

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RANDOLPH WEBSTER WOOD,

Appellant.

No. 49425-6-II

UNPUBLISHED OPINION

WORSWICK, P.J. — Randolph Webster Wood appeals his conviction for attempting to elude a pursuing police vehicle. Wood argues that (1) the trial court erred in admitting an officer's testimony regarding a victim's statements when the officer responded to two 911 calls from her residence, (2) the trial court erred in admitting a police database photo of Wood, (3) the trial court abused its discretion in denying Wood's motion for mistrial, (4) the trial court erred in giving the jury an instruction regarding expert testimony, (5) the prosecutor committed misconduct, and (6) the cumulative effect of these alleged errors deprived Wood of a fair trial. We affirm Wood's conviction.

FACTS

I. BACKGROUND

On September 25, 2015, Anna Hall's daughter called 911 to report a domestic violence incident. Officer Michael Johnson was dispatched to Hall's residence and responded approximately 10 minutes after the 911 call was placed. Hall told Officer Johnson that her boyfriend, Wood, had assaulted her and that he left in an older green vehicle. After Officer

Johnson's conversation with Hall, he obtained a police database photo of Wood and searched the area around Hall's residence.

Approximately three hours later, Hall called 911 to report that Wood had returned to her home. Officer Johnson was again dispatched to Hall's residence. As Officer Johnson neared Hall's residence, he recognized a vehicle matching the description of the vehicle Hall had said Wood was driving. As he passed the vehicle, Officer Johnson recognized Wood as the driver. Officer Johnson then activated his emergency lights and sirens. A high-speed chase ensued and the driver later crashed the vehicle into a wooded area. The driver exited the vehicle before police arrived and was not apprehended at that time. The State subsequently charged Wood with attempting to elude a pursuing police vehicle.¹

II. PRETRIAL

Prior to trial, Wood filed a motion in limine to exclude all of Hall's out-of-court statements, including the statements made to Officer Johnson after he responded to the first 911 call and Hall's statements in the second 911 call, as testimonial hearsay. Wood did not object on relevance grounds or under ER 404(b). The State presented Officer Johnson's testimony in an offer of proof.

Officer Johnson testified that he responded to Hall's residence approximately 10 minutes after the first 911 call. When he arrived, Hall was crying and "[i]t was obvious that she had just been in some sort of a fight." 2 Verbatim Report of Proceedings (VRP) at 158. Hall had red marks on her forehead and an injury to her lip. Hall told Officer Johnson that Wood assaulted her, and she provided a description of the vehicle he left in. Hall also told Officer Johnson that

¹ RCW 46.61.024(1).

there were prior no-contact orders between her and Wood and that Wood was potentially watching her home from a nearby apartment complex. Officer Johnson stated that there was some concern that Wood would return. Officer Johnson also testified that Hall called 911 approximately three hours later to report that Wood had, in fact, returned.

The trial court denied Wood's motion, ruling:

The Court's finding that at the time . . . some of the statements that were made were an excited utterance.

....

So, as a result of that . . . that information is going to be allowed in, and the Court is finding that it is not barred by *Crawford*^[2] as being testimonial.

It is also provided for . . . the non-hearsay purpose as to why the law enforcement officers were looking for the defendant.

3 VRP at 195-96.

Wood also filed a motion in limine to exclude admission of the recordings of the two 911 calls. The State agreed that it would not introduce the content of the 911 calls, and the trial court granted Wood's motion in limine.

Also during the pretrial hearing, Wood objected to the admission of the police database photograph of Wood that Officer Johnson obtained as a result of his conversation with Hall and any testimony about the photograph. The trial court denied Wood's motion, determining that the photograph was obtained pursuant to an excited utterance and that testimony about the photograph would be admitted only to show why Officer Johnson attempted to stop Wood.

III. TRIAL

During her opening statement, the prosecutor said:

² *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

No. 49425-6-II

At the time that the Lakewood police arrived that night, the first call, the defendant had already left the scene. Ms. Hall reported he had already left the scene. . . . So they had no contact with him at that time.

Officers then were called back to the scene in the early morning hours And Officer Johnson again responded. Ms. Hall had called to indicate that the defendant had returned.

3 VRP at 203-04. Wood moved for mistrial, arguing that the prosecutor's reference to the second 911 call violated an order in limine, and the statements made during the second 911 call were inadmissible hearsay. The trial court denied Wood's motion.

Hall did not testify at trial. Officer Johnson testified that he was dispatched to Hall's residence to respond to a call about a misdemeanor incident. Officer Johnson stated that when he responded to her residence, Hall identified Wood and said that he left in an older green vehicle. Officer Johnson testified that he located a photograph of Wood in a police database after his conversation with Hall. The trial court admitted the photograph into evidence.

Officer Johnson also testified that he received a call notifying him that Wood had returned to Hall's residence. Officer Johnson located a vehicle matching Hall's description, identified Wood as the driver of the car, and activated his lights and sirens. Sergeant Matt Brown testified to the above facts regarding law enforcement's pursuit of the older green vehicle.

Before closing arguments, the trial court instructed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of witness testimony regarding statements made by Anna Hall and may be considered by you only for the purpose of understanding why law enforcement officers were called . . . and were provided the name Randolph Wood. You may not consider it for any other purpose.

Clerk's Papers (CP) at 44. The trial court also provided an expert witness instruction over Wood's objection. That instruction stated:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any another witness.

CP at 51.

During closing argument, the prosecutor provided that the officers were “trained observers These are not lay witnesses where they glance at a car going by and they’re in an emotional state.” 5 VRP at 386. The prosecutor also noted: “You can also reasonably infer from the evidence that the defendant knew that the police were behind him to arrest him on a misdemeanor charge, and that was the reason that he was trying to flee from the police.” 5 VRP at 350. Wood objected, arguing that the prosecutor’s remarks went beyond the scope of the court’s limiting instruction. The trial court denied Wood’s objection. Later, the prosecutor provided:

You know just that [the reason the police were called was for] a misdemeanor. It doesn’t matter what it was. You’re only to use the information about the fact that the officers had a basis to arrest him on the misdemeanor to provide context as to why the officers responded that night to [Hall’s residence] and were looking for the defendant You cannot use that information for any other reason.

5 VRP at 360.

The jury returned its verdict finding Wood guilty of attempting to elude a pursuing police vehicle. Wood appeals.

ANALYSIS

I. ADMISSION OF HALL'S STATEMENTS TO POLICE

Wood argues that the trial court erred in admitting Officer Johnson's testimony regarding Hall's statements when he responded to the 911 calls because Hall's statements violated Wood's right to confrontation, were irrelevant, and were improper character evidence.³ We hold that evidence of Hall's statements did not violate Wood's right to confrontation and further hold that Wood failed to preserve his remaining arguments.

A. *Testimonial Evidence*

First, Wood argues that the trial court erred in admitting Officer Johnson's testimony regarding Hall's statements when he responded to Hall's 911 calls because her statements violated Wood's right to confrontation under the Sixth Amendment. We disagree.

We review de novo an alleged violation of a defendant's right to confront witnesses. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354 (2004)). However, nontestimonial statements

³ Wood also argues that the trial court erred in admitting Officer Johnson's testimony regarding Hall's statements because Hall's statements were inadmissible hearsay and were not subject to a hearsay exception. Although the trial court ruled that some of Hall's statements were excited utterances, Hall's statements clearly were not admitted for the truth of the matter asserted. This is evidenced by the trial court's limiting instruction: ". . . witness testimony regarding statements made by Anna Hall and may be considered by you only for the purpose of understanding why law enforcement officers were called . . . and were provided the name Randolph Wood. You may not consider it for any other purpose." CP at 44. Accordingly, we do not consider Wood's argument because Hall's statements were not admitted as excited utterances.

No. 49425-6-II

are admissible under the Sixth Amendment subject to only the rules of evidence. *State v. Pugh*, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009).

“Where the police are involved in procuring an unconfroed statement, whether the statement is testimonial depends upon the ‘primary purpose’ for the interrogation during which the statement was made.” *State v. Reed*, 168 Wn. App. 553, 562, 278 P.3d 203 (2012) (quoting *Davis*, 547 U.S. at 822). When the circumstances of a police interrogation objectively show that there was no ongoing emergency and that the primary purpose of the interrogation was to establish past events that may be relevant to future criminal prosecution, the product of the interrogation is necessarily testimonial. *Pugh*, 167 Wn.2d at 832. On the other hand, statements are nontestimonial when they were made under circumstances that objectively indicate that the primary purpose of the interrogation was to enable the police to assist in an ongoing emergency. 167 Wn.2d at 832.

To determine whether the primary purpose of police interrogation was to enable the police to assist in an ongoing emergency, we consider:

(1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.

167 Wn.2d at 832. Statements made within minutes of an assault may be properly considered as statements that are contemporaneous with the events that occurred. *State v. Ohlson*, 162 Wn.2d 1, 17, 168 P.3d 1273 (2007).

During a pretrial hearing, Officer Johnson testified that he responded to Hall’s residence approximately 10 minutes after the first 911 call. When he arrived, Officer Johnson saw Hall

crying, observed injuries, and reasoned that “[i]t was obvious that she had just been in some sort of a fight.” 2 VRP at 158.

Officer Johnson spoke with Hall in her home, and during that conversation, Hall told Officer Johnson that Wood assaulted her and left in an older green vehicle. Hall also disclosed that there were prior no-contact orders between her and Wood and that Wood may have been watching her home from a nearby apartment complex. Officer Johnson testified that he was concerned that Wood would return. He further testified that Hall called 911 approximately three hours later to report that Wood did in fact return.

The circumstances of Officer Johnson’s conversation with Hall after the first 911 call objectively show that the primary purpose of the conversation was to assist Hall in an ongoing emergency. Officer Johnson’s conversation with Hall was in Hall’s home and appeared informal. Because Officer Johnson responded within minutes of the 911 call, we consider Hall’s statements as being made contemporaneously with the assault. *Ohlson*, 162 Wn.2d at 17. In addition, a reasonable listener would clearly understand that Hall faced an ongoing emergency. When Officer Johnson responded, it was clear that Hall had been assaulted. Hall disclosed that she had previous no-contact orders against Wood, and Officer Johnson noted that there was concern that Wood would return.

That Hall was facing an ongoing emergency is further evidenced by the fact that Wood returned to her residence shortly after the assault. Further, questions and answers regarding Wood’s name and the vehicle he was driving were necessary to locate Wood and to end the ongoing emergency. As a result, the primary purpose of Officer Johnson’s conversation with Hall was to assist in an ongoing emergency, and Hall’s statements were nontestimonial.

No. 49425-6-II

Therefore, the trial court did not violate Wood's right to confrontation under the Sixth Amendment by admitting Hall's statements to Officer Johnson.

Moreover, Hall's statement during the second 911 call was made for the primary purpose of obtaining assistance in an ongoing emergency. Hall called 911 when Wood returned to her home. Given the previous 911 call and assault that evening, a reasonable listener would understand that Hall was facing a continuing emergency and that her statement was necessary to obtain help from law enforcement to end the emergency. Accordingly, the primary purpose of Hall's statement was to obtain assistance in an ongoing emergency, and her statement was nontestimonial. Thus, the trial court did not violate Wood's right to confrontation by admitting Hall's statement during the second 911 call.

B. *Relevance & Improper Character Evidence*

Wood argues for the first time on appeal that the trial court erred in admitting Officer Johnson's testimony regarding Hall's statements when he responded to two 911 calls from her residence because Hall's statements were irrelevant and were improper character evidence under ER 404(b). Generally, we will not review issues raised for the first time on appeal. RAP 2.5(a). In addition, a party arguing an evidentiary error must assign error on appeal only on the specific grounds argued at trial. *DeHaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986). Wood failed to object to the admission of Hall's statements on relevance grounds or under ER 404(b). Accordingly, we do not review Wood's arguments that the trial court abused its discretion in admitting irrelevant evidence and improper character evidence under ER 404(b). *See State v. Mason*, 160 Wn.2d 910, 931, 162 P.3d 396 (2007).

II. ADMISSIBILITY OF PHOTOGRAPH

Wood also argues without authority that the trial court erred in admitting a police database photo of Wood because admission of the photo was based on Hall's testimonial hearsay statements to Officer Johnson. We disagree.

Hall's statements to Officer Johnson were properly admitted. Because Hall's statements to Officer Johnson were admissible, the foundation necessary to admit the photograph was also admissible. Therefore, admission of the photograph was proper.

