IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. Tyler B. Ljubich, Appellant.	)	No. 66095-1
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: April 23, 2012

Becker, J. — The primary issue in this appeal is prosecutorial misconduct. We conclude the prosecutor's remarks made in closing argument were misconduct and remand for a new trial.

Tyler Ljubich was charged with first degree robbery for allegedly robbing a pharmacy at gunpoint in West Seattle on September 16, 2009. A jury trial lasting five days was held in August 2010. According to testimony presented at trial, former pharmacy owners Arlene Mark-Ng and Michael Ng were clearing out the retail space of the pharmacy, which they had recently sold, when a man entered the store, pushed Mark-Ng up against a wall, pointed a gun at her, and demanded OxyContin. The Ngs explained that they had recently sold the pharmacy, so they had no drugs, but they turned over some expired prescriptions, empty pill bottles, and several hundred dollars from the cash

register. The man placed the pill bottles and money into a white plastic garbage bag and left. Mark-Ng followed him out onto the street and observed him head up the street and turn toward 44th Street, to the northwest.

When police arrived, the Ngs described the suspect as a white male of medium complexion, brown hair, six foot two inches in height, age 25, and an athletic build, approximately 170 pounds. They also described him as wearing dark sunglasses, gloves, a black baseball cap, a gray sweat shirt or jacket, and blue denim pants.

Police set up a containment perimeter around the pharmacy. While standing patrol a couple of blocks away, Officer James Patchen was approached by an individual who volunteered information concerning a car he had observed being parked in the street with its trunk left open. He described the car, including a partial license plate number, and gave physical descriptions of the driver and a man who later came running up to the car and threw a white plastic bag into the trunk before sitting into the passenger seat. He told Patchen the car had departed to the west along Dawson Street. He described the man who ran up to the car as a "tall and skinny" white male, age 17 to 22, six foot two inches, 180 pounds, wearing a white t-shirt and baggy jeans. The informant refused to identify himself. Patchen detailed the informant's statements in his report.

Two days later, Detective Thomas Healy ran the partial license number in a department of licensing database and identified a car potentially matching the description given by the informant. The car was registered to Mario Clark at an

address in West Seattle to the northwest of the pharmacy. Healy and another officer went to this address and observed three men outside looking at the engine of the car. Two of the man matched the descriptions given by the informant. One of the men, a tall slender white male, was Ljubich. Healy and his partner approached and identified themselves as Seattle police. Ljubich turned and ran. He was apprehended and arrested. Mark-Ng and Ng were later presented with a photo montage and both positively identified Ljubich as the robber.

Before trial, a hearing was held on the defense's motion to suppress the informant's statements. The matter was discussed and argued by counsel during three days of pretrial motions. Defense counsel argued the statements were inadmissible hearsay. Counsel pointed out that nothing was known of the informant's identity or motives in making the statements to Officer Patchen and that admission of the statements would violate Ljubich's right to confrontation. Counsel proposed that it would suffice for Patchen and Healy to testify simply that "Our investigation led us to a car," without providing the details of the informant's statements.

The prosecutor initially sought to admit the statements under exceptions to the hearsay rule for eyewitness identification or present sense impressions. The court disagreed, but suggested that the evidence could be admitted as nonhearsay "background information," "because it explains why the officer did what he did, or how the investigation proceeds." On the second day of pretrial

motions, the prosecutor adopted this theory and cited two authorities to support the "background information" means of admitting the statements: State v. Mason, 127 Wn. App. 554, 126 P.3d 34 (2005), aff'd on other grounds, 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008), where the court permitted an officer to testify about statements by a murder victim because those statements were offered only to explain why the officer seized the victim's checkbook and searched the defendant's home; and a comment by Tegland citing recent case developments, including Mason, and observing that hearsay statements could be admitted "to provide background or context . . . 'Typically to explain why the police or others proceeded to investigate the defendant.'" See 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence ER 801(a), (b), (c) author's cmt. 9, at 393-94 (2009-10 ed.).[1]

[1] The court did not express any opinion regarding the prosecutor's citation to this section of Tegland beyond noting: "Tegland didn't write the rules of evidence; he helps us to understand them, and of course he is quite authoritative." We have reviewed the comment in question. We observe that it provides:

> Counsel seeking to avoid the hearsay rule have occasionally succeeded by persuading the court that the statement in question was not offered to prove the truth of the matter asserted, but was instead offered for the limited, nonhearsay purpose of providing background or context (typically to explain why the police or others proceeded to investigate the defendant).
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> This argument—if it succeeds—is highly desirable from the prosecution's point of view because it overcomes not only the hearsay rule, but also the defendant's Sixth Amendment right to confrontation. . . .
>
> . . . .
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> Despite the success of the argument in several recent cases (see above), the argument remains an argument of last resort. Many trial judges instinctively regard the argument as all-too-clever maneuvering to try to avoid the hearsay rule, and instinctively believe that a hearsay objection should be sustained. Moreover, the argument is a clear signal that the proponent of the evidence (typically the State) has a serious hearsay problem and is forced to make a questionable argument in an effort to introduce the evidence.

Defense counsel argued in reply that the informant's statements were inadmissible at trial under State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990), because the court there ruled that "[w]hy the officer thought what he did is completely irrelevant to the issue of whether or not a person is guilty of a crime." Counsel read aloud to the court the following holding from Aaron:

> [T]he officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence." . . . It seems clear that the State introduced Officer Gough's testimony solely to suggest to the jury that the jacket containing the [stolen articles] . . . belonged to Aaron.

Aaron, 57 Wn. App. at 280. Defense counsel agreed that hearsay evidence relevant to an officer's state of mind was available during hearings on pretrial motions, but the evidence was inadmissible before the jury at trial because "the only relevance of that would be to specifically tell the jury, 'There really was a car and there really was a white man who got into it, and there really was this Hispanic driver in that car.'" Counsel additionally argued that admission of the informant's statements was prejudicial to Ljubich because they provided "the one and only piece of evidence making that link" between the robbery and Ljubich: "We are talking about if we leave this evidence out, all we have is there was a robbery with a tall, thin, white man; they went to a house and Mr. Ljubich ran.

> The cases cited above do not guarantee that the argument will succeed. The argument has probably failed as many times as it has succeeded.

5D Tegland, ER 801(a), (b), (c) author's cmt. 9, at 393-94.

That is the only connection."

The court expressed concern that without evidence of the informant's statements, the jury could conclude that the police investigation leading to Mario Clark's house was "bad police work," and "totally random." The court admitted the informant's statements for the limited purpose of providing background information to explain the officers' investigation but agreed that limiting instructions would be necessary. The court additionally cautioned the prosecutor against referring to the information during his opening statement.

At trial, over defense objection, Officer Patchen was permitted to recount in detail his conversation with the unidentified informant. The court, however, first instructed the jury:

> 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 this 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.

Detective Healy also testified in detail as to what the informant told Patchen. At defense counsel's urging, the 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 then judge whether the steps that he next took are consistent with that information.
>
> Again, that information is not admitted for the -- 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.

Following the evidentiary portion of the trial, the jury was instructed verbally and in writing:

> The Court ruled that Detective Healy and Officer Patchen could testify about statements made out-of-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.

Before closing arguments, defense counsel made a "cautionary request" that the State not refer to the informant's statements in closing, "for anything except to say officer Healy followed up on a hunch and went" to Mario Clark's address. The prosecutor replied that he would be "very cautious when I mention the information." The court agreed: "[O]f course the parties should be cautious. We have had a chance to think about, in general, this problem for a few days, so I will expect that that's going to show up in terms of how closing is made."

In his initial closing remarks, the prosecutor argued the jury's verdict should turn on whether it believed the Ngs' claims that Ljubich was the robber. In urging the jury to believe the Ngs, the prosecutor stated that there was

evidence corroborating their testimony: "We have corroboration." The prosecutor stated he wished to go through the elements of corroborative evidence "one at a time." The prosecutor stated that the "first corroborating evidence we have is the escape route" observed by Mark-Ng that led the robber northwest in the direction of 44th Street. The prosecutor then continued, and the following exchange took place:

> Then you heard hearsay statements, which is not for the truth of the matter asserted, it is 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 are 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."
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> 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 is where Mario Clark lives. This is where he resides.
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> And you also heard later that this is the area Tyler Ljubich, the defendant, resides.
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> So if you think about the escape route, that corroborates where they were going and why they were going. They were going back home.
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> [Defense counsel]: Objection, Your Honor, this is improper argument. This is not evidence.
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> [Prosecutor]: It is not evidence because it is argument.
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> THE COURT: It is argument.
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> Again, the jury has heard all of the evidence. You may

continue.

The prosecutor went on to note Detective Healy's use of the partial license plate number provided by the informant to locate Mario Clark's car and home, and that Clark lived only 10 blocks away from the pharmacy.

In rebuttal, the prosecutor referred once more to the informant's statements to resolve the discrepancy between how the Ngs described what the robber was wearing and how the informant described the clothing of the man he saw running. The prosecutor argued that the discrepancy made sense if the jury inferred that Ljubich shed the hat, sunglasses, and gray sweat shirt as he fled the pharmacy in an attempt to change his appearance.

After a full day of deliberation, the jury submitted a note stating, "We are unable to reach an agreement." Before the court brought in the jury to discuss the note, defense counsel moved for a mistrial based on the prosecutor's use of the informant's statements as substantive evidence in closing argument and the trial court's failure to sustain the defense objection. The court denied the motion.

After polling the jurors regarding the note, the court directed them to return the following day to resume deliberations. The following day the jury reached agreement and convicted Ljubich as charged for first degree robbery. Before the verdict was entered, defense counsel renewed her motion for a mistrial. The court denied it summarily after the jury read its verdict.

On October 10, 2010, Ljubich was sentenced within the standard range

for 41 months' incarceration. Nine months later, on July 11, 2011, the court entered CrR 3.6(b) findings of fact and conclusions of law on the pretrial evidentiary hearing.

PROSECUTORIAL MISCONDUCT

Ljubich seeks reversal of his conviction on a theory that the prosecutor's statements during closing argument violated his right to a fair trial. Ljubich contends the prosecutor improperly employed the informant's statements as substantive evidence to corroborate the Ngs' identifications of Ljubich as the man who robbed them.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing both improper conduct and resulting prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), citing State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Comments made by a prosecuting attorney during closing argument may constitute improper misconduct entitling a petitioner to a new trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" McKenzie, 157 Wn.2d at 52, quoting Brown, 132 Wn.2d at 561. 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), cert. denied, 518 U.S. 1026 (1996).

In closing argument, a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). It is, however, improper for a prosecutor to argue from facts not in evidence. See State v. Staten, 60 Wn. App. 163, 173, 802 P.2d 1384, review denied, 117 Wn.2d 1011 (1991), citing State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

We conclude the prosecutor's use of the informant's evidence during closing argument was improper. The prosecutor's statements sent a clear suggestion to the jury that the informant's statements—which were not admitted for their truth—should be taken as true: that a slender white man *actually did* come running toward a parked car, that the man *actually was* carrying a white plastic bag, and that a car bearing the informant's description *actually did* drive off toward the northwest in the direction of Ljubich's home. In closing, the prosecutor recounted these details given by the informant and then stated that this information was "kind of important" because it corroborated the escape route taken by the robber and his getaway vehicle: "So if you think about the escape route, that corroborates where they were going and why they were going. They were going back home."

These statements were improper. The trial court erred by overruling defense counsel's objection. In suggesting to the jury that the informant's statements could be employed for *any* corroborative purpose, the prosecutor confused and contravened the court's clear limiting instructions. Before trial, the court clearly explained the purpose of the limiting instruction: so that the jury "will understand that there is no evidence that there was a car, that there was a tall skinny white man on such and such a street. Ms. Ng can testify to what she saw, but on the other street . . . there is no substantive testimony that that was there." By overruling defense counsel's objection, the trial court sent a confusing message to the jury as to whether or not they could employ the informant's statements in corroboration of the State's evidence.

