IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63992-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
WILLIE LEE WHITFIELD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 27, 2010

LAU, J.— Willie Whitfield challenges his jury convictions for two counts of delivery of cocaine, one count of possession of cocaine with intent to deliver, and two counts of unlawful possession of a firearm in the first degree. He argues that the trial court erred by precluding him from impeaching an adverse witness with evidence of an allegedly false statement. But that evidence was properly excluded, as it was neither relevant nor probative of any issue of consequence. He also argues that the prosecutor engaged in misconduct during closing argument, that defense counsel provided ineffective assistance, and that cumulative error denied him a fair trial. Finding no error, we affirm.

FACTS

In September 2008, confidential informant Dorothy Aguilar told King County

Sheriff's Detective Keith Martin that Whitfield was selling cocaine out of his apartment in Seattle. Aguilar was a former cocaine and heroin user who had worked with the King County Sheriff's Office since 2003. Detective Martin arranged two controlled buy operations, using Aguilar to purchase cocaine from Whitfield.

On October 26, Whitfield arrived alone by car to meet Aguilar at the prearranged location for the sale, a grocery store parking lot. Aguilar got into the car and gave Whitfield $100 cash that Detective Martin provided her. Whitfield took a baggie of cocaine from his pants and gave it to Aguilar. Aguilar walked to Detective Martin's car and gave the cocaine to him. Sergeant Jesse Babauta, Martin's supervisor, saw Whitfield return to his apartment shortly after the sale. Laboratory tests confirmed the substance Whitfield sold Aguilar was cocaine.

On November 9, 2008, Whitfield arrived alone by car at the prearranged location. Aguilar again gave him $100 that Detective Martin provided her and received cocaine. Aguilar gave the cocaine to Detective Martin, and tests confirmed the substance was cocaine. Again, Sergeant Babauta saw Whitfield return to his apartment shortly after the sale.

Detective Martin thereafter obtained a search warrant for Whitfield's apartment. Officers waited for Whitfield outside his apartment, arrested him when he arrived, and used his key to enter the apartment to conduct the search. Inside they found a loaded shotgun and a safe containing a loaded pistol, plastic baggies, and $900 cash. They also found a dresser containing cocaine, electronic scales, ammunition, more baggies, and an additional $175 in cash. They also found documents indicating Whitfield lived

in the apartment, including his rental agreement and driver's license listing the address of the apartment.

Whitfield was charged by amended information with two counts of delivery of cocaine, one count of possession of cocaine with intent to deliver, and two counts of unlawful possession of a firearm in the first degree.

At trial, Sergeant Babauta, Detective Martin, and Aguilar all testified about their involvement in the controlled buys. Other officers also testified about their involvement. Detective Todd Morrell was present during both controlled buys to provide security for Aguilar. Detective Matt Tighe identified Whitfield during the first controlled buy from a prior booking photograph. Detective Mulligan also identified Whitfield and saw Aguilar hand Whitfield cash.

Several officers testified about their respective roles in the search of Whitfield's apartment. Sergeant Babauta supervised the search. Detective Smith found four electronic scales, a plate with suspected cocaine, razor blades, handgun ammunition, shotgun shells, and $175 cash, as well as Whitfield's rental agreement. Detective Morell found the handgun and small plastic baggies, Detective Tighe found the shotgun, and Detective Mulligan found about $900 cash and documents showing Whitfield's dominion and control over the apartment.

A jury convicted Whitfield of all five offenses, and the trial court imposed a standard range sentence. Whitfield appeals.

ANALYSIS

Limits on Cross-Examination

Whitfield asserts that the trial court erred in precluding him from impeaching Detective Martin with evidence of a prior false statement. We disagree.

In March 1999, Detective Martin called police to report that his car had been stolen and his apartment burglarized. Soon thereafter he revealed to the investigating officers that he had given an acquaintance staying at his house permission to drive the car. The acquaintance was arrested shortly thereafter and admitted that she let her friends into Detective Martin's house while he was away, and they took his property. Detective Martin was suspended for one day without pay after an internal investigation concluded that "he omitted facts when reporting the theft of personal property during a burglary of his residence." Pretrial Ex. 1 at 41.[1]

Prior to trial, the court granted the State's motion in limine to preclude the defense from cross-examining Detective Martin about the incident. The court concluded that the evidence was not probative of Martin's credibility because it was not related to the facts of the case, was a "domestic situation," and involved an omission, not a false statement.

The rights to present a defense and to confront and cross-examine adverse witnesses are guaranteed by both the federal and state constitutions. U.S. Const. amend VI; Wash. Const. art. I, § 22; Wash. v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed.

