

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 73105-0-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
TODD ANTHONY PEREZ,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>January 19, 2016</u>
)	

2016 JAN 19 AM 9:49
 COURT REPORTER'S DIV.
 STATE OF WASHINGTON

Cox, J. – Todd Perez appeals the judgment and sentence imposed following his conviction of failing to register as a sex offender. The trial court properly admitted Perez’s prior convictions under ER 609(a)(2). It did not abuse its discretion by characterizing these convictions as “crimes of dishonesty.” Additionally, the trial court did not comment on the evidence by stating that Perez’s conviction was for a “crime of dishonesty” in its limiting instruction. Lastly, the trial court did not abuse its discretion by giving the State’s proposed jury instruction and rejecting Perez’s. We affirm.

Perez was previously convicted of a sex offense, requiring him to register as a sex offender. He registered with the Snohomish county sheriff as homeless. Because he was homeless, he had to register weekly. Perez allegedly did not comply with the registration requirements. He was charged with failing to register as a sex offender.

During trial, Perez moved to prohibit the State from characterizing his prior convictions as crimes of dishonesty. Instead, he asked that the State name the

crimes, arguing that using the term “crimes of dishonesty” was “a comment on the evidence” and “would be improper in expressing a personal opinion.” The court denied Perez’s motion. The court stated that “the whole purpose [of ER 609] is to alert the jury that these particular crimes go to the defendant’s credibility” and that “[the State] has a right to indicate that these are crimes of dishonesty.”

During direct examination, Perez was asked if he had “been convicted of four other charges which are considered crimes of dishonesty,” to which he answered yes. Perez did not object to this question.

Additionally, the parties disagreed on how to characterize these convictions in the court’s limiting instruction. Perez proposed a jury instruction, stating “You may consider evidence that the defendant has been convicted of a non-sex offense crime only in deciding what weight or credibility to give the defendant’s testimony, and for no other purpose.” The State’s proposed instruction stated “You may consider evidence that the defendant has been convicted of a crime of dishonesty only in deciding what weight or credibility to give the defendant’s testimony, and for no other purpose.” The trial court determined that it was “appropriate to use the same terminology [as was used during the testimony] with the jurors.” The court adopted the State’s instruction. Perez later objected to this instruction.

The jury found Perez guilty of failing to register as a sex offender.

Perez appeals the judgment and sentence.

PRIOR CONVICTIONS CHARACTERIZATION

Perez argues that the trial court abused its discretion in allowing the State to characterize his prior convictions as crimes of dishonesty. We disagree.

Under ER 609(a)(1), parties may offer evidence of a witness's felony convictions to impeach the witness's credibility.¹ But the court must determine "that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered."²

But under ER 609(a)(2), the court may admit evidence of a witness's criminal convictions for crimes "involv[ing] dishonesty" to impeach the witness's credibility. Convictions for crimes of dishonesty are per se admissible.³ When a court admits a prior conviction under this rule, it should instruct the jury "that the conviction is admissible only on the issue of the witness'[s] credibility, and, where the defendant is the witness impeached, may not be considered on the issue of guilt."⁴

After the trial court determines the prior conviction's admissibility, the court has discretion to name or not name the conviction.⁵ "This rule tends to operate as a defense option to request nondisclosure of the nature of the felony, because

¹ State v. King, 75 Wn. App. 899, 904, 878 P.2d 466 (1994).

² ER 609(a)(1).

³ King, 75 Wn. App. at 904.

⁴ City of Seattle v. Patu, 108 Wn. App. 364, 376, 30 P.3d 522 (2001), aff'd, 147 Wn.2d 717, 58 P.3d 273 (2002) (quoting State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013, 787 P.2d 906 (1989)).

