IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

YAKIMA COUNTY, a political subdivision of the State of Washington,	)	**No. 27529-9-III**
Appellant,	)	**Division Three**
v.	)	
MAXINE AGNES SCHREINER, as her separate estate; MAXINE AGNES SCHREINER and JOHN DOE SCHREINER, wife and husband,	)	
Respondent,	)	**UNPUBLISHED OPINION**
THE BANK OF NEW YORK TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT SERIES 200330; NACHES-SELAH IRRIGATION DISTRICT NO. 60; ILENE THOMSON, YAKIMA COUNTY TREASURER, as tax assessment collection agent for Yakima County, Weed District No. 2; PACIFICORP, d/b/a PACIFIC POWER & LIGHT COMPANY, a foreign corporation,	)	
Defendants.	)	

Kulik, C.J. — Yakima County (the County) appeals the jury's $171,004.10 award to Maxine Schreiner for damages and diminution in property value following the County's condemnation of the front 35 feet of her property. The County asserts the court abused its discretion by allowing Ms. Schreiner to testify about matters that may have violated the court's orders in limine, and by allowing one of Ms. Schreiner's experts to give updated valuation testimony that had not been disclosed during discovery. We conclude that the trial court did not abuse its discretion and, accordingly, we affirm the jury's verdict.

FACTS

On December 12, 2006, the Board of County Commissioners for Yakima County authorized the acquisition of a right-of-way to improve Selah Loop Road north of Selah, Washington. The County filed a condemnation petition on December 20, 2006, and named Maxine Schreiner as one of the fee owners. The County and Ms. Schreiner stipulated to an order adjudicating public use and necessity on January 26, 2007, but did not agree on the amount of compensation for the property.

The proposed roadway expanded the existing two-lane road into a four-lane road. Ms. Schreiner's property contained a 5,576 square foot house. Previously, the Schreiner property had been the location of the Selah Central School built in 1910. The

condemnation took the front 35 feet of Ms. Schreiner's property and required the removal of five 100-year-old trees. Ms. Schreiner's septic system, drain field, and underground sprinkler system were also destroyed as part of the condemnation. The project caused damage to fencing, landscaping, and sidewalks. After the road improvements, a street light pole was placed on Ms. Schreiner's front property line.

In January 2007, the County served interrogatories and requests for production on Ms. Schreiner. She answered on August 10, 2007. In this discovery, the County asked Ms. Schreiner to specify the amount she sought as just compensation. Together with the answers to interrogatories, Ms. Schreiner disclosed an appraisal report prepared by Terry Rudd dated April 28, 2007, and designated him as an expert witness at trial.

Ms. Schreiner supplemented her written discovery responses by disclosing Mr. Rudd's amended report dated October 11, 2007. Ms. Schreiner provided this report to the County on October 12. She made no further supplementation of her answers to the County's written discovery regarding Mr. Rudd's expected testimony until the trial was underway.

Prior to the trial on just compensation, the court granted the County's first motion in limine barring "[a]ny testimony, evidence or argument elicited for the purpose of engendering sympathy for [Ms. Schreiner] based on a claim or theory of sentimental

attachment to the subject real estate, or pain, suffering, or emotional distress as a result of the taking." Clerk's Papers (CP) at 218. The court stated that Ms. Schreiner's personal feelings about the effect of this project would be inadmissible, as would testimony with regard to Ms. Schreiner's emotional distress or reduction in enjoyment.

The County also filed second and third motions in limine. These motions related to the admissibility of certain valuation evidence, including the extent to which Ms. Schreiner could claim compensation for the large ornamental trees, independent of their value to the real property.

The trial began on July 14, 2008. During Ms. Schreiner's counsel's opening statement, the County objected to statements that suggested sympathy, victimhood, or psychic trauma. The court noted that it had instructed counsel not to make comments that would raise the issue of sympathy. Ms. Schreiner's counsel also explained that the presence of the large trees on the property was linked to a 100-year-old schoolhouse that formerly stood on the property. The County objected, and the court accepted Ms. Schreiner's counsel's assertion that evidence would show that the history of the property had an effect on market value.

The County called Yakima County Engineer Gary Ekstedt. On cross-examination, counsel for Ms. Schreiner questioned Mr. Ekstedt about the justification for taking the

entire strip of property from the west side of the existing right-of-way. This line of questioning was contrary to the County's first motion in limine which prohibited inquiry into "the wisdom of the exact route selected for the Selah Loop Road improvement project, or the availability or merits of various alternative routes and/or acquisitions." CP at 217-18. The court sustained the County's objection to this line of questioning.

