IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MONTEECE SMITH-LLOYD, Appellant.	No. 42507-6-II UNPUBLISHED OPINION

Armstrong, J.[1] (Pro Tem) — Monteece Smith-Lloyd[2] appeals his convictions for first degree perjury. He argues that a prosecution witness improperly offered opinion testimony regarding a core element of perjury. He further argues that we need to remand this matter for the trial court to enter findings of facts and conclusions of law as required by CrR 3.5(c). We affirm.[3]

The Pierce County Superior Court tried Smith-Lloyd on two perjury counts. RCW 9A.72.020(1).[4] The counts stemmed from sworn testimony he provided at two severed trials

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[1] Judge Armstrong is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

[2] He also goes by the name Monteece Brewer.

[3] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then referred it to a panel of judges.

related to a shooting of Billy Ray Griffin that occurred on September 4, 2008.

Detective John Ringer investigated Griffin's shooting. He initially spoke by telephone with Smith-Lloyd about the event. Smith-Lloyd acknowledged he was in the vehicle that Detective Ringer believed was used in the shooting, but stated that he and the other occupants, his brother Demarco McGown and "Little Tuf" and "Rock" only took some girls to the movies on the evening of September 4, 2008.

The following month Detective Ringer interviewed Smith-Lloyd in person after advising him of his *Miranda*[5] rights. Smith-Lloyd said he was extremely drunk the evening of the incident and did not provide the detective with many details. Detective Ringer told Smith-Lloyd that "[w]e knew he was in the vehicle with others that night, and that Billy Griffin had been shot from the vehicle." Report of Proceedings (RP) at 91. "[Smith-Lloyd] never denied having been in the vehicle." RP at 91. Smith-Lloyd saw a photograph of Derrick Johnson, the suspected driver, in Detective Ringer's papers and spontaneously told the detective that Johnson "[could] supply all the answers." RP at 91. Smith-Lloyd offered to assist in locating Johnson if he could get a "deal." RP at 91, 93. Detective Ringer unsuccessfully attempted to contact the prosecutor.

Ultimately, the State charged four individuals with crimes related to the shooting: Smith-Lloyd, the suspected rear seat passenger on the passenger's side; Brennan Morford, the suspected rear seat passenger on the driver's side; McGown, the front seat passenger and suspected shooter; and Johnson, the driver, who allegedly instructed McGown to "[s]moke that nigga" immediately

[4] This statute provides: "A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law."

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

before McGown shot Griffin. RP at 64, 72, 158-62, 168. The State dismissed the charges with prejudice against Morford and Smith-Lloyd so they would be available as witnesses in the trials of Johnson and McGown.

At McGown's trial, Smith-Lloyd first testified he had no recollection of being a passenger in a car involved in a shooting of Griffin. He then denied being in the vehicle and participating in any shooting. The jury convicted McGown of attempted murder, participating in a drive-by shooting, and unlawful firearm possession. Smith-Lloyd testified for the defense at Johnson's trial. He stated that someone named "Rock" drove the car and that Smith-Lloyd, not McGown, shot Griffin after saying, "I'm about to smoke this nigg-r." RP at 274, 281. The jury also convicted Johnson of attempted murder, participating in a drive-by shooting, and unlawful firearm possession.

During Smith-Lloyd's perjury trial, the following occurred during the testimony of Gregory Greer,[6] the prosecutor in both the Johnson and McGown trials:

> [Greer]: . . . So it's important whether you know what they're going to say or not that if they have material evidence whether they're going to give it to you or not you put them on the stand.
>
> [Prosecutor Ausserer]: You indicated that they had material evidence. What does material evidence mean?

[6] The court allowed Greer to testify not only as a fact witness but as a gang expert, based on his experience as a prosecutor in the Pierce County gang unit.

[Greer]: Well, it's subjective. But material evidence would be evidence which goes to prove an element of whatever the charge is. So any witness that has information of any sort that would help the jurors in determining an element, any element, of the crime would be material.

[Ausserer]: And in your opinion and based on what you know of the facts to be during the course of your work on this case were Mr. Smith Lloyd and Mr. Morford both material witnesses in this matter?

. . . .

[Defense Counsel Johnson]: I'm objecting to the use of terminology, and I would like the State to correct it. **Basically the question to the witness is what is material evidence?** The definition that the witness has given is really the definition for relevant evidence, evidence that tends to prove a fact or not.

Materiality is very specific with perjury. So what I've heard from Mr. Greer in his explanation of what is material sounds more like the definition of relevancy, and I think he should be corrected.

[Ausserer]: **Your Honor, it would be improper for me to ask this witness about materiality as it relates to perjury.** That is the sole issue in this case. I'm asking him in his assessment of this case was this witness material to the presentation of this case. That's a completely different scenario.

This witness can testify as a trial attorney what evidence was important to the presentment of his case, specifically whether these witnesses were important to his case.

[Johnson]: **But we are using a very technical term with regards to the criminal charge against my client**.

THE COURT: Well, won't that be clarified by way of instruction to the jury? We have a definition as to what that term means.

[Johnson]: I would hope so, Your Honor. But I think that while we're giving testimony right now that since the description of what decision there was to use a particular witness or not seems to follow along with the idea of what is relevant and—

THE COURT: Well, even if it follows the idea of what is relevant, isn't that inclusive in materiality?

[Johnson]: No.

THE COURT: Well, in order for someone to be—I would assume for someone to be material to a case one would also assume that whatever they testify about is going to be relevant.

[Ausserer]: I agree

[Johnson]: My request is for a clarification given the nature of the charge. I think that using material rather than relevant is confusing to the jury. So.

THE COURT: All right. I'm going to overrule that objection.

. . . .

[Ausserer]: I think before we took a break, Mr. Greer, I asked you in the presentment of your case were the two witnesses present in the vehicle material to

> the case you intended to present to the jury?
>
> [Greer]: Yes.
>
> [Ausserer]: Explain that, please.
>
> [Greer]: Well, that's hardly arguable. I mean, if you're in a car and believing what these individuals said and, again, all the rest of the facts; the witness/victim seeing a couple of people and couldn't identify them in the back, and then all the rest of the facts with the car belonging to one of those individual's mother's and everything working together, those two individuals would have obviously been witnesses within a few feet of the actual shooting and there is no question that what they would have to say would be material to a decision about what happened.

RP at 325-27 (emphasis added). The jury found Smith-Lloyd guilty of two counts of perjury.

Smith-Lloyd argues that the trial court violated his right to a jury trial by allowing Greer to testify that Smith-Lloyd's testimony was "material,"[7] when materiality is an element of perjury. Br. of Appellant at 7 (citing *State v. Abrams*, 163 Wn.2d 277, 289, 178 P.3d 1021 (2008)) ("the materiality of a false statement in a perjury prosecution must be submitted to a jury rather than decided by a trial judge"); RCW 9A.72.020(1). The State initially responds that Smith-Lloyd failed to preserve a claim of improper opinion or legal conclusion evidence because he did not object on that basis. The State characterizes that basis of Smith-Lloyd's objection as one solely on the "basis that it would be 'confusing' to the jury" under ER 403 (covering jury confusion). Br. of Resp't at 11.

The record of the objection illustrates that the State understood that Smith-Lloyd expressed concern about the use of the term "material" during Greer's testimony because "[m]ateriality is very specific with perjury." RP at 325-27. After Smith-Lloyd's objection, the

[7] A "materially false statement" is defined as "any false statement oral or written . . . which could have affected the course or outcome of the proceeding[.]" RCW 9.72.010(1). The jury instructions repeated this definition. The instructed elements further required the State to prove that "the statement was material." Clerk's Papers at 43.

State, in fact, specifically addressed whether the testimony improperly referenced an element of the perjury charge and distinguished the purpose for which it presented Greer's testimony: "Your Honor, it would be improper for me to ask this witness about materiality as it relates to perjury. That is the sole issue in this case. I'm asking him in his assessment of this case was this witness material to the presentation of this case. That's a completely different scenario." RP at 325-27. Thus, while a subsequent portion of the post-objection discussion also involved jury confusion,[8] this was not the preliminary concern discussed by the parties or the court. We, therefore, will reach Smith-Lloyd's argument on appeal regarding Greer's use of the term "material."