⁵ King, 75 Wn. App. at 909.

once the court rules in favor of admission, only the defendant will be strategically interested in moving to middle ground.”⁶

We review for abuse of discretion rulings made under ER 609.⁷ A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.⁸ “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.”⁹ The appellant bears the burden of proving an abuse of discretion.¹⁰

Here, ER 609(a)(2) is at issue. The prior crimes at issue were convictions for second degree robbery, first degree possession of stolen property, third degree theft, and making a false statement. Accordingly, they were per se admissible.

In State v. White, this court stated that the decision whether to name a prior conviction:

rest[s] with the discretion of the trial judge as an additional aspect of the ultimate determination that the prejudicial effect of the evidence on the defendant does not outweigh its probative value. It is apparent that no bright line rule can be formulated for this issue and that each case will have to be determined on its facts.^[11]

⁶ Id.

⁷ State v. Garcia, 179 Wn.2d 828, 846, 318 P.3d 266 (2014).

⁸ In re Marriage of Chandola, 180 Wn.2d 632, 659, 327 P.3d 644 (2014) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

⁹ Id. (quoting Littlefield, 133 Wn.2d at 47).

¹⁰ State v. Asaeli, 150 Wn. App. 543, 573, 208 P.3d 1136 (2009).

¹¹ 43 Wn. App. 580, 586, 718 P.2d 841 (1986).

The trial court denied Perez's motion to prohibit the State from characterizing his convictions as crimes of dishonesty during his testimony, concluding that they were "appropriately referred to as crimes of dishonestly." The court also stated that "the whole purpose is to alert the jury that these particular crimes go to the defendant's credibility" and that "[the State] has a right to indicate that these are crimes of dishonesty." This was a proper exercise of discretion.

Perez argues that the jury should have been allowed to determine his credibility "free from the unfair prejudice arising from" the crimes of dishonesty label. He cites State v. Hardy¹² as support, stating that reversal is required "where credibility was central to the case" and where only a prior conviction was used to impeach the defendant's veracity. But that case is distinguishable.

In that case, the State moved to introduce Patrick Hardy's prior drug conviction to impeach his testimony.¹³ The defense objected, and the trial court admitted Hardy's conviction as an unnamed felony under ER 609(a)(1), stating "the jury should be entitled to know that there is some prior conviction."¹⁴ The

¹² 133 Wn.2d 701, 713-14, 946 P.2d 1175 (1997).

¹³ Id. at 705.

¹⁴ Id. at 706.

defense elicited Hardy's unnamed felony on direct.¹⁵ The jury convicted Hardy for second degree robbery and he appealed.¹⁶

In its unnamed felony analysis, the supreme court stated

If the balance merits admission, it is anomalous to unname the felony as it is generally the nature of the prior felony which renders it probative of veracity. Courts should not admit unnamed felonies under ER 609(a)(1) unless they can articulate how unnamings the felony still renders it probative of veracity.^[17]

The supreme court determined the trial court erred in admitting Hardy's prior drug conviction "as neither the State nor the trial court articulated how it was probative of Hardy's veracity."¹⁸ It also stated that "Hardy's credibility was important because it was virtually his word against the alleged victim's as to whether he forcefully took the jewelry. . . . There was no[] overwhelming evidence that Hardy forcefully took the jewelry as alleged."¹⁹ Additionally, "the prior crime was the only impeachment of Hardy's veracity and was thus critical."²⁰

Accordingly, the supreme court concluded that "there was at least a reasonable probability that this improper impeachment affected the jury's determination" and reversed the admissibility of the prior drug conviction.²¹

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 712.

¹⁸ Id. at 713.

¹⁹ Id.

²⁰ Id.

²¹ Id.

Here, ER 609(a)(2) controls, not ER 609(a)(1). There is no legitimate dispute over whether the prior convictions are crimes of dishonesty. They were for second degree robbery, first degree possession of stolen property, third degree theft, and making a false statement. Additionally, the admissibility of his prior convictions was not at issue as in Hardy. Rather, the issue is the characterization of those prior convictions.

Perez also cites to Hardy,²² arguing that naming the convictions “is the preferred method for impeachment evidence under” the rule. But the decision on how to characterize such convictions is a discretionary one. The rationale of the court in this case was proper.