[1] Although Whitfield also sought to cross-examine Martin about a second alleged incident, his appeal concerns only the 1999 allegations.

2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. Hudlow, 99 Wn.2d at 15 (citing Texas, 388 U.S. at 16). And the right to cross-examine adverse witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The confrontation right is subject to the following limitations: (1) the evidence sought must be relevant[2] and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. Hudlow, 99 Wn.2d at 15.

Whether the trial court has violated the confrontation clause is a question of law involving the right to a fair trial and is reviewed de novo. State v. Jones, 168 Wn.2d 713, 723–24, 230 P.3d 576 (2010). Although our review is de novo, we recognize that a trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. Similarly, a court's limitation of the scope of cross-examination will not be disturbed absent a manifest abuse of discretion. Darden, 145 Wn.2d at 619; State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). Abuse exists when the trial court's exercise of discretion is "'manifestly unreasonable or based upon untenable grounds or reasons.'" Darden, 145 Wn.2d at 619 (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Whitfield asserts that the trial court deprived him of his rights to present a

[2] "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

defense and confront adverse witnesses, relying heavily on State v. York, 28 Wn. App. 33, 34–37, 621 P.2d 784 (1980). However, York is distinguishable. In York, the defendant was charged with two counts of delivery of a controlled substance to an undercover informant, the only witness to the transactions. York, 28 Wn. App. at 34–35. The trial court precluded defense counsel from cross-examining the informant about his termination from a prior job with a law enforcement agency for "irregularities in his paperwork" and "his general unsuitability for the job." York, 28 Wn. App. at 34. The appellate court reversed, concluding that the case "was simply a contest between the word of [the informant] and [the defendant's] alibi witnesses," and the informant's credibility was "crucial" to the State and was the "very essence of the defense." York, 28 Wn. App. at 35–36. Moreover, the informant's credibility was based on his "apparent unsullied background and the total lack of meaningful impeachment," and was "stressed heavily by the prosecution." York, 28 Wn. App. at 35.

Detective Martin's credibility was less essential to the defense and less crucial to the State than the informant's in York. Unlike York, this case was not simply a contest between the word of Detective Martin and Whitfield. There were multiple witnesses to the drug transactions and the search of Whitfield's apartment. These included Sergeant Babauta, Detectives Smith, Morrell, Tighe and Mulligan, and the confidential informant. The confidential informant was the witness with the most detailed account of the drug sales. Whitfield's defense counsel was able to impeach her with evidence that she had been twice convicted for theft, was a former opiate and cocaine user, and was using drugs close in time to the controlled buys. There was also a large amount of

physical evidence implicating Whitfield. A shotgun, a pistol, ammunition, scales, baggies, cash, and cocaine were found in his apartment, along with multiple documents revealing his dominion and control over the apartment.

Moreover, Detective Martin's prior conduct was distinguishable from the undercover informant's in York and was significantly less probative. While the undercover informant was terminated from his employment for irregular work and unsuitability for the job, Detective Martin's conduct was essentially unrelated to his work as a detective. Whatever his motive in initially omitting the identity of his acquaintance, his 1999 conduct did not evince a propensity to falsify evidence in a drug investigation of an individual he did not know, nearly ten years later.

Because the evidence is not relevant under ER 401 standards, its exclusion did not deprive Whitfield of his right to present a defense or to confront adverse witnesses. Hudlow, 99 Wn.2d at 16. The State's interest in seeking a just trial by preventing evidence of little probative worth from distracting and inflaming jurors was sufficient to justify exclusion of the evidence. See Hudlow, 99 Wn.2d at 16. The trial court's rulings on the admissibility of the evidence and limits of cross-examination were not manifestly unreasonable. We find no abuse of discretion.

Prosecutorial Misconduct

Whitfield next argues that the prosecutor committed misconduct in closing argument by making the following remark:

> [Defense counsel], I don't begrudge her what she's doing. She's an excellent attorney. Her job is to search for doubt. That's her job.
> Your job, on the other hand, is to seek the truth.

Report of Proceedings (RP) (May 4, 2009) at 89. Although defense counsel did not object to the argument, Whitfield argues on appeal that the remark was so flagrant and ill intentioned that no contemporaneous objection was required. We disagree.

We review a prosecuting attorney's allegedly improper 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. State v. Russell, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994). Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

Whitfield argues that the prosecutor's remark misstated the law regarding the burden of proof, citing State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); Anderson, 153 Wn. App. at 429; and State v. Coleman, 74 Wn. App. 835, 838–41, 876 P.2d 458 (1994). But those cases reveal that a properly worded curative instruction would have cured any potential prejudice from the challenged remark. In Warren, the prosecutor repeatedly told jurors in closing that the defendant was not entitled to "the benefit of the doubt." Warren, 165 Wn.2d at 24. Defense counsel objected each time, and the trial court gave an "appropriate and effective curative instruction." Warren, 165 Wn.2d at 28. Although it deemed the prosecutor's actions "flagrant," the Warren court held that the "correct and thorough curative instruction" cured any error. Warren, 165 Wn.2d at 28.

In Anderson, the prosecutor repeatedly requested the jury to "'declare the truth'"

by its verdicts. Anderson, 153 Wn. App. at 429. The Anderson court held that the defendant failed to demonstrate a substantial likelihood that this misconduct affected the verdict. Anderson, 153 Wn. App. at 429.

In Coleman, the prosecutor told jurors that to return a verdict finding the defendant guilty of a lesser included offense of first degree theft rather than robbery, it would have to "'ignore the actual evidence'" and "'thereby to violate [their] oath as jurors.'" Coleman, 74 Wn. App. at 838. Coleman's counsel promptly objected. The Coleman court concluded there was not a substantial likelihood the conduct affected the verdict, because (1) there was only a single instance of misconduct, (2) the prosecutor's other remarks indicated the verdict would be honored, and (3) the trial judge was in the best position to assess the prejudice.

We conclude that any prejudice from the prosecutor's lone remark could have been cured by an instruction by the trial court had one been requested. Any prejudice in this case was less significant than that in Warren, yet the trial court's curative actions in that case adequately remedied the prejudice. We presume the jury follows the trial court's instructions. Anderson, 153 Wn. App. at 429. Because any prejudice here could have been cured by a timely instruction had Whitfield requested one, the issue is waived. Russell, 125 Wn.2d at 86.

Ineffective Assistance of Counsel

Whitfield also argues that his trial counsel was ineffective for (1) failing to object to the prosecutor's remarks in closing argument and (2) failing to request a limiting instruction pertaining to his stipulation to having committed a prior felony. However,

Whitfield's claims relate to reasonable tactical decisions.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686,104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. McFarland, 127 Wn.2d at 334–35; State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

First, counsel was not deficient for not objecting to the prosecutor's remark in closing argument. Decisions regarding when or whether to object are trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defense counsel could have legitimately determined that the remark was not unduly prejudicial or that objecting would emphasize the argument. Whitfield has not overcome the strong presumption of effective assistance of counsel regarding this tactical decision. Second, Whitfield has not demonstrated his counsel was ineffective for deciding not to emphasize the stipulated conviction by requesting a limiting instruction.

Whitfield stipulated to the fact of a prior conviction for a felony, an element of the firearm charges. His counsel argued that the stipulation was necessary to prevent the jury from learning the nature of his underlying conviction for a prior drug offense.

Defense counsel drafted the stipulation. The stipulation was read into the record as follows: "The parties agree and stipulate that the defendant, Willie Whitfield, has a prior conviction for a serious felony." RP (Apr. 30, 2009) at 38. The trial court told counsel, "I'm not going to read it again. I think that would have more emphasis on the evidence." RP (May 4, 2009) at 10. The trial court later reemphasized that it did not want to call unnecessary emphasis to the stipulation—"I just want to specify we're not going to read that again to the jury. The jury's already been informed. And I think repeating it would be error, so we're certainly not going to do that." RP (May 4, 2009) at 17.

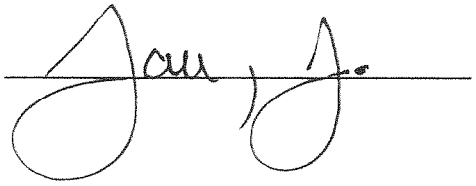
Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). It is well settled that we may presume defense counsel decided not to request a limiting instruction because to do so would reemphasize damaging evidence. See In re Rice, 118 Wn.2d 876, 888–89, 828 P.2d 1086 (1992); Barragan, 102 Wn. App. at 762; State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). Because the decision to forego a limiting instruction can be fairly characterized as a legitimate trial tactic, Whitfield has not overcome the strong presumption of effective assistance of counsel.

Cumulative Error

Finally, Whitfield argues that cumulative trial court error deprived him of a fair trial. A defendant may be entitled to a new trial when errors, even though not

individually reversible, cumulatively result in a trial that was fundamentally unfair. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). This standard was not met.

We affirm.



WE CONCUR: