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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 60678-6

Title of Case: State, Res. V. Armando Morales-carillo, App.

File Date: 12/29/2008

SOURCE OF APPEAL

Appeal from King County Superior Court

Docket No: 06-1-07108-1

Judgment or order under review

Date filed: 10/02/2007

Judge signing: Honorable Dean S Lum

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 60678-6-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
ARMANDO MORALES-CARILLO,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: December 29, 2008

PER CURIAM -- Armando Morales-Carillo appeals from his conviction for possession of cocaine in violation of the Uniform Controlled Substances Act, alleging that the trial court denied him his right to a fair trial by allowing the prosecutor to argue in closing that "the only way Mr. Morales is not guilty is if Officer Neubert is not credible." Because there was not a substantial likelihood that the prosecutor's improper statement substantially affected the jury's verdict, we affirm

FACTS

On the evening of August 13, 2006, Officers Jason Diamond and Greg Neubert, members of the Seattle Police Department's bike squad, were on patrol in the Belltown 60678-6-I/2 area of downtown Seattle. Near First and Bell Streets, they saw a man who appeared to be in the process of handing money to Brooke Webber, a known drug dealer whom Neubert had recently arrested on drug charges. After he saw the officers, the man withdrew his hand, stuffed the money in his pocket, and walked away. As the officers approached Webber, she dropped a cigarette package and a piece of crack cocaine

spilled out of the package. Diamond placed Webber under arrest.

After questioning Webber, Neubert went into a tavern across the street called the Lava Lounge, presumably to collect Webber's purse and sweatshirt, which were found inside. Morales was standing at the bar when Neubert entered the tavern. Morales looked at Neubert, then turned and walked toward a set of booths, which were 6 -- 8 feet away from the bar. Neubert testified that Morales placed his hand in his right pocket as he began to scoot into an unoccupied booth. He said that when Morales withdrew his hand from his pocket, a bag of cocaine fell to the floor. Neubert placed Morales under arrest and recovered the cocaine, along with the other items on the table, which included a pink purse, a handbag, and a sweatshirt. Brooke Webber's identification was inside the purse.

The State charged Morales by information with one count of possession of cocaine. Morales did not testify, but his position at trial was that the cocaine was Webber's. His attorney impeached Neubert by eliciting testimony that he had failed to submit a detention report in violation of police department policy in another case. During closing arguments, the prosecutor said:

What this comes down to is the credibility of Officer Neubert. And as I said from the start, if you find what he says is credible, the case is basically closed. And so the only way Mr. Morales is not guilty is if Officer

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Neubert is not credible.

The trial court overruled Morales's objection to that statement. The jury found the defendant guilty as charged on September 5, 2007. Morales appeals.

DISCUSSION

The State concedes that the prosecutor committed misconduct by arguing that the jury must find Neubert not credible in order to acquit Morales.¹ Morales argues that this misconduct violated his constitutional right to a fair trial. But we reverse a verdict based on prosecutorial misconduct only where the misconduct had a prejudicial effect on the jury.² To demonstrate prejudice, the defendant must show there is a substantial likelihood that the misconduct affected the jury's verdict.³ We view the "prejudicial or inflammatory effect" of the improper remarks "in context with the earlier evidence and the circumstances of the trial in which they were made."⁴

Morales argues that the "nature of the misconduct" and the trial court's failure to sustain his objection had a substantial likelihood of affecting the jury's verdict. The nature of this misconduct involved "[m]isstating the bases upon which a jury can

acquit."⁵ Contrary to the prosecutor's erroneous statement of law, the jury did not have

1 See State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) ("[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find the State's witnesses are either lying or mistaken."), review denied, 131 Wn.2d 1018 (1997); State v. Barrow, 60 Wn. App. 869, 875 -- 76, 809 P.2d 209 (1991) ("[T]he jurors did not need 'completely disbelieve' the officers' testimony in order to acquit . . . ; all that they need to entertain a reasonable doubt."), review denied, 118 Wn.2d 1007 (1991).

2 State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

3 State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 102 (1996).

4 State v. Green, 71 Wn.2d 372, 381, 428 P.2d 540 (1967).

5 Fleming, 83 Wn. App. at 214.

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to find a police officer not credible in order to acquit. Rather, the jury merely needed to entertain a reasonable doubt about the State's case.⁶ Here, the jury could have

entertained a reasonable doubt about the State's case without finding Officer Neubert personally not credible, even though that would have been the most direct route to acquittal in this case. For example, the jury could have acquitted after concluding that Officer Neubert was credible in general, but mistaken about what he thought he saw.

The State counters that misconduct of this nature is not inherently prejudicial, even when the defense objection is overruled during closing argument. In State v. Barrow, the prosecutor committed misconduct by saying "'in order for you to find the defendant not guilty . . . you have to completely disbelieve the officers' testimony. You have to believe that the officers are lying.'"⁷ As in this case, the trial court in Barrow overruled the defendant's objection. This court affirmed Barrow's conviction, holding that the misconduct was not "of a nature to overcome the jury's ability to perform its function."⁸ Here, the prosecutor's misconduct was even less likely to improperly inflame the jury than the misconduct in Barrow because the prosecutor did not tell the jury it would have to find the police officer was lying. Contrary to Morales-Carillo's assertion, the term the prosecutor actually used -- "not credible" -- is not interchangeable with the term "liar," which evokes a more emotional response. While

6 Compare Barrow, 60 Wn. App. at 875 -- 76 (misconduct to give jury false choice between concluding officers were lying and acquitting defendant), with State v. Wright, 76 Wn. App. 811, 823 -- 24, 888 P.2d 1214 (not misconduct to state that jury would have to believe officers "got it wrong" in order for jury to believe defendant), review denied, 127 Wn.2d 101 (1995).

7 60 Wn. App. 869, 874 -- 75, 809 P.2d 209 (1991).

8 Id. at 879.

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lying involves an intent to deceive,⁹ the jury could have found Officer Neubert not credible or only partially credible without concluding that he was deliberately misleading.¹⁰

The misconduct in Barrow also included the prosecutor's argument that the defendant had effectively called the police officers liars by giving testimony contradictory to the officers' testimony.¹¹ The prosecutor continued that line of argument over a sustained objection. But we held that the misconduct was not so inflammatory as to require reversal.¹² Here, the misconduct was significantly less inflammatory than the misconduct in Barrow because the prosecutor did not accuse Morales of calling Neubert a liar, and credibility is a proper consideration for the jury.

Additionally, the context of the prosecutor's statement minimizes the likelihood that the misconduct affected the jury's verdict. Both the defense and the prosecution explained to the jury that the State had the burden of proving the elements of possession of cocaine beyond a reasonable doubt. And after Morales's objection, the prosecutor did not argue that the jury had to find Neubert not credible in order to convict.¹³ Accordingly, there was not a substantial likelihood that the misconduct

9 Webster's Third New International Dictionary 1305 (1993).

10 See State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 ("The testimony of a witness can be unconvincing or wholly or partially incorrect . . . without any deliberat misrepresentation being involved."), review denied, 118 Wn.2d 1007 (1991).

11 60 Wn. App. at 874.

12 Id. at 874, 879.

13 The prosecutor stated earlier in his closing argument that "the only way that Mr. Morales is not guilty is if what Officer Neubert told you is not credible." Morales did not c to that phrasing at trial and does not assign error to it on appeal. Focusing the jury's att on the credibility of the officer's statements rather than the credibility of the officer doe present the jury with the same false choice between acquitting Morales and finding that Neubert could not personally be believed.

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affected the jury's verdict.

We affirm.

For the Court: