IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE MICHAEL RANCIPHER, Appellant.	No. 38244-0-II UNPUBLISHED OPINION

Houghton, P.J. — Eugene Rancipher appeals his second and third degree theft convictions, arguing prosecutorial misconduct. Because certain statements made in closing argument constituted prosecutorial misconduct, we reverse and remand for a new trial.[1]

FACTS

Rancipher worked for the University Place Fred Meyer store as a loss prevention manager. In this role, he managed the store's two employee incentive programs designed to combat shoplifting. The first program, known as the "Buck-a-Beep" program, paid employees $1 each time they responded to an alarm at the store's exit. IV Report of Proceedings (RP) at 168. The second program, known as the "Employee Recovery Incentive Award" program, paid employees 10 percent of the value of an item they prevented someone from stealing, not to exceed $100. IV

[1] Although this appeal raises multiple arguments, we discuss only those issues likely to arise on retrial or that serve as the basis for our reversal and remand. We do not address Rancipher's arguments based on ineffective assistance of counsel, cumulative error, double jeopardy, or restitution.

RP at 171. Rancipher's responsibilities included tracking the money owed to each employee. At the end of each month, he filled out two refund slips, one for each program, and presented the slips to customer service. Customer service processed the refund slips and issued the funds, in cash, to him to distribute to the respective employees.

Fred Meyer terminated Rancipher in August 2005 for failing to show up for work. Fred Meyer replaced him with Christopher Voelker, a loss prevention specialist who had worked under Rancipher. Store management then asked Voelker to look into possible fraud in the employee incentive programs. Voelker ultimately determined that over seven months, Rancipher presented a significant number of refund slips.

As a result of the store's investigation, the State eventually charged Rancipher with 58 counts of second degree theft and 32 counts of third degree theft.

Before trial, Rancipher's counsel retained a handwriting analyst, Robert Floberg, to review the refund slips that the State claimed Rancipher had completed. Floberg determined that the handwriting on several of the refund slips conclusively matched Rancipher's. Rancipher's counsel listed Floberg as a defense witness and provided a copy of his report to the State, as required. CrR 4.7(b)(1). Because the report contained information that benefited the State's case, however, the State named Floberg as a witness.

Also before trial, Rancipher's counsel moved to exclude Floberg's handwriting analysis testimony under *Frye*. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (the standard for determining whether evidence based on novel scientific procedures is admissible requires a trial court to determine whether a scientific theory or principle has achieved general acceptance in the

relevant scientific community before admitting it into evidence). The trial court ultimately allowed Floberg's testimony, refusing to hold a *Frye* hearing because courts have long accepted handwriting analysis evidence.

A jury heard the case. During closing argument, the State told the jury that no evidence showed that Rancipher would go to jail if he was convicted. The State also told the jury to "recall that Mr. Rancipher was terminated for time fraud," apparently referring to previous testimony that Fred Meyer terminated Rancipher for failing to show up to work. XVII RP at 1818. The trial court sustained Rancipher's objections to both of those statements, but it did not instruct the jury to disregard them.

The jury found Rancipher guilty of 56 of the 58 second degree theft counts and guilty of 28 of the 32 third degree theft counts. Following the trial, he moved for a judgment notwithstanding the verdict on double jeopardy grounds. The trial court denied the motion. He appeals.

ANALYSIS

Handwriting Analysis Expert Testimony / *Frye* Hearing

Rancipher first contends that the trial court erred in admitting Floberg's expert testimony on handwriting analysis without first holding a *Frye* hearing. "We review the trial court's decision to admit or exclude novel scientific evidence de novo." *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). But we review the ultimate decision to admit or exclude expert testimony under ER 702 for an abuse of discretion.[2] *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164

[2] ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

(2004). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Once an appellate court determines that the *Frye* test is met as to a specific novel theory or principle, trial courts may rely on that decision in future cases. *Cauthron*, 120 Wn.2d at 888 n.3. Trial courts are still required to undertake the *Frye* analysis, however, if one party produces new evidence that "seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community." *Cauthron*, 120 Wn.2d at 888. Otherwise, a *Frye* hearing is not necessary. *See State v. Thorrell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003).

Rancipher argues that the trial court should have held a *Frye* hearing because he presented evidence that questioned the general acceptance of handwriting analysis. The State counters that he did not adequately present new evidence and that our Supreme Court has established the validity of handwriting analysis under *State v. Haislip*, 77 Wn.2d 838, 467 P.2d 284 (1970).

As the State correctly points out, Washington courts have allowed handwriting analysis evidence for some time. *See Hanslip*, 77 Wn.2d at 844-45. And our various evidentiary and procedural rules recognize this fact. *See* CrR 4.7(b)(2)(vii) (providing for handwriting exemplars); 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 702.36, at 135-38 (5th ed. 2007) (discussing the process to admit handwriting analysis testimony). Rancipher fails to show how the courts' longstanding use of handwriting analysis for

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knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

the purpose of comparing writing samples is improper. Thus, the trial court did not err in refusing to hold a *Frye* hearing and Rancipher's argument fails.

Prosecutorial Misconduct

Rancipher also raises a series of prosecutorial misconduct claims on appeal, including that the prosecutor (1) improperly commented on Rancipher's right to counsel,[3] (2) asked leading questions despite the trial court's repeated directions not to, (3) sought testimony in violation of ER 404(b) and the trial court's orders in limine, and (4) in closing argument suggested that there was no evidence that Rancipher would go to jail if convicted and that Rancipher was terminated for "time fraud." Appellant's Br. at 11, 25, 27. With regard to the prosecutor's statements at closing argument, we agree.

In order to prevail on his prosecutorial claims, Rancipher must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's comments are prejudicial when they are substantially likely to affect the jury's verdict. *McKenzie*, 157 Wn.2d at 52. When determining the prejudicial effect of the conduct, we look to the context of the entire argument, the issues of the case, the evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

We do not reverse when the trial court could have corrected a prosecutor's improper remark by a curative instruction that defense counsel failed to request. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If defense counsel fails to object to improper remarks by the

[3] Rancipher objected to these statements and moved for a mistrial, which the trial court denied. The trial court instead gave a curative instruction to the jury. In doing so, however, it said, "I would not be astonished if this case does not come back on appeal having been reversed for cumulative error on the Prosecuting Attorney." XVI RP at 1757. Even though we do not reach the substance of Rancipher's argument here, a mistrial might have been more appropriate given the trial court's stated views. The trial court is in the best position to control counsel's trial conduct, instead of deferring to us to address the matter under the cumulative error doctrine.

prosecutor, he has waived the error on appeal "unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Hoffman*, 116 Wn.2d at 93.

Rancipher first argues that the State committed prosecutorial misconduct when the prosecutor stated in closing argument, "Please recall that Mr. Rancipher was terminated for time fraud," presumably in an attempt to link Fred Meyer's termination of him to the alleged thefts. RP at 1818. Rancipher further argues that this statement violated the trial court's previous order to limit testimony regarding Fred Meyer's termination of him.

This statement was clearly improper in light of trial court's order that limited testimony about Rancipher's termination from Fred Meyer.[4] No evidence showed that Rancipher committed "time fraud." *See State v. Stover*, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992) (comments that encourage the jury to render a verdict on facts not in evidence are improper). Fred Meyer's stated reasons for terminating Rancipher had nothing to do with the theft charges. Although the trial court sustained Rancipher's objection, doing so did not mitigate the impact of the statements. It is substantially likely that this statement influenced the jury.

Rancipher also argues that the State's comments during closing argument—that a lack of evidence existed to show that he would suffer a loss of liberty if convicted—constituted prosecutorial misconduct. The State counters that its comments were a proper response to the defense counsel's comments during closing argument. Rancipher's defense counsel stated at closing,

[4] The trial court allowed testimony that Fred Meyer terminated Rancipher for not showing up to work for the limited purpose of showing why he no longer worked there.

> Now, in jury selection, the State talked about peanut butter and jelly and cookie crumbs. That's not what this is about. This is about loss of liberty. This is a serious matter. This is where you have to really take the instructions at heart and consider what is behind our judicial system, the fact that your verdict can take away the liberty of Mr. Rancipher; and it's a serious matter, and it requires you to seriously consider all of the evidence and weigh it and decide if the State has met its burden of proving beyond a reasonable doubt all the elements of the charge; and the instructions tell you that. They say that the fact that the punishment may follow conviction, you shouldn't consider it, except insofar as it may tend to make you careful; and that's what I'm asking you to do when you go into the jury room is be careful. . . .
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> Now that's not peanut butter and jelly. That's not cookie crumbs and see who took the cookies out of the cookie jar.

XVII RP at 1840-41. And the State responded,

> [L]et me remind you, as well, that when [defense counsel] stood up here and talked about the fact that his liberty is at stake, that's a comment which has no support or testimony behind it. Did anyone come up here and say that he's going to go to jail? No one came up and said that. [Defense counsel] is the only person who said that.
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> [DEFENSE COUNSEL]: Objection to this argument, Your Honor.
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> THE COURT: I'll sustain the objection. Rephrase it, counsel.
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> [STATE]: That is not testimony. No witness has testified to that, and so you are to consider that only as argument by counsel. There is no support for that in any of the evidence in this case.

XVII RP at 1862-63.

The State's comment in rebuttal closing argument was clearly more than a mere response to Rancipher's argument. Rancipher's counsel only reiterated the importance of being careful in deliberations, as included in jury instruction 103. The State's argument, however, most likely left the jury with the impression that Rancipher, even if found guilty, would not go to jail. It is improper for the State to comment on the punishment that the defendant might receive. *See State v. Torres*, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976) (holding that prosecutorial argument regarding punishment is improper because it may distract the jury from its function of determining

guilt). And it is also improper for the State to mislead the jury. *See State v. Belgarde*, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988). Thus, the State's statement was improper, and it is substantially likely that it affected the jury's verdicts, despite the trial court's sustaining defense counsel's objection.

Because both of these statements constituted prosecutorial misconduct, Rancipher's argument prevails.

Reversed and remanded for a new trial.

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 pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Hunt, J.

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Quinn-Brintnall, J.