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *See State v. Rivers*, 129 Wn.2d 697, 709-10, 921 P.2d 495 (1996). Smith-Lloyd argues that Greer's testimony was lay opinion related to a core element of perjury, that is, whether Smith-Lloyd made any "material statements."[9]

A lay witness may give only "those opinions or inferences which are (a) rationally based on the perception of the witness, [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. "[W]hen analyzing the admissibility of lay opinion testimony, we first determine whether the opinion relates to a core element or to a peripheral issue." *State v. Farr-Lenzini*, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999).

Simply because in his testimony Greer used the same term—material—that appears in the

[8] To the extent that Smith-Lloyd objected that the testimony would confuse the jury, ER 403, he does not assign error to the challenged testimony on this ground.

[9] Although the court allowed Greer to testify as a gang expert, because his contested testimony does not speak to gang activities, we will treat Greer as a lay witness for the purpose of Smith-Lloyd's objection.

perjury statute does not mean that he necessarily improperly testified regarding a core element of perjury. During Greer's testimony, the State ultimately asked Greer whether he considered the rear seat occupants of the vehicle to be "material witnesses" in the prosecution of the driver and the front seat passenger, prompting the objection. RP at 323-25. This comment, however, arose near the end of a line of questioning to allow Greer to explain why he would call a witness when Greer did not know what he or she would say at trial.[10] Greer explained that there are certain witnesses in every trial "who the jury logically would need to hear from and want to hear from." RP at 323.

After the court overruled the defense objection, Greer continued to explain that Smith-Lloyd and Morford "would have obviously been witnesses within a few feet of the actual shooting and there is no question that what they would have to say would be material to a [jury] decision about what happened." RP at 327. He added that the "jurors want to hear the entire case." RP at 328. He concluded that this would be so regardless of the substance of the testimony of the witnesses "who the jury logically would need to hear from and want to hear from" and regardless of the jury's ultimate decision. RP at 323, 328 (mentioning that whether the witness told the truth or did not tell the truth "it would be something that would go toward whatever [jury] decision was made in whatever case.").

The full context of this disputed testimony demonstrates that Greer was testifying as to his prosecutorial decision to present Smith-Lloyd as a (reluctant) witness at the two criminal trials

[10] Because Johnson's trial occurred 14 months after McGown's trial, Greer would have made the decision to use Smith-Lloyd as a witness in Johnson's trial after he testified at McGown's trial that he was not involved in the shooting or present in the vehicle.

and was not commenting on the substance or materiality of any allegedly false statement Smith-Lloyd gave at either trial. Witnesses testified that on the day of the shooting, Smith-Lloyd was in the vehicle used in the shooting and, therefore, he was someone "who the jury logically would need to hear from and want to hear from." RP at 323. Consequently, we find no reason to conclude that Greer submitted opinion evidence on the core perjury element whether certain of Smith-Lloyd's statements at either trial were "materially false statement[s]." RCW 9A.72.020; Clerk's Papers (CP) at 43. We conclude that the trial court did not abuse its discretion in overruling Smith-Lloyd's objection to Greer's use of the term "material" in his testimony.

Smith-Lloyd also argues that the superior court erred by failing to enter findings of fact and conclusions of law after it held a hearing on the admissibility of Smith-Lloyd's statements to Deputy Ringer. CrR3.5(c). The State responds that the trial court entered the required written order 16 days after Smith-Lloyd filed his appellate brief. When a trial court files findings of fact and conclusions of law post-opening brief, we will not reverse unless an appellant can establish he or she was prejudiced by the delay or that the findings and conclusions were tailored to meet issues presented in the opening brief. *State v. Quincy*, 122 Wn. App. 395, 398, 95 P.3d 353 (2004).

At the hearing, Smith-Lloyd conceded that Detective Ringer legally obtained his statement. Nothing in the records suggests that the trial court tailored its written order. Accordingly, we dismiss this assignment of error as moot.

We affirm.

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.

Armstrong, J.P.T.

We concur:

Worswick, C.J.

Johanson, J.