III. MISTRIAL

Wood also argues that the trial court abused its discretion in denying Wood's motion for mistrial because the prosecutor violated an order in limine during opening argument by referring to Hall's second 911 call. We disagree.

We review a trial court's decision denying a motion for mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion when no reasonable judge would have reached the same conclusion. 174 Wn.2d at 765. "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." 174 Wn.2d at 765. To determine the effect of a trial irregularity, we examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. 174 Wn.2d at 765.

The trial court denied Wood's motion in limine to exclude all of Hall's out-of-court statements but granted his motion in limine to exclude recordings of the two 911 calls. In her opening statement, the prosecutor said:

At the time that the Lakewood police arrived that night, the first call, the defendant had already left the scene. Ms. Hall reported he had already left the scene. . . . So they had no contact with him at that time.

Officers then were called back to the scene in the early morning hours And Officer Johnson again responded. Ms. Hall had called to indicate that the defendant had returned.

3 VRP at 203-04. Based on these comments, Wood moved for mistrial, arguing violation of the order in limine and inadmissible hearsay. The trial court denied Wood's motion, reasoning that the prosecutor's reference to the second 911 call did not violate the previous order in limine, and that it provided background information for law enforcement's involvement.

At the close of evidence, the trial court instructed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of witness testimony regarding statements made by Anna Hall and may be considered by you only for the purpose of understanding why law enforcement officers were called . . . and were provided the name Randolph Wood. You may not consider it for any other purpose.

CP at 44.

The prosecutor's remark that there was a second call where Hall reported that Wood had returned was inconsequential. The trial court previously ruled that the statement was admissible, and the prosecutor did not violate an order in limine by referring to the second call. Moreover, the trial court's limiting instruction directed the jury to consider Hall's statements only for the purpose of understanding why law enforcement was called. This instruction was consistent with the trial court's pretrial rulings and helped to eliminate any resulting prejudice. As a result, Wood cannot show that the prosecutor's comment during opening argument was so prejudicial that nothing short of a new trial could ensure that he would be fairly tried. Accordingly, the trial court did not abuse its discretion in denying Wood's motion for mistrial.

IV. INSTRUCTIONAL ERROR

Wood also argues that the trial court erred in giving the jury an instruction regarding expert testimony because the instruction misled the jury in that no expert witnesses testified at trial. We determine that the expert testimony instruction was erroneous but nevertheless conclude that the error was harmless beyond a reasonable doubt.

We review alleged errors of law in jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. 153 Wn.2d at 370. A jury instruction is misleading when an ordinary juror would interpret the instruction erroneously. *See State v. Moultrie*, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008). An erroneous jury instruction that misleads the jury is subject to a constitutional harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). An erroneous instruction is harmless so long as we conclude beyond a reasonable doubt that the jury verdict would have been the same without the error. 150 Wn.2d at 845.

At trial, only Officer Johnson and Sergeant Brown testified. The State did not offer or disclose either witness as an expert witness. Despite Wood's objection, the trial court instructed the jury:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any another witness.

CP at 51.

During closing argument, the State noted that the officers were “trained observers These are not lay witnesses where they glance at a car going by and they’re in an emotional state.” 5 VRP at 386.

The trial court gave an expert testimony instruction when no witness testified in an expert capacity. As a result, an ordinary juror may have interpreted the instruction as suggesting that the two testifying officers were expert witnesses. Accordingly, the trial court’s instruction misled the jury and was erroneous.

Despite this, we conclude that the error was harmless beyond a reasonable doubt. Although it is possible that the jurors concluded that the instruction applied to the officers’ testimony, the instruction made clear that it applied only to the officers’ opinions, and not to the facts they testified to. At trial, Officer Johnson testified to his observations, which allowed him to identify Wood as the driver of the older green vehicle. In addition, Sergeant Brown testified to facts that occurred during the high speed chase and his observations regarding the driver’s physical features. Consequently, neither Officer Johnson nor Sergeant Brown expressed an opinion at trial. Moreover, the instruction stated that the jury could reject an expert’s opinion and that each juror must consider an expert’s credibility, as well as the weight to give his or her testimony, as any other witness. Accordingly, the instruction did not suggest that the officers’ testimony be given more weight and did not impact the jury in assessing the officers’ testimony. As a result, we conclude beyond a reasonable doubt that Wood’s verdict would have been the same without the erroneous instruction. Therefore, the trial court’s erroneous jury instruction was harmless beyond a reasonable doubt.