The State's arguments to the contrary are not persuasive. The State contends that the escape route corroboration theory articulated by the prosecutor during closing argument was properly limited to facts in evidence: that Ljubich was ultimately "apprehended to the northwest of the pharmacy" and that detectives determined that he actually lived to the northwest of the robbery scene. But as recounted above, the prosecutor specifically asked the jury to observe that the informant's statements corroborated the escape route.

We are additionally unpersuaded by the State's argument that the prosecutor cured any impropriety in the comments by "noting the limited purpose of the testimony" before referring to the informant's statements. Although a jury is presumed to follow the court's limiting instructions, State v. Copeland, 130

Wn.2d 244, 284, 922 P.2d 1304 (1996), the prosecutor's statements contravened those instructions. His repetition of the limited purpose under which the evidence was allowed was meaningless when immediately followed by statements that clearly exceeded the limitation.

We also conclude the prosecutor's use of the informant's statements as corroboration was prejudicial. The State contends there was no prejudice, because the informant's statements to Officer Patchen carried little weight compared to the two independent eyewitness identifications provided by the Ngs. Detective Healy testified that both Ngs gave "immediate and confident" identifications of Ljubich in the photo montage. At trial, Mark-Ng said she was "100 percent sure" Ljubich was the robber, and Ng said he was "90 percent sure."

But there were several reasons a reasonable juror could have believed the Ngs were mistaken. There were notable differences between the descriptions given by the Ngs and Ljubich's actual appearance. Ng, for example, explained both before and during trial that the robber's eyes were a distinctive and memorable feature because they were "deep set" and "one eye was looking one direction and the other one was looking straight," as if "[s]kewed, maybe." But close-up photographs of Ljubich's face provided in the photo montage reveal no such peculiarity. Mark-Ng informed investigators after the incident that the robber's eyes were brown, while the photo montage shows that Ljubich's eyes are a light green color.

The defense also highlighted other factors that plausibly called into question the reliability of the Ngs' identifications. Although both Ngs' gave statements to investigators describing the robber's eyes, they informed the officer soon after the robbery that the man wore "dark sunglasses" covering his eyes. The Ngs are both of Asian descent, while Ljubich is Caucasian. A defense expert testified on the topic of "cross-racial identification," and informed the jury that the theory "demonstrates, generally speaking, . . . that people are less able to recognize and identify members of other races then they are able to recognize and identify members of their own race." Mark-Ng testified that when the robber entered the pharmacy she and Ng both believed it was one of their former employees named Raphael, and that Raphael was playing a joke on them. These statements may also have called into question the Ngs' ability to accurately identify faces.

Added to this, there was a dispute at trial over whether the Ngs had been informed of Ljubich's arrest and subsequent release before being shown the photo montage. The Ngs claimed they had, while Detective Healy claimed they had not. Healy agreed that if he had informed the Ngs before showing them the montage that a suspect had been arrested, it could have impacted the reliability of their identifications. A defense expert confirmed that crime victims are more likely to select a person from a photo montage if they are told in advance that police have a suspect.

The State admits that its case "relied upon the ability of the Ngs to identify

Ljubich as the same person that robbed them." There was no direct physical evidence linking Ljubich to the robbery, such as fingerprints or surveillance video. None of the items taken from the Ngs were ever recovered, despite a search of Clark's car and Ljubich's home. Seen against this backdrop, any improper use of evidence to corroborate the Ngs' identifications had a "substantial likelihood" of affecting the jury's verdict against Ljubich. Brown, 132 Wn.2d at 561.

Because no error has been assigned on appeal to the court's decision to admit evidence of the informant's statements to Officer Patchen, we express no opinion as to the soundness of that decision. And because we conclude reversal is required, we need not resolve the remaining challenge on appeal to the court's belated entry of CrR 3.6 findings of fact.

Reversed and remanded for a new trial.

Becker, J.

WE CONCUR:

Leach, C.J.

Grosse, J.