 73144-1

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Court of Appeals
Division I
State of Washington

NO. 73144-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAHAMED M. ABDI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the trial court properly exercise its discretion in admitting relevant testimony regarding uncontrolled substances? If not, was any error harmless because the evidence was overwhelming?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Mahamed Abdi was charged by information with one count of violation of the Uniform Controlled Substances Act and one count of felony harassment. CP 9-10. The State alleged that between June 6, 2014, and June 7, 2014, (1) Abdi negotiated the sale of cocaine and then delivered an uncontrolled substance, and (2) knowingly threated to cause bodily injury to Seattle Police Department Officer Wesley Collier. CP 9-10.

A jury found Abdi guilty as charged of the violation of the Uniform Controlled Substances Act. CP 40. The jury found Abdi not guilty of felony harassment. CP 41.

2. SUBSTANTIVE FACTS.

On June 7, 2014, Officer Collier was working as an undercover buyer as part of a narcotic operation in the Belltown

neighborhood of downtown Seattle. 4RP 12.[1] Officer Collier was working with at least ten other officers in the undercover operation focusing on areas of downtown Seattle known to be high narcotic trafficking areas. 3RP 59; 4RP 7-8.

About 11:20 p.m., Officer Collier came into contact with Abdi at Third Avenue and Virginia Street. 4RP 23. Officer Collier asked Abdi "two for twenty?", a common narcotic transaction phrase used to buy two rocks of cocaine for 20 dollars. 4RP 29. Abdi tried to negotiate the drug transaction. 4RP 31-32. Abdi wanted Officer Collier to walk around the block and Abdi would leave the cocaine on the windowsill of a business adjacent to them. 4RP 30-31. Officer Collier would not agree with those terms. 4RP 32. Abdi opened his mouth, visibly displaying small white rocks to Officer Collier that Officer Collier believed, based on his training and experience, to be cocaine. 4RP 33. Officer Collier showed Abdi a 20 dollar bill, and Abdi spit one of the white rocks onto the ground. 4RP 34. Officer Collier bent down to pick up the rock and Abdi

[1] The verbatim report of proceedings will be referred to as follows: 1RP (6/25/2014); 2RP (10/27/2014); 3RP (1/5/2015); 4RP (1/6/2015); 5RP (1/7/2015); 6RP (1/8/2015); 7RP (1/23/2015); and 8RP (2/20/2015).

responded "Don't fucking pick it up."[2] 4RP 35. Abdi spit a second rock. 4RP 36. Officer Collier again reached down and Abdi responded, "If you touch it I'm going to fucking kill you." 4RP 37. Officer Collier again extended the 20 dollar bill, and Abdi grabbed it out of his hand. 4RP 38-39. Abdi spit a third rock onto the ground. 4RP 39. Officer Collier gave a good buy signal to officers for the successful narcotic transaction. 4RP 39. Abdi came toward Officer Collier with his hand in his pocket and stated, "I'm going to fuck you up." 4RP 41-42. Officer Collier executed his undercover operation duress signal to the officers working as part of the undercover operation. 4RP 44.

The undercover operation arrest team moved in and placed Abdi under arrest. 4RP 46-47. Officer Collier recovered the three small white rocks Abdi had spit on the ground. 4RP 41, 54, 58-59. The recovered rocks were subsequently tested and found to contain uncontrolled substances. 5RP 65.

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[2] Officer Collier testified to methods for exchanging narcotics on the street that does not involve hand to hand transactions. One of these methods includes storing narcotics in your mouth. 4RP 10.

At trial, Officer Collier testified to his extensive training and experience in narcotics, undercover operations, and his familiarity with narcotics in Seattle. 4RP 6-12. Collier further testified to the transaction with Abdi, the threats made by Abdi, and Officer Collier's fear of Abdi carrying out his threats. 4RP 66-67. The prosecutor asked about the risks of drug dealing in the downtown area. 4RP 67. The prosecutor subsequently asked:

> Q: Um, so, Officer Collier, I'll move on from that. Um, with regards to, um, controlled substances, why are, um, uncontrolled substances a risk in the community.
>
> A: Uh, my personal opinion, I—
>
> Mr. Burkland: Objection. Foundation, speculation and relevance.
>
> The Court: Well, I don't know if we want his personal opinion. So maybe you should rephrase the question.
>
> Q: In—in your training and experience, Officer Collier, why are, um, uncontrolled substances a risk in the community?
>
> Mr. Burkland: Objection. Foundation and hearsay, if he's learning it from someone else.
>
> The Court: He can testify to his knowledge if it's based on his training.
>
> A: Uh, because you don't know the-the-whoever's taking that substance does not know, uh, what the actual drug is. That drug can cause 'em to do, uh, pretty unpredictable things, get them sick, uh, kill them, um, and make them make irrational decisions.

Q: Are there also repercussions from those drug transactions?

A: Uh, yes, for both parties.

Q: And what would those be?

A: Uh, if a addict is trying to get high and a drug dealer sells the, uh, bunk, which is, uh, fake drugs, that user tries to smoke it and doesn't get his fix, doesn't get his high, he can then try to seek revenge on the person who just sold him that drug and—

Mr. Burkland: Objection. Speculation.

The Court: It's overruled.

A: --seek revenge an, uh, try to cause harm to that drug dealer who is, uh, more dominant than him or --but often— and then that drug dealer try to protect himself and we have violence there. Uh, and then you have the user who is using fake drugs that probably has bleach in it or some other substance that—

Mr. Burkland: Objection. Speculation.

The Court: Insofar as bleach, that's sustained and it's stricken. But go ahead.

A: --an unknown element in it that can, uh, cause 'em significant damage.

C. ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE TESTIMONY REGARDING UNCONTROLLED SUBSTANCES. EVEN IF THE COURT ERRED, THE ERROR WAS HARMLESS.

Abdi contends that the trial court improperly admitted testimony by Officer Collier regarding the risks of selling uncontrolled substances as controlled substances in the community. This claim should be rejected. The court did not abuse its discretion in admitting the evidence and even if the court did error, any error was harmless as defense cannot show that the admission of the evidence had a prejudicial effect on the verdict.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). Courts will not disturb a trial court's rulings on the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion only occurs "when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." Id. A trial court's decision is manifestly unreasonable if it adopts a view that no reasonable person would

take. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) (emphasis added).

Evidence must be relevant to be admissible. ER 402. Evidence is relevant when it has "any tendency to make the existence of any fact ... more ... or less probable." ER 401; ER 402. Minimal logical relevance is all that is required. State v. Suarez-Bravo, 72 Wn. App. 359, 364, 864 P.2d 426 (1994); State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512, 518 (1986), aff'd, 108 Wn.2d 515, 740 P.2d 829 (1987) (citing 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)). Although relevant, evidence may be excluded if its probative value is substantially outweighed by unfair prejudice. State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). The trial judge has wide discretion in balancing probative value against potential prejudice. State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984).

The testimony at issue was relevant to show the circumstances of Abdi's arrest. Evidence regarding the circumstances of an arrest is relevant. State v. Perez-Arellano, 60 Wn. App. 781, 784, 807 P.2d 898 (1991); see also State v. Scott, 143 Wash. 166, 254 P. 851 (1927) (evidence about a particular neighborhood's crime pattern is relevant and not unduly

prejudicial); State v. Weiss, 73 Wn.2d 372, 438 P.2d 610 (1968) (testimony concerning dirty and unkempt condition of location where defendant arrested admissible). In Perez-Arellano, the defendant was charged with delivery of heroin. Id. at 782. The court found evidence that the defendant was arrested in a "high narcotic area" was relevant, was not unduly prejudicial, and was properly admitted to explain why police were observing a particular area when the defendant was contacted. Id. at 784. Similar to Perez-Arellano, the evidence regarding uncontrolled substances in this case helped "explain to the jury the reason why police were observing a particular area" and why officers conduct undercover operations in areas known to be high narcotic trafficking areas. Id. at 784.

Additionally, the Perez-Arellano court added that three officers' cumulative testimony was not unduly prejudicial. Id. at 785. Officer Collier was the first of five involved officers to testify at trial. Collier was the sole officer that testified to the risk of uncontrolled substances in the community. His testimony was limited and relevant to the circumstances surrounding the undercover operation.

Defense relies on Suarez-Bravo. This reliance is misplaced. In Suarez-Bravo, the defendant was charged with possession of cocaine with the intent to deliver based on an informant's purchase. The trial court allowed testimony that the defendant's apartment building was considered a high crime area even though the actual drug transaction at issue did not take place near the defendant's apartment building. The court found there was no logical relevance to any discussion of the defendant's apartment building. Unlike Suarez-Bravo, the testimony by Officer Collier was relevant to the circumstances of the actual transaction at issue. Officer Collier did not discuss some other arbitrary location. He discussed the risks of uncontrolled substances in the community where he conducted the operation.

The testimony was also relevant to show the context and circumstances of Abdi's threats. Circumstantial evidence is relevant to show the context and circumstances of a true threat associated with a felony harassment charge. A person is guilty of felony harassment if that person knowingly threatens to kill a person and the "words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020. RCW 9A.46.020 only criminalizes true threats. At trial, the State must

prove a true threat: a "statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted...as a serious expression of intention to inflict bodily harm upon or to take the life of another person." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A true threat is determined "in light of the entire context" and whether "a reasonable person...would foresee that in context the listener would interpret the statement as a serious threat." Id. at 46.