COMMENT ON THE EVIDENCE

Perez argues that one of the court’s jury instructions constituted an improper comment on the evidence. We disagree.

Article IV, section 16 of Washington’s constitution prohibits judges from conveying their “personal attitudes toward the merits of the case.” It also prohibits a judge from “instructing a jury that ‘matters of fact have been established as a matter of law.’”²³ The purpose of this provision “is to prevent the jury from being influenced by . . . the court’s opinion of the submitted evidence.”²⁴

²² Id. at 712.

²³ State v. Besabe, 166 Wn. App. 872, 880, 271 P.3d 387 (2012) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

²⁴ State v. Miller, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014).

The facts and circumstances of each case must be reviewed when determining whether an act constituted a comment on the evidence.²⁵ Whether the trial court's feeling as to the truth value of a witness's testimony has been communicated to the jury is the "touchstone of error."²⁶

A jury instruction may constitute an improper comment on the evidence.²⁷ An instruction improperly comments on the evidence when it "relieve[s] the State of its burden" of proof or "resolve[s] a contested factual issue for the jury."²⁸ A jury instruction does not comment on the evidence when it "does no more than accurately state the law pertaining to an issue."²⁹ Further, an instruction does not comment on the evidence if the court expresses no opinion on the parties' "character or credibility or the strength of their case," "merely articulate[s] the basis for evidentiary rulings[,] and appropriately instruct[s] the jury on the use of evidence" admitted for limited purposes.³⁰

Here, the jury instruction did not comment on the evidence. It merely gave the jury a proper legal characterization of the crimes at issue. Nothing

²⁵ State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478 (2009).

²⁶ Id. (quoting State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)).

²⁷ Miller, 179 Wn. App. at 107.

²⁸ State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

²⁹ Id. (quoting State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)).

³⁰ Wuth ex rel. Kessler v. Lab. Corp. of Am., 189 Wn. App. 660, 700, 359 P.3d 841 (2015).

about the instruction communicated the judge's view on any contested factual issue.

The plain terms in the instruction demonstrate that the court instructed the jury "that the conviction is admissible only on the issue of the witness' credibility, and . . . may not be considered on the issue of guilt."³¹ The instruction also "expressed no opinion" on Perez's "character or credibility or the strength of [his] case."³² Thus, the trial court did not "pass[] upon the credibility of [Perez's] testimony but was simply advising the jury concerning the limited purpose for which the evidence could be considered."³³ "Whether or not [Perez's] testimony was to be believed was a question for the jury."³⁴

Perez relies on State v. Dewey,³⁵ arguing that the instruction allowed "the jury to infer that the trial court believed Perez was dishonest and therefore not credible." But that case is distinguishable.

Before the victim testified in that case, "the court instructed the jury that they would hear evidence concerning an 'incident.' But the final instruction described the incident as a 'rape.'"³⁶ Division Two concluded that the instruction

³¹ Patu, 108 Wn. App. at 376 (quoting Brown, 113 Wn.2d at 529).

³² Wuth ex rel. Kessler, 189 Wn. App. at 700.

³³ Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969).

³⁴ Id.

³⁵ 93 Wn. App. 50, 59, 966 P.2d 414 (1998), abrogated by State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003).

³⁶ Id.

“allowed the jury to infer that the judge accepted [the witness’s] testimony as true,” stating that “[t]he ‘incident’ would only become a ‘rape’ if [the victim’s] testimony were believed.”³⁷

Here, both the direct examination question and instruction used the phrase “crime of dishonesty.” Thus, the instruction did not allow the jury to infer that the trial court believed Perez was dishonest.

Perez also argues that the trial court should have used a more neutral term, stating that “the standard ER 609 limiting instruction does not reference ‘crimes of dishonesty.’”

But this argument does not explain why the court abused its discretion in its choice of words. There is no dispute that these words were legally correct characterizations of the prior crimes.

