The court included the following written instruction to the jury:

The court ruled that Detective Healy and Officer Patchen could testify about statements made of [sic] court by an unidentified witness.

The court allowed the evidence but only for a limited purpose. You may consider the testimony as to the out of court statement only for the purpose of what the officer or detective did as a result of hearing or learning this information.

The Statement is not admitted for the truth of the out of court statement. You may not consider the statement for any other purpose.

CP 139 (Instruction 10). The court also read this instruction orally to the jury. RP 950-51.

During closing argument, the State referenced the unidentified witness. The prosecutor first cited substantive evidence about Ljubich's escape route offered by Mark-Ng, then prefaced his remarks about the unidentified witness by noting the limited purpose of the evidence:

The first corroborating evidence we have is the escape route. Mrs. Ng described, as soon as this pharmacy robbery occurred, she asked for her camera back and asked for the cell phone back; he took him [sic] out of his bag, placed them down, he left the pharmacy, hung a left, hung another left, and then walked up the street and turned right on South Dawson. Okay.

Defense: Objection, Your Honor, mischaracterizing the evidence.

Court: Thank you, this is argument. The jury has heard the evidence.

Prosecutor: Went out of the pharmacy, took a left, took another left, cut through, ended up this way on 44<sup>th</sup>.

Then you heard hearsay statements, **which was not for the truth of the matter asserted, it was just for the investigation** - - that some man around here that Officer Patchen thinks could live around there approached him and said "I know why you're here. I saw suspicious activity right here. There was a car with a trunk opened, kind of fidgeting back and forth. An Hispanic male, kind of puffy hair - that's what you're here for, and then soon thereafter I saw a white male running this way towards this vehicle, about six foot two inches, 170 pounds, with a white plastic bag. And you know what he did with that bag? He threw it in the trunk, shut it, got into the passenger side and

they took off. And the way they took off was this way, left on - - I believe Southwest Dawson Street. They took off this way.

The reason that's kind of important and the reason I mentioned that as the escape route is you heard Detective Healy's testimony - - This is where they took off, Southwest Dawson Street. This where Mario Clark lives. This is where he resides.

And you also heard later that this is the area Tyler Ljubich, the defendant, resides.

So if you think about the escape route, that corroborates where they were going and why they were going. They were going back home.

Defense: Objection, Your Honor, this is improper argument. This is not evidence.

Prosecutor: It is not evidence because it is argument.

Court: It is argument. Again the jury has heard all the evidence. You may continue.

RP 956-57 (emphasis added). Defense counsel also reminded the jury about the limited purpose of the evidence:

I just want to caution you, there is a lot of reference to somebody seeing some car near the shopping area, near Rite Aid, like on 44<sup>th</sup> and Dawson, and the judge has I think instructed you two or three times already, and given you an instruction because that is not evidence. That has no bearing on the case except Detective Healy went looking for a car.

The substance of it, the description, none of that is evidence in this case for the reasons the judge has ruled. So you have been instructed again and again and again, because it is logical that we want to say, Should we consider that? Is there some merit to that? There isn't, and that is what the instruction tells you again.

RP 980-81. The jury returned a verdict of guilty on the charge of robbery in the first degree.

**C. ARGUMENT**

1. LJUBICH HAS FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.

a. The Prosecutor Did Not Commit Misconduct.

Ljubich argues that the prosecutor committed misconduct during closing argument by referencing hearsay that was not offered for the truth of the matter asserted. However, the trial court instructed the jury as to the limited purpose of the evidence on multiple occasions, and the prosecutor prefaced his remarks by pointing out the limited purpose of the evidence. Ljubich has failed to demonstrate any prosecutorial misconduct.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Unless a defendant objected to the allegedly improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the

prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992).

Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

In the present case, the prosecutor's remarks did not constitute misconduct. Ljubich argues that the prosecutor relied on the hearsay to argue there was corroboration that Ljubich was the robber. Ljubich is incorrect. The prosecutor argued that the Ngs' identifications were corroborated by the fact Ljubich fled to the north and west of the robbery scene, and was apprehended to the northwest of the pharmacy. There was substantive non-hearsay evidence to support the State's argument. Mark-Ng testified that she followed Ljubich as he turned left on California Avenue Southwest, then turned west on Brandon and then through some trees north on 44<sup>th</sup> Avenue. RP 535, 538, 457-58. There was substantive evidence that Ljubich was discovered at Clark's house to the northwest of the robbery scene, and that Ljubich lived to the northwest of the robbery scene. RP 676-77, 734. The prosecutor referenced the unidentified witness, but only after noting the limited

purpose of the testimony. The prosecutor said those statements were "hearsay statements, which was not for the truth of the matter asserted, it was just for the investigation . . ." RP 957. The State's arguments were proper, and in compliance with the rulings of the trial court.

Furthermore, the trial court instructed the jury on the limited purpose of the testimony three times: orally during testimony and while instructing the jury at the end of the case. RP 479, 673-74, 950-51. The trial court also gave a written instruction explaining the limited purpose of the testimony. CP 139. The prosecutor noted the limited purpose of the testimony just before discussing the testimony of Officer Patchen. RP 956-57.