Officer Collier's testimony regarding the risks of uncontrolled substances in the community was relevant to the context and circumstances of Abdi's threat. In this case, the threat to Officer Collier was made by a person negotiating the sale of illegal narcotics in an area known for heavy drug trafficking. Officer Collier was in civilian clothes and unarmed. 4RP 13. Officer Collier was familiar with the area, and the dangers associated with undercover drug operations. The testimony at issue came immediately following questions regarding Officer Collier's interaction with Abdi and the question, "Why was this particular situation different than anything else?" 4RP 66. Officer Collier's response stated in part, "unknowing what means he had to carry out those threats." 4RP 66-67. Officer Collier continued that violence is commonly

associated with drug dealing in the community and with uncontrolled substance transactions. 4RP 67-69. Those circumstances are relevant to assess whether the threat made was serious. Officer Collier's testimony regarding uncontrolled substances in the community was relevant and not unduly prejudicial in the context of whether Abdi made a true threat to Collier in an area commonly associated with heavy drug trafficking.

Reasonable concerns about jury nullification can also be a trial court's basis in exercising its discretion over relevant evidence. Testimony is relevant if the jury would consider the evidence in exercising their "constitutional prerogative to acquit intelligently." State v. Salazar, 59 Wn. App. 202, 210, 796 P.2d 773 (1990). In Salazar, the Court allowed testimony that the search of the defendant's car was pursuant to a valid search warrant even though the validity of the search warrant was not at issue at trial. Id. The court reasoned that the jury could nullify if the jury believed the officers did not have a legitimate basis to stop and search the car. Here, there was a legitimate basis in eliciting testimony regarding the risks of dealing uncontrolled substances in the community as the State was reasonably concerned that the jury may not

understand why the delivery of an uncontrolled substance is against the law.

Even if this court should find the relevancy of the testimony at issue weighed against unfair prejudice close, "the trial court's decision was within the bounds of appropriate discretion." State v. Russell, 125 Wn.2d at 78. The trial court's admission of the testimony was not manifestly unreasonable. For the reasons stated, the trial court did not abuse its discretion in allowing testimony by Officer Collier regarding the risk of selling uncontrolled substances in lieu of a controlled substance in the community.

Even assuming the trial court erred in admitting Officer Collier's limited testimony, the error was harmless in the context of all the evidence offered. Courts will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). An evidentiary error requires reversal only if the error, within a reasonable probability, materially affected the outcome of the case. Id.; see also State v. Everbodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (citing State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997)). The error is harmless if the evidence is of

minor significance compared to the overall evidence as a whole. Everbodytalksabout, 145 Wn.2d at 469.

Abdi was convicted of delivery of a material in lieu of a controlled substance. CP 40. At trial, there was overwhelming evidence that Abdi negotiated the sale of cocaine and then delivered an uncontrolled substance. Officer Collier testified to Abdi negotiating the sale of cocaine in exchange of 20 dollars. 4RP 29-32. Officer Collier testified to Abdi spitting multiple rocks on the ground, giving Abdi the money, Abdi taking the money, and using the "good buy" signal for the successful transaction. 4RP 34, 35, 39. Officer Collier's cover officer testified to observing the same narcotic transaction. 5RP 30-31, 33-35. Arresting officers located the marked money at Abdi's feet. 4RP 112; 5RP 11-13. The defendant's post-arrest statements corroborated his receipt of the money. 4RP 140, 142-49. Forensic testing confirmed the substance Abdi gave Collier was not a controlled substance. 5RP 65. The limited testimony challenged by defense is minor compared to the rest of the untainted, overwhelming evidence of guilt.

Defense alleges that Abdi was prejudiced because the admitted testimony was designed to inflame the passions of the jury. This argument is not persuasive. Defense cites Sixth Circuit

case United States v. Solivan for this contention. 937 F.2d 1146, 1153 (6th Cir. 1991). In Solivan, the court addressed the nature of closing arguments by the prosecutor—that the drug problem in the community would continue if the jury did not convict—and whether these statements were calculated to inflame the jury. Id. at 1153. The court noted that "appeals to the jury to act as the community conscience are not per se impermissible" but found error in the prosecutor arguing to end a social problem by convicting a particular defendant. Id. at 1151-53. Unlike Solivan, the prosecutor in this case made no such argument. 5RP 111-28, 144-48. There was no argument urging the jury to convict this particular defendant based on the war on drugs. At no time during any of the testimony at trial did the State advocate the necessity of a conviction to solve a social issue. There is nothing in the record to suggest that the testimony inflamed the passions of the jury.

Based on all the evidence presented at trial, the minimal testimony regarding the dangers of selling uncontrolled substances in the community was minor. Any error in admitting Collier's testimony was not prejudicial considering the overwhelming evidence supporting the jury's conviction. Because there is no

evidence that the outcome of the case was affected, the admission of the testimony, if found to be an error, was harmless.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Abdi's conviction and sentence.

DATED this 3rd day of November, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Thomas M. Kummerow, containing a copy of the Brief of Respondent, in STATE V. ABDI, Cause No. 73144-1-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.

Name

Date 11-03-15

Done in Seattle, Washington