Perez further argues that the jury was not instructed to refrain from inferring Perez’s dishonesty or credibility from the trial court’s comment. But the trial court instructed the jury to “disregard” any unintentional expression of the judge’s “personal opinion.” He also cites no authority requiring such an instruction. Thus, we do not further consider this argument.³⁸

PROPOSED INSTRUCTION

Perez argues that the trial court abused its discretion by giving the State’s proposed instruction to the jury. We disagree.

³⁷ Id.

³⁸ See Darkenwald v. Emp’t Sec. Dep’t, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

“The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, so far as it is competent for the court to assist them.”³⁹ “We consider instructions as a whole and read the challenged portions in context.”⁴⁰ “Jurors are presumed to follow the court’s instructions.”⁴¹

“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.”⁴² “A trial court is not required to give a requested instruction when the subject is adequately covered by another instruction.”⁴³ A jury instruction’s “propriety” “is governed by the facts of the particular case.”⁴⁴

Additionally,

a trial court must give a limiting instruction where evidence is admitted for one purpose but not for another The trial court is not obliged to give the instruction in the exact language proposed by the defendant. The court has broad discretion to fashion its own limitation on the use of the evidence.⁴⁵

³⁹ State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978).

⁴⁰ State v. Fehr, 185 Wn. App. 505, 514, 341 P.3d 363 (2015).

⁴¹ State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

⁴² Fehr, 185 Wn. App. at 514 (quoting State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)).

⁴³ Patu, 108 Wn. App. at 376.

⁴⁴ Fergen v. Sestero, 182 Wn.2d 794, 803, 346 P.3d 708 (2015).

⁴⁵ State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010).

Further, "where a prior conviction is an element of the current charge and a different prior conviction is also admitted as bearing on credibility or for some other purpose, it [is] preferable for the court to tailor the limiting instruction so that there can be no mistake which prior conviction it refers to."⁴⁶

We review for abuse of discretion a trial court's decision to give a particular jury instruction.⁴⁷

Here, Perez's proposed instruction stated "You may consider evidence that the defendant has been convicted of a non-sex offense crime only in deciding what weight or credibility to give the defendant's testimony, and for no other purpose."⁴⁸

The trial court rejected Perez's instruction, stating that "since the evidence [concerned] crimes of dishonesty, . . . it's appropriate to use the same terminology with the jurors."⁴⁹ Additionally, the subject of Perez's proposed instruction, which explained how the jury was to consider his prior convictions, was adequately covered by the instruction that was given to the jury. Thus, the court did not abuse its discretion by giving the State's instruction, especially in light of its decision "to use the same terminology" in the jury instruction as was used during Perez's testimony.

⁴⁶ State v. Ortega, 134 Wn. App. 617, 622-23, 142 P.3d 175 (2006).

⁴⁷ Fergen, 182 Wn.2d at 802.

⁴⁸ Clerk's Papers at 70, 73.

⁴⁹ Report of Proceedings (December 9, 2014) at 103.

Perez argues that the trial court erred by giving the State's instruction. Because the issue here concerns the court's decision to give a particular jury instruction, the abuse of discretion standard of review applies.⁵⁰

Perez specifically argues that his proposed instruction "was properly tailored to differentiate between" his convictions admitted for impeachment purposes and other purposes.⁵¹ But the State's instruction was also tailored to differentiate between his prior convictions.

Perez also argues that his proposed instruction "allowed the State to receive all legitimate impeachment value from the prior convictions, without the unfair prejudice associated with labeling [them] as 'crime[s] of dishonesty.'"⁵² He also argues that the court's error was prejudicial, claiming that his testimony was crucial to his defense that he did not knowingly fail to register. But as previously discussed, the court did not abuse its discretion by giving the State's instruction. Thus, these arguments are unpersuasive.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Trickey, J.

Spears, C.J.

⁵⁰ Fergen, 182 Wn.2d at 802.

⁵¹ Brief of Appellant at 13.

⁵² Id. (some alterations in original).