

67626-2

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NO. 66726-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ABDI HILOW,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. A criminal defendant does not have the right to cross-examine State's witnesses with prior acts that are not relevant to truthfulness or probative of bias. Here, the trial court excluded evidence that was not probative of the detective's truthfulness or bias. Did the trial court properly exercise its discretion?

2. Due process requires the State to disclose material exculpatory evidence to the defendant. In the present case, there was no material exculpatory evidence regarding Officer Lee. Has the defendant failed to establish a due process violation?

3. A claim of prosecutorial misconduct in argument is waived if no objection was made below unless the misconduct was flagrant and ill-intentioned. It is not flagrant or ill-intentioned misconduct to argue the credibility of the State's witnesses. Should the defendant's claim of misconduct be deemed waived?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Abdi Hilow was found guilty by jury verdict of the crime of possession of cocaine with intent to deliver. CP 36, 68. He was sentenced to 12 months plus 1 day of total confinement. CP 71.

2. FACTS OF THE CRIME.

On December 4, 2009, Seattle Police were conducting a "see-pop" operation in the Pioneer Square neighborhood of downtown Seattle. RP 62-64. A "see-pop" involves a surveillance officer who observes a drug transaction and then communicates with an awaiting arrest team to make an arrest. RP 63. In this operation, Officer James Lee was the surveillance officer and Officers Jason Diamond and Andrew West were arrest officers. RP 60, 64, 125, 128, 153-54.

As Officer Lee stood in a parking garage observing the street below him with binoculars, he saw Hilow and another man, named Salah, approach a large group of people at the corner of Yesler Way and Occidental Street. RP 67. He saw Salah reach into his pants pocket, take out a clear cellophane bag, untwist the top of the bag and start exchanging small items in the bag for money. RP 68.

Officer Lee saw Salah conduct three exchanges while Hilow stood by him. RP 69. Next, Salah and Hilow walked a short way down the block and entered a store for a few minutes. RP 69. When they exited the store, they stood outside the entrance. RP 69. A person walked up to them, spoke to Salah, and then nodded at Hilow. RP 69. Hilow reached into his jacket pocket and handed a small item to that person, who examined it and then handed money to Salah. RP 69. Another person walked up to them and spoke to Salah. RP 71. Hilow again reached into his jacket pocket and handed a small item to this person, who examined it and then handed money to Salah. RP 71. At this point, Officer Lee requested that the arrest team place Hilow and Salah under arrest. RP 72.

Officers Diamond and West arrested Salah and Hilow as they were trying to enter a parked car at First Avenue and James Street. RP 72, 75. Officer Lee communicated to them that they had contacted the correct individuals. RP 72. Officer Diamond grabbed Hilow as he attempted to enter the passenger side of the car, and saw him throw a small rock of suspected crack cocaine on

the floor of the car. RP 130, 136, 142. The rock that Hilow threw onto the floor of the car weighed .11 grams. RP 168-70. Hilow had no additional drugs on his person, and only \$20 in cash. RP 132. Officer West arrested Salah as he attempted to enter the driver's side of the car. RP 154. Officer West found 1.5 grams of suspected crack cocaine in Salah's pants pockets, as well as \$262 in cash. RP 154-56, 172-73. Testing revealed that the substance that Hilow threw into the car and the substance in Salah's pocket contained cocaine. RP 168-75.

Hilow testified in his defense. He admitted to being with Salah on the night in question and standing outside the store with Salah. RP 222. He testified that he was minding his own business and simply waiting for a ride from Salah, and that he did not see Salah make any exchanges with any other people. RP 225. He claimed he was not aware that Salah had cocaine in his possession, and that he himself had no cocaine in his possession. RP 225-26.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN NOT ADMITTING EVIDENCE OFFERED TO IMPEACH OFFICER LEE THAT WAS NOT PROBATIVE OF TRUTHFULNESS OR BIAS.

Hilow contends that the trial court abused its discretion in not allowing the defense to impeach Officer Lee with information obtained from internal investigation files regarding a prior case where Officer Lee had disclosed to the prosecution and the court that he had been mistaken in his testimony. Hilow also claims he should have been allowed to impeach Officer Lee regarding a videotaped incident in which Officer Lee kicked a robbery suspect, an incident that was under investigation by the police department at the time of trial. Hilow's claims should be rejected. None of this information was probative of Officer Lee's truthfulness, or evidence of any bias. Even if it had some minimal probative value, the court did not abuse its discretion.

A trial court's ruling on the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). The trial court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds. Id. The trial court's ruling will not be disturbed on appeal unless no

reasonable person would take the position adopted by the trial court. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991).

This standard of review applies even when limits are placed on a criminal defendant's right to cross-examine State's witnesses.

Darden, 145 Wn.2d at 619. The right to cross-examine the State's witnesses is not absolute. Id. at 620. The right to cross-examine is limited by general considerations of relevance. Id. at 621.

However, the more essential a witness is to the prosecution's case, the more latitude the defense should have to explore motive, bias, and credibility. Id. at 619.

Impeachment with specific instances of misconduct is governed by ER 608(b).<sup>1</sup> That rule provides that specific instances of conduct may, in the discretion of the court, be inquired into on cross-examination if probative of truthfulness or untruthfulness. ER 608(b). Hilow argues that the trial court should have allowed him to impeach Officer Lee with evidence that several years earlier Lee had mistakenly testified that he did not use force against a suspect, and then promptly advised the prosecutor and the court of his mistake. Officer Lee testified, outside the presence of the jury,

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<sup>1</sup> In briefing provided to the trial court, defense counsel cited to ER 608(b) as the basis for his request to impeach Officer Lee with the prior incidents of alleged misconduct. CP 79.

that in that matter he had been asked if he had used force and had answered "no." RP 108. When he returned to the precinct after his testimony, Lee reviewed his report and realized that his testimony was incorrect and that he had used force. RP 108. The next morning, Lee advised the prosecutor and the judge of his mistake. RP 108. The case against the defendant was dismissed. RP 108. Personnel records from Seattle Police Department provided to the trial court show that Officer Lee was subsequently cautioned by his supervisors to carefully review all reports prior to testifying in the future. CP 65-66. He received no reprimand or discipline other than this "supervisory intervention." RP 108-09.

The trial court properly exercised its discretion by reasonably concluding that this incident was not probative of Officer Lee's truthfulness, as there was no finding by any reviewing body that Officer Lee had been dishonest. RP 199-201. As Officer Lee testified, by quickly alerting the prosecutor and court of his mistake, "I was being honest, not dishonest." RP 108. The trial court's conclusion that this incident had no probative value as to Officer Lee's truthfulness was not manifestly unreasonable. Indeed, even defense counsel seemed to concede this point below, when he stated, in response to the trial court's ruling, "I'm satisfied that the

Court has extended me an opportunity and I failed in my proofs and we will move forward." RP 200.

Counsel also wished to impeach Officer Lee with an incident that happened a few months before trial in which Officer Lee, working undercover, had kicked a robbery suspect. RP 98. Officer Lee testified that the matter was under investigation, that to his knowledge it had not yet been referred for criminal charges, and that he would assert his Fifth Amendment right against incrimination as to any questions regarding his use of force in that incident. RP 105-06. The trial court properly exercised its discretion by reasonably concluding that that matter was not relevant to Officer Lee's truthfulness, and thus not a proper subject for impeachment pursuant to ER 608(b). RP 202.

Hilow argues for the first time on appeal that the incident was relevant to Officer Lee's bias because it gave him a motive to be helpful to the prosecution. Defense counsel at trial did not articulate this theory of admissibility, but rather argued that this incident demonstrated Officer Lee's bias against young African-American males. RP 100. The appellate court may refuse to consider a theory of admission of evidence that was not presented to the trial court. ER 103; State v. Negrin, 37 Wn. App. 516,

681 P.2d 1287 (1984); 5 Karl Tegland, Washington Practice: Evidence § 103.19, at 72 (4<sup>th</sup> ed. 1999) ("Thus if the evidence offered is not admissible on the theory or for the purpose urged by the offeror, the offeror will not be heard to argue on appeal that the evidence was admissible on some other theory or for some purpose not argued at trial."). See also State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983). This Court should refuse to consider this theory of impeachment that is being raised for the first time on appeal.

However, if this Court chooses to address Hilow's argument, the trial court did not abuse its discretion because there was no evidence of a motive for Officer Lee to testify falsely in this case. The right of cross-examination encompasses more than the right to ask general questions concerning bias; it includes the opportunity to demonstrate specific reasons why a witness might be biased in a particular case. Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The trial court, however, still has discretion to control the scope of cross-examination and may reject lines of questioning that only remotely tend to show bias or prejudice. State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), affirmed, 147 Wn.2d 288, 53 P.3d 974 (2002).

Hilow's argument that the incident with the robbery suspect gave Officer Lee a motive to be helpful to the prosecution glosses over the fact that Officer Lee was employed as a police officer, and thus his job was to be helpful to the prosecution in a criminal case. Officer Lee had participated in several hundred narcotics investigations during his ten years with the Seattle Police Department and there is no reason to believe that this particular investigation was of special importance to the prosecution or to Officer Lee. RP 60, 63. There is no indication from the record that Officer Lee's testimony was in any way inconsistent with the report he wrote in December of 2009, before the incident in question occurred. Most importantly, there is no evidence that any criminal investigation into Officer Lee's action was yet pending at the time of this trial. There is simply no basis for a conclusion that Officer Lee had an expectation of leniency in exchange for his testimony in this case.

This Court's decision in State v. Soh, 115 Wn. App. 290, 62 P.3d 900 (2003), provides a useful comparison to the present case. In that case, Soh was charged with possession of stolen property based on his possession of stolen automobile parts. Id. at 292. A co-defendant, Thomas, agreed to testify against Soh. Id.

The State disclosed to Soh that Thomas had agreed to testify in exchange for "consideration at sentencing." Id. In addition, evidence was presented that Thomas's attorney had met with the prosecutor and the detective, who had promised a "substantial reduction of the charges," as well as an agreement not to pursue other charges, in exchange for Thomas's cooperation. Id. But Thomas's attorney had never revealed that promise to Thomas. Id. This Court held that the State should have disclosed the promise to Soh, but that the information had no impeachment value because, "what Thomas did not know could not supply a motivation for him to testify falsely." Id. at 295-96.

At the time of this trial, Officer Lee was not facing criminal charges and it appears that the police department had not yet referred the matter to any prosecutor. There is no evidence that the incident supplied any motivation for Officer Lee to testify falsely in Hilow's case. Even if this theory of impeachment had been presented to the trial court, the court would not have abused its discretion in denying cross-examination on this subject, as it was not probative of any bias.

2. THE STATE DID NOT FAIL TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

Next, Hilow argues that the State violated his right to due process by withholding material, exculpatory evidence. However, for the reasons stated above, the information about Officer Lee was not relevant to his truthfulness or to any bias in this case, and was neither material nor exculpatory.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that due process requires the State to disclose evidence that is favorable to the accused and material either to guilt or punishment. Evidence is "material" only if there is a reasonable probability that if the evidence had been disclosed to the defense the result of the proceeding would have been different. In re Personal Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999). Prosecutors need only discover and disclose "favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 427, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). While the prosecution cannot avoid Brady by keeping itself ignorant of matters known to other state

agents, the State has no duty to search for exculpatory evidence.

State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984).

Hilow claims that the State had a duty under Brady to disclose to the defense the "pending criminal investigation undertaken by the prosecution." However, there is no evidence that any criminal investigation was pending at the time of this trial. The only evidence in the record on this point was Officer Lee's testimony outside the presence of the jury. Officer Lee testified that the matter, which had occurred just a few months before, was under investigation by the police department. Appellate counsel improperly cites to media reports from two months after this trial, which could not have been part of the record below, that Officer Lee was charged with assault in April of 2011.<sup>2</sup> There is no evidence as to when that matter was referred to any prosecuting agency by the Seattle Police Department. Until that happened, this was not a criminal matter but an internal police investigation.

Moreover, as argued above, this information was neither material nor exculpatory. Officer Lee's alleged assault of the robbery suspect is completely unrelated to Hilow's drug charge.

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<sup>2</sup> The trial began on February 9, 2011 and closing arguments were completed on February 14, 2011.

That incident was not relevant to Officer Lee's truthfulness in this case, and was not probative of any bias in the present case. Hilow has failed to establish a due process violation pursuant to Brady.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Hilow assigns error to the prosecutor's closing argument, stating that the prosecutor improperly urged the jury to convict based on the credibility of the police witnesses. At trial, defense counsel did not object to the State's argument. The prosecutor's argument regarding the credibility of the witnesses was not misconduct.

This Court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the defense does not make a timely objection and request a curative instruction, the misconduct is waived unless the comment was so

flagrant and ill-intentioned that no instruction could have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

In the present case, the argument by the State was nothing more than an argument that the State's witnesses were credible. RP 262. The State did not refer to facts outside the record, or ask the jury to draw any improper inferences. The prosecutor's argument that the State's witnesses were credible cannot be characterized as flagrant and ill-intentioned misconduct causing prejudice that could not have been alleviated with a curative instruction. Thus, Hilow's claim of misconduct was waived by the failure to object.

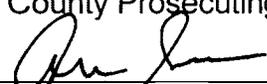
D. CONCLUSION.

Hilow's conviction should be affirmed.

DATED this 10<sup>th</sup> day of October, 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 Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. HILOW, Cause No. 66726-2-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.

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