V. PROSECUTORIAL MISCONDUCT

Wood also argues that the prosecutor committed misconduct during closing argument by arguing that the jury could consider evidence of the two 911 calls for more than the trial court had instructed in its limiting instruction. The State appears to concede that the prosecutor's statement was improper. We determine that Wood fails to show that the prosecutor's statement was prejudicial.

To establish prosecutorial misconduct, a defendant must show first that the prosecutor's conduct was improper and second, that the comments were prejudicial. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). A prosecutor's improper conduct is prejudicial only when there is a substantial likelihood that the misconduct affected the jury's verdict. 161 Wn.2d at 774. In assessing the prejudicial effect of a prosecutor's improper statements, we do not review the statements in isolation and instead place the remarks in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given to the jury. 161 Wn.2d at 774.

The trial court instructed the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of witness testimony regarding statements made by Anna Hall and may be considered by you only for the purpose of understanding why law enforcement officers were called . . . and were provided the name Randolph Wood. You may not consider it for any other purpose.

CP at 44.

During closing argument, the prosecutor provided that “[y]ou can also reasonably infer from the evidence that the defendant knew that the police were behind him to arrest him on a misdemeanor charge, and that was the reason that he was trying to flee from the police.” 5 VRP

at 350. Wood objected, arguing that the prosecutor's remarks went beyond the scope of the court's limiting instruction. The trial court denied Wood's objection. The prosecutor continued:

You know just that it's a misdemeanor. It doesn't matter what it was. You're only to use the information about the fact that the officers had a basis to arrest him on the misdemeanor to provide context as to why the officers responded that night to [Hall's residence] and were looking for the defendant . . . You cannot use that information for any other reason.

5 VRP at 360.

The prosecutor's remark that the jury could infer that Wood knew he was going to be arrested and attempted to flee as a result suggested to the jury that it could consider Hall's statements for purposes other than the purpose of understanding why law enforcement was called to her residence and provided with Wood's name. As a result, the prosecutor indicated that the jury was not bound by the purposes stated in the court's limiting instruction. Accordingly, the prosecutor's remark was improper.

Although the prosecutor improperly suggested that the jury could disregard the trial court's limiting instruction, Wood cannot show that there is a substantial likelihood that the prosecutor's isolated remark affected the jury's verdict. The prosecutor later rephrased her reference to Hall's statements and clarified the purposes for which the jury could consider the evidence. Moreover, the trial court instructed the jury that it could consider Hall's statements only for purposes of understanding law enforcement's involvement; we presume that juries follow the trial court's instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Accordingly, Wood fails to show that the prosecutor's conduct was prejudicial.

VI. CUMULATIVE ERROR

Wood also argues that the cumulative effect of these alleged errors deprived him of a fair trial. We disagree.

The cumulative error doctrine applies when a trial is affected by several errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant's conviction, we must consider whether the totality of circumstances substantially prejudiced the defendant. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). The cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial's outcome. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

As discussed above, Wood identifies only two trial errors—the trial court's erroneous expert testimony instruction and the prosecutor's improper suggestion that the jury could disregard the trial court's limiting instruction. Considering these errors together, Wood fails to show that their combined effect deprived him of a fair trial. The prosecutor's remark during closing argument had little to no effect on the outcome of Wood's trial because it was brief, the trial court instructed the jury that it could consider Hall's statements only for purposes of understanding why law enforcement responded and was given Wood's name, and the prosecutor rephrased her improper suggestion. Moreover, the trial court's erroneous instruction did not impact the jury's consideration of the officers' testimony, and the trial court instructed the jury to weigh the credibility of witnesses on its own. Accordingly, Wood identifies only two errors that

No. 49425-6-II

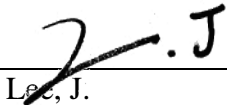
had little to no effect on the outcome of his trial. Thus, the cumulative error doctrine does not apply.

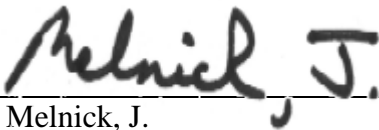
We affirm Wood's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, P.J.

We concur:


Lee, J.


Melnick, J.