Later, Ms. Schreiner's counsel cross-examined Mr. Ekstedt and asked about the applicability of federal acquisition policies. The County objected to this questioning because it violated the order in limine's prohibition on matters related to the County's compliance with right-of-way acquisition procedures, and the existence of relocation assistance programs provided under state or federal law. The court sustained the objection.

During direct examination of Ms. Schreiner, her counsel displayed two photographs purporting to show the historical significance of the Schreiner property and improvements located on the property. One of the pictures showed children in front of the Selah Central School. Neither of the photographs had been admitted as an exhibit. The County objected to the photographs on the basis that they had not been admitted prior to publication to the jury, they were unfairly prejudicial, and they were cumulative of Ms. Schreiner's claim that later evidence would link the photographs to testimony of

diminished market value. During the discussion on this issue, the County complained that Ms. Schreiner was putting the County in the awkward position of repeatedly objecting in front of the jury to evidence that was clearly in violation of the orders in limine. The following day, the court instructed the jury to disregard the photograph of children at the old schoolhouse.

On a second motion in limine, the court excluded evidence related to the value or cost of the trees separate and apart from the fair market value of the property. Nonetheless, on further direct examination, Ms. Schreiner testified it would cost $500,000 to relocate the trees in question. The court sustained the County's objection to Ms. Schreiner's testimony that tree replacement would cost $500,000.

Later, the court overruled the County's objection to Ms. Schreiner's testimony regarding her fear for her personal safety. The court also overruled the County's objection to "remarks about the government method of using appraisals to acquire property at wholesale value." Report of Proceedings (RP) (July 21, 2008, Vol. I) at 88.

The County objected to Mr. Rudd's testimony when he used an analogy to suggest that the government would attempt to manipulate its appraisal to pay only one-half of the fair market value. The court sustained the objection.

The court allowed Mr. Rudd to testify as to his expert opinion on diminution of

value in a manner that departed from any disclosures made by Ms. Schreiner in response to the County's written discovery requests. The County objected that Mr. Rudd's testimony had not previously been disclosed. The court allowed the testimony.

Following the court's ruling, the County moved for a mistrial based on the court's refusal to limit Mr. Rudd's testimony and the cumulative effect of repeated violations of the court's orders in limine. The court denied the County's motion.

The sole issue at trial was the determination of just compensation. The court instructed the jury as to two damage elements: (1) the reasonable cost of repairing portions of the retained property damaged by construction activities, and (2) the difference between the fair market value of the property before the condemnation and the value after the condemnation.

The court instructed the jury that its decision must be based on facts "not on sympathy, bias, or personal preference." RP (July 22, 2008) at 43. The court further instructed that the jury must not concern itself "with the wisdom of Yakima County's project or the wisdom of the taking involved in this action." RP (July 22, 2008) at 44.

As to the first element of damages, the amount of undisputed damage to the property was $31,931.

The primary damage dispute related to the second element, "the difference

between the fair market value of the entire Schreiner property before the acquisition of the strip of land, and the fair market value of the Schreiner property remaining after the acquisition." RP (July 22, 2008) at 45. Experts estimated the property's total value between $439,000 and $580,000 before condemnation of the 35-foot strip and between $417,600 and $432,797 after the condemnation. The diminution in value by each expert was:

Tim Vining	$22,300
Terry Rudd	$160,000
Nancy Nulph	$139,073

The jury determined that just compensation was $171,004.10. The jury verdict represented the amount of undisputed damage to the property ($31,931) plus the diminution in market value—before versus after—of $139,073, the middle value.

The County appeals the denial of its motion for mistrial.

ANALYSIS

Motion for Mistrial. We review a trial court's denial of a motion for mistrial for an abuse of discretion. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A trial court abuses its discretion in denying a motion for mistrial when a trial irregularity is so prejudicial that nothing short of a new trial can insure that it is remedied. *Id.* (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)); *State v. Gilcrist*, 91 Wn.2d

603, 612, 590 P.2d 809 (1979). In determining the effect of an irregularity, a reviewing court considers whether (1) it was serious, (2) it involved cumulative evidence, and (3) the trial court properly instructed the jury to disregard it. *Johnson*, 124 Wn.2d at 76 (quoting *Hopson*, 113 Wn.2d at 284).

"'The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice [his or her] presentation.'" *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004) (internal quotation marks omitted) (quoting *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993)). Testimony that violates a ruling in limine is grounds for a mistrial if it prejudices the jury. *State v. Escalona*, 49 Wn. App. 251, 254-56, 742 P.2d 190 (1987). This court must review (1) the propriety of the statements in the context of the entire argument, (2) the issues in the case, (3) the evidence addressed in the argument, and (4) the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). The standard of review for denial of a mistrial is an abuse of discretion. *State v. Condon*, 72 Wn. App. 638, 649, 865 P.2d 521 (1993). A trial court is in the best position to evaluate irregularities. It abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The County filed a motion in limine early in the proceedings. The County contended that Ms. Schreiner had an extraordinary emotional connection to the property that could easily be manipulated to influence the jury in an unfair and prejudicial way. The County argued that during opening statements Ms. Schreiner focused the jury on themes designed to portray the County in a negative light. The reference in the record is related to the passing of Ms. Schreiner's husband by her counsel in opening statement:

> There's no eel skin, there's no flames; this started a hundred years ago. Now what was Mrs. Schreiner's interest? She didn't soup this thing up, or fix this thing up. No, she bought this home on June 14th 1978. Thirty years and one month ago. She has lived there; this is her home, where she lived with her husband who passed away in (inaudible) 1992. She raised a family.

RP (July 14, 2008) at 147-48.

The court did not abuse its discretion by allowing this statement. This statement was not so prejudicial that only a new trial could remedy its prejudice. This comment was made during an opening statement that was part of a seven-day trial. And it is unlikely that this statement overwhelmed seven days of testimony. Furthermore, a jury is presumed to have followed the court's instruction to disregard attorney's comments that were not supported by the evidence. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

The County also brought a motion in limine to block any evidence that would taint

the jury's consideration of the sole issue in the case—just compensation. To accomplish this, the order in limine required that neither party mention various matters in the presence of the jury "without first approaching the bench and securing a ruling from the Court authorizing such reference." CP at 217. The County complains that there is not a single instance where Ms. Schreiner obtained the court's permission before introducing argument or testimony that might reasonably have been considered a violation of the order. However, while this requirement was included in the order, the County retained the right to object.

The County's primary assertion is that Ms. Schreiner's counsel engaged in "flagrant violations" of orders in limine. Appellant's Br. at 22. However, during the seven-day trial, the County registered only a few evidentiary objections based on purported violations of the orders in limine—one dealt with the location of the project roadway and federal funding of the project. This same testimony had already been elicited by the County on direct. Despite this fact, the trial court sustained the objection. In any event, an irregularity that is cumulative with respect to admissible evidence cannot be the basis for a mistrial. *See State v. Hicks*, 41 Wn. App. 303, 314-15, 704 P.2d 1206 (1985). Consequently, this statement cannot serve as the basis for a mistrial.

The County maintains that Ms. Schreiner engaged in a game of cat-and-mouse,

forcing the County to police the orders in limine repeatedly throughout the trial. However, only one sustained objection related to the orders in limine. The objection was made to testimony by Ms. Schreiner concerning the valuation of the property without the trees and the reason that she listed the property for a lower price. The court sustained the County's objection that was based on the court's orders in limine. The County did not ask for a curative instruction.

The County suggests that the court erred in its handling of the old photographs of Selah Central School. However, the County did not object to the photographs but, instead, raised the issue as a concern during a break in the proceedings. Significantly, the exhibits were excluded not because they violated the orders in limine but because they were irrelevant.

The County makes reference to other asserted transgressions. For example, the County refers to improper evidence regarding the cost of replacing trees. The court excluded this evidence based on hearsay and relevance, not as a violation of the orders in limine. And the jury was instructed to disregard the testimony.

With regard to the issue of sympathy and bias, the court instructed the jury that such matters were not appropriate considerations in condemnation cases. The court also instructed the jury as follows:

If evidence was not admitted or was stricken from the record, then you are

> not to consider it in reaching your verdict. . . . In considering a witness['s] testimony, you may consider these things: . . . the manner of the witness while testifying, any personal interest that the witness might have in the outcome or the issues, any bias or prejudice that the witness may have shown, the reasonableness of the witness'[s] statements in the context of all the other evidence, and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony. . . . [I]t is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you. . . . You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you; not on sympathy, bias, or personal preference.

RP (July 22, 2008) at 40-43.

The County relies on *Masson v. Kansas City Power & Light Co.*, 7 Kan. App. 2d 344, 642 P.2d 113 (1982). *Masson* involved appeals from two condemnation proceedings arising from right-of-way acquisition of property for overhead transmission lines. The appellate court granted a new trial in one case based on *numerou*s improper comments to the jury and the effect of the trial court's failure to admonish the jury when asked. *Id.* at 351-52.

The County argues that "[t]he trial court erred in allowing [Ms.] Schreiner to testify on topics that injected inflammatory bias against the condemnor and sympathy for the condemnee into the jury's consideration of value." Appellant's Br. at 3. This assignment of error apparently relates to testimony regarding Ms. Schreiner's "personal

safety." However, no briefing is provided in connection with this assignment of error; thus, the issue is waived. *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

Misconduct is prejudicial when there is a substantial likelihood that it affected the jury's verdict. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415(1993) (quoting *State v. Barrow*, 60 Wn. App. 869, 876, 809 P.2d 209 (1991)). In *Stith*, the court granted a mistrial based on flagrantly improper material in jury instructions. *Id.* at 23. The court concluded that such prejudice could not be cured absent a mistrial. *Id.* Here, it is doubtful that any alleged misconduct affected the jury's verdict. The amount of the verdict was $171,004.10. The uncontroverted damages to the property were $31,931. The jury award was within the range suggested by the experts.

The court did not abuse its discretion by denying the motion for a mistrial. We agree that any irregularities were not so prejudicial as to require a new trial.

<u>Untimely Disclosed Expert Testimony.</u> The County contends that the court abused its discretion by allowing Mr. Rudd to testify.

After several days of trial, Ms. Schreiner disclosed that Mr. Rudd's testimony would not be based on either of the two reports that had previously been disclosed in discovery. Instead, Mr. Rudd's new report was based on the corrected valuation date of December 31, 2007. The new report was dated July 11, 2008, and gave a diminution in

value of $160,000.

Like the April 2007 report, the new report set forth the "before taking" value of the Schreiner property compared to the "after taking" value of the property. Exs. 122, 123. And the July report used a sales comparison approach to determine value and a cost report. However, unlike the April report, the July report substituted different comparable sales for the "before taking" value and new property sales were used for two out of three comparisons in the "after taking" value. These adjustments were deemed necessary by Mr. Rudd to reconcile the comparable sales to the Schreiner property, even in connection with the single comparable property that remained present in the "after" situation in both reports. Further, Mr. Rudd's use of the cost approach to valuation changed between the earlier and later reports. The July report contained no narrative report by Mr. Rudd to account for his revisions and there was no supplementation by Ms. Schreiner responding to the County's interrogatory requesting a summary of the grounds for Mr. Rudd's opinion.

The County objected to the untimely change in Mr. Rudd's opinion. The County argued that an effective cross-examination of Mr. Rudd required detailed knowledge of Mr. Rudd's adjustments to the figures for comparable sales. The County asked the court to limit Mr. Rudd to the testimony that had been disclosed in his first appraisal report as

supplemented on October 12, 2007.

The court considered the circumstances and determined, "I don't think anybody has completely clean hands." RP (July 21, 2008, Vol. I) at 131. The court explained that:

> I do fault [the County] somewhat for not providing the information that [the County's appraiser] was going to be using, even though he ended up saying the valuations were the same, he did have additional information that he looked at that he used that bore upon his opinion that hadn't been disclosed. And so it's a situation here where I am trying to balance, and I am just trying to see if I have any other options.

RP (July 21, 2008, Vol. I) at 131.

Concerning the use of the wrong valuation date, the court stated:

> I thought that agreed order was pretty clear that the valuation date was the date the money was deposited in the Court. I didn't think there was any doubt about that at all, and so I, I fault [Ms. Schreiner's counsel] somewhat for giving [Mr. Rudd] the wrong date to use for a valuation. Had you given him the correct date we wouldn't have had this problem.

RP (July 21, 2008, Vol. I) at 139.

The court denied the County's motion and allowed Mr. Rudd to testify.

"The trial court has discretionary authority to exclude an expert's testimony as a sanction for a party's failure to timely provide supplementary responses to interrogatories." *In re Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997). "[I]t is an abuse of discretion to exclude testimony as a sanction for discovery

violations absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct." *In re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1989). "A 'willful' violation means a violation without a reasonable excuse." *Id.* An inadvertent error in failing to disclose an expert witness may be deemed as willful, justifying the exclusion of testimony. *Id.*

"[T]he particular sanction imposed should at least insure that the wrongdoer does not profit from his wrong." *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985). In a given situation of discovery noncompliance, the choice of a particular sanction is a matter within the court's discretion. *Id.* When the decision to exclude testimony arises from the fact that the witness was not disclosed until just before or during trial, prejudice to the other side must be considered. *Gillespie*, 89 Wn. App. at 404.

Even if we assume a discovery violation here, the County has failed to show prejudice. The County was provided with a copy of Mr. Rudd's updated appraisal report and given five days to study the material. The County made no request to interview or depose Mr. Rudd. The trial court did not abuse its discretion by allowing Mr. Rudd to testify about his updated appraisal.

Conclusion. In summary, we conclude that the trial court did not abuse its

discretion and, accordingly, we affirm the jury's verdict.

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.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.