Ljubich objected, but given the prosecutor had just told the jury the evidence was not offered for the truth of the matter asserted, the trial court did not sustain the objection. RP 956-57. The purpose of requiring an objection is to give the court the opportunity to give a curative instruction. However, the limiting instruction had already been given multiple times. The prosecutor had prefaced his remarks with the court's limitation on the use of the evidence. There was little danger the jury would disregard the court and the prosecutor's remarks and misuse the evidence.

Ljubich also argues the prosecutor sought to explain the difference between the clothes reported by the Ngs and the unidentified witness. However, pointing out any discrepancies between the Ngs' description and the unidentified witness's descriptions was not prejudicial to Ljubich.

b. Ljubich Has Failed To Demonstrate Prejudice Requiring Reversal.

Even if the prosecutor's argument was improper, despite noting the limited purpose of the evidence, Ljubich cannot show prejudice. Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672.

Even if the Court concludes that the prosecutor improperly attempted to rely upon the hearsay as substantive evidence, the trial court had clearly instructed the jury that the statements were not to be considered for the truth of the matters asserted. The trial court orally advised the jury that the evidence was not to be considered for the truth of the matter three separate times. RP 479, 673-74, 950-51. The court gave the jury a written instruction. CP 139. Both the prosecutor and the defense counsel

noted the limited purpose of the evidence. RP 956-57, 980-81. The jury was told at least six times that the evidence was not to be considered for the truth of the matter. The jury is presumed to follow the instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). That presumption certainly applies here, where the jury was given the instruction repeatedly.

Furthermore, the hearsay was not unduly prejudicial. The evidence clearly established that that the Ngs were robbed by a man whose description closely resembled Ljubich. It was not surprising that a person matching that description was seen fleeing the area. The defense theory was that this individual was not Ljubich. The State's case relied upon the ability of the Ngs to identify Ljubich as the same person that robbed them. Mark-Ng identified Ljubich from the photo montage with "without a doubt." RP 532, 546. Detective Healy described her selection as "immediate and confident." RP 688. Mark-Ng identified Ljubich in court and was also certain that he was the person that robbed them. RP 547-48. Ng also identified Ljubich from the photo montage with what he described as 95% certainty. RP 633. Detective Healy also described his selection as "immediate and confident." RP 688. Ng also identified Ljubich in court with 90%

certainty (acknowledging that the passage of time led to adjusting his certainty from 95% to 90%). RP 634. The unidentified witness' description of the suspect fleeing had little weight in comparison to the eyewitness identifications by the Ngs. Even the trial court, while ruling on the admissibility of the hearsay, noted it was not unduly prejudicial because it was merely a clue that the officer could use to find the robber. RP 215.

The strength of the State's case, with the eyewitness identifications of the Ngs, coupled with the repeated instructions to the jury limiting the purpose of the hearsay, made any error harmless.

**2. THE LATE ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW HAS NOT PREJUDICED THE APPELLANT, AND THUS REVERSAL OR DISMISSAL IS INAPPROPRIATE.**

Ljubich argues that his conviction should be remanded because findings of fact and conclusions of law were not timely filed. However, the findings have since been filed, and Ljubich can show no prejudice from the delay. Reversal and remand is not required.

If the Court of Appeals does not receive written findings and conclusions from the State before hearing the merits of an appeal, then the failure to enter those findings may merit reversal of the conviction. State v. Smith, 68 Wn. App. 201, 842 P.2d 494 (1992). Where the State merely delays the entry of findings, the court will not reverse the conviction absent a showing of prejudice. State v. Head, 69 Wn.2d 619, 964 P.2d 1187 (1998).

The appellant must show prejudice for reversal of a case based upon tardy entry of findings of fact and conclusions of law. State v. Bennett, 62 Wn. App. 702, 710-11, 814 P.2d 1171 (1991). A conviction will normally not be reversed absent a showing of prejudice or some form of tailoring of the findings to address the issues raised in the appellant's brief. State v. Brown, 68 Wn. App. 480, 485-86, 843 P.2d 1098 (1993); State v. Litts, 64 Wn. App. 831, 836-37, 827 P.2d 304 (1992); Bennett, 62 Wn. App. at 711; State v. Taylor, 69 Wn. App. 474, 477, 849 P.2d 692 (1993).

In the present case, the findings have now been filed by the trial court. CP 189-92. Ljubich does not raise any substantive issues on appeal from the CrR 3.6 hearing. There is no evidence that the prosecutor tailored the findings of fact and conclusions of law. CP 193-96. Ljubich has not alleged any prejudice due to the

late filing of findings of fact, and absent any prejudice, reversal would be inappropriate.

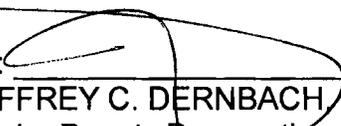
**D. CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm Ljubich's conviction for robbery in the first degree.

DATED this 15<sup>th</sup> day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TYLER LJUBICH, Cause No. 66095-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

8/19/11  
Date 8/19/11