IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29241-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JOSEPH CHRISTOPHER MILLER, JR.,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

Brown, J. — Joseph C. Miller, Jr. appeals his convictions for driving under the influence of intoxicants (DUI), two counts of third degree assault, and driving without an ignition interlock device. He contends (1) the trial court abused its discretion by allowing the State to question Mr. Miller regarding his prior convictions, and (2) the prosecutor committed misconduct by provoking Mr. Miller to comment on officer credibility to elicit testimony that they were lying. Because Mr. Miller opened the door to questions about his prior convictions, and because he failed to object to the alleged misconduct and fails to show any resulting prejudice, we affirm.

FACTS

As background, in the early morning on June 27, 2009, Yakima County Sheriff's Deputy Ernie Lowry stopped Mr. Miller for speeding. Deputy Eric Wolfe was called to assist. The ensuing events resulted in Mr. Miller being charged with DUI, two counts of third degree assault of a police officer, and driving without an ignition interlock device. Mr. Miller's first trial resulted in a hung jury. In his second trial reviewed here, the State produced sufficient evidence, not appealed here, supporting each charge that is unnecessary to detail for our review. But relevant here, Mr. Miller generally defended at trial by vehemently denying the State's evidence and offering sympathetically innocent explanations, admitting previous DUIs, and portraying the State's evidence as fabricated to cover up officer misconduct. The relevant appeal facts are next.

After Deputy Lowry stopped Mr. Miller and saw his intoxicated behavior, he learned Mr. Miller's license was suspended and warrants existed for his arrest. When Deputy Wolfe attempted to place Mr. Miller under arrest, he refused. The ensuing struggle resulted in the assault charges to the officers and their use of batons and a taser to subdue and handcuff Mr. Miller. Deputy Wolfe notified dispatch that a subject had been tased and requested medical aid. Deputy Wolfe asked Mr. Miller if he needed to be concerned about Mr. Miller having spit in his face, and Mr. Miller replied he had AIDS. Deputy Wolfe later related Mr. Miller told him he had said he had AIDS because he wanted to scare Deputy Wolfe. After emergency medical technician (EMT) Randy Garcia checked Mr. Miller for injuries, a deputy drove Mr. Miller to the hospital.

Mr. Miller told Theresa Schuknecht, an internal affairs investigator, that he had spit on the deputy. EMT Randy Garcia testified he noticed one of the officers had saliva on his face at the scene and that Mr. Miller was noncompliant and highly intoxicated.

During direct examination, defense counsel asked Mr. Miller: "In your past life, have you ever been arrested for driving while intoxicated?" to which Mr. Miller answered: "Yes." Report of Proceedings (RP) (July 1, 2010) at 531. The trial court ruled this question "opened the door" for the prosecutor to inquire further about the arrests, specifically how many DUI arrests Mr. Miller had and how many resulted in convictions. *Id.* at 568-73. On cross-examination, the prosecutor asked Mr. Miller: "Okay. Mr. Miller, earlier you had said that you had been arrested for DUIs. Our records indicate that from 1986 to December 11th 2008, you've been arrested for DUI 11 times, would you agree with that?" to which Mr. Miller answered, "Yes." RP (July 2, 2010) at 661. The prosecutor continued: "Some of those arrests have turned into convictions, would you agree with that?" to which Mr. Miller also answered, "Yes." *Id.*

Additionally, the defense called Ms. Schuknecht regarding her investigation, including her interview with Mr. Miller. The deputy prosecutor for the State cross-examined Mr. Miller about the interview:

> Q: Mr. Miller, you are alleging some very serious conduct, misconduct against Deputy Wolfe, Deputy Miller [sic], and another deputy on the scene–
>
> [Defense]: Object.
>
> Q: - - aren't you?
>
> THE COURT: Sustained. Rephrase.
>
> [State]: Okay.

Q: Well, you said you were never speeding that afternoon, [sic], is that correct?
A: I was speeding earlier that day.
Q: Okay. But when you got pulled over by Deputy Lowry, you weren't speeding, is that your- -
A: No, I was not.
Q: Okay. The officer said you were speeding, is that correct?
A: They said I was, yes.
Q: Okay. So he would be being dishonest about that, is that correct?
[Defense]: I'm going to - - What? I didn't, I didn't hear the question.
THE COURT: Wait a minute. What? I didn't hear the question. What was your - -
[State]: I said, "So you're saying he's being dishonest about that, is that correct?"
THE COURT: Who's being dishonest?
A: That's your opinion.
THE COURT: Just a second.
[State]: Correct.
THE COURT: Who was being dishonest?
[State]: Deputy Lowry.
THE COURT: Sustained. The jury will disregard that question.
[State]: Okay.
Q: But you are, you are saying that the deputies made up a reason to search your car, is that correct?
A: Yes.
Q: Okay. You are saying the deputies essentially made up the entire assault on you, is that correct?
A: Yes.
Q: And you're saying the officers hit you with a night stick and tased you without any reason, is that correct?
A: They tased me after I reached for the telephone.
Q: Okay. Without any good reason, then, is that correct?
A: Yes.
Q: Okay. But you never told Theresa Schuknecht anything about these events on that day, did you?
A: No, she asked about the beating.
Q: Okay, You never said anything to her about any of these other incidents, though?
A: No.

RP (July 1, 2010) at 590-92.

The jury found Mr. Miller guilty as charged. Mr. Miller appealed.

ANALYSIS

A. Cross-Examination about Prior Convictions

The issue is whether the trial court erred in allowing the State to question Mr. Miller regarding his prior DUI arrests. Mr. Miller contends the trial court abused its discretion by allowing cross-examination about his prior DUI arrests.

Under ER 404(b), evidence of a defendant's prior crimes is not admissible to prove the defendant's character predisposed him or her to commit the charged crime. Additionally, under ER 609(a), evidence of a defendant's prior convictions is usually not admissible to attack the defendant's credibility. But a defendant can waive objection to inadmissible evidence if the defendant was the first to raise the subject matter at trial; this is known as the "open door" rule. *See* 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14-.15 (5th ed. 2007).

Under the "open door" rule, if one party raises a material issue, the opposing party is generally permitted to "explain, clarify, or contradict the evidence." *State v.*

Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008) (citing *State v. Price*, 126 Wn. App. 617, 109 P.3d 27 (2005)). "This is the long-recognized rule that when a party opens up a subject of inquiry, that party 'contemplates that the rules will permit cross-examination or redirect examination . . . within the scope of the examination in which the subject matter was first introduced.' Otherwise, [t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.'" *Berg*, 147 Wn. App. at 939 (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). Therefore, a defendant's testimony on direct examination regarding a prior arrest can open the door for the State to cross-examine the defendant about the arrest. *See State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

We review a trial court's decision to allow cross-examination under the "open door" rule for abuse of discretion. *State v. Wilson*, 20 Wn. App. 592, 594, 581 P.2d 592 (1978); *Ortega*, 134 Wn. App. at 626. A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds for untenable reasons. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Mr. Miller testified during direct examination that he had previously been arrested for DUI. The trial court ruled this opened the door to cross-examination about his prior DUI arrests. Mr. Miller does not actually dispute he opened the door. Rather, he argues the number of his convictions was beyond the scope of his direct

examination because it "did not explain, clarify or contradict Mr. Miller's simple admission." Br. of Appellant at 9.

Regardless of the reason why Mr. Miller presented the evidence, he presented a limited part of the evidence• that he had been arrested for DUI in the past. The trial court discussed with counsel "what kind of door" that opened. RP (July 1, 2010) at 570-73; 577-79. The court reasoned "legitimate follow-up questions" included how many times Mr. Miller had been arrested for DUI and how many convictions he had gotten. *Id.* at 572-73. The court confirmed that the State did not plan to ask Mr. Miller about the facts of his DUI arrests.

During cross-examination, the State asked Mr. Miller two questions regarding his DUI arrests. His answers informed the jury that between 1986 and December 11 2008, he had been arrested for DUI 11 times and that some of those arrests resulted in convictions. All of that information clarified and explained his testimony that he had been arrested for DUI in his "past life." In addition, the jury was instructed to consider any evidence of Mr. Miller's previous convictions for the limited purpose of deciding what weight to give his testimony and for no other purpose. Jurors are presumed to follow court instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Considering all in context, the court did not abuse its discretion by allowing the State to elicit testimony regarding the number of Mr. Miller's DUI arrests and confirm that some of his arrests resulted in convictions.

B. Prosecutorial Misconduct

The issue is whether the State committed prosecutorial misconduct. Mr. Miller contends the prosecutor provoked him to comment on the deputies' credibility which affected the verdict and warrants a new trial.

A defendant claiming prosecutorial misconduct "must first establish the prosecutor's improper conduct and second, its prejudicial effect." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)). Cross-examination "designed to compel a witness to express an opinion as to whether other witnesses were lying" constitutes improper conduct. *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Prejudice is established solely if a substantial likelihood exists that the misconduct affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578.

Mr. Miller does not argue the questioning was improper, except for a glancing analogical reference to *Padilla*. Nonetheless, he argues the questioning, despite the sustained objection, was misconduct. The State responds that the prosecutor's question about whether the deputy was lying about Mr. Miller speeding was stricken. Further, the remaining questions did not amount to improper conduct because their purpose was to clarify Mr. Miller's direct testimony contradicting the State's evidence, not to compel Mr. Miller to comment on the veracity of the deputies.

On cross-examination, the State questioned Mr. Miller about his interview with Ms. Schuknecht. Immediately following that line of questioning, the State asked the challenged questions: "Q: But you are, you are saying that the deputies made up a reason to search your car, is that correct? A: Yes. Q: Okay. You are saying the deputies essentially made up the entire assault on you, is that correct? A: Yes." RP (July 1, 2010) at 591. And immediately following the challenged questions it asked: "But you never told Theresa Schuknecht anything about these events on that day, did you?" RP (July 1, 2010) at 590-92. This is proper clarification cross-examination. Generally, the proper scope of cross-examination is inquiry into what was elicited on direct examination. *Gefeller*, 76 Wn.2d at 455; *see* ER 611. We cannot say the examination was flagrant or designed to elicit an opinion on the deputies' veracity, such that "no curative instructions could have obviated the prejudice engendered by the misconduct." *Padilla*, 69 Wn. App. at 300.

Moreover, Mr. Miller would still need to show prejudice; he fails to do so. The testimony that the prosecutor elicited from Mr. Miller reiterated his exculpatory testimony on direct. Accordingly, it is not likely that the testimony affected the verdict.

Given all, we conclude the prosecutor's questions did not constitute prosecutorial misconduct.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

_____ _____
Korsmo, A.C.J. Siddoway, J.