State v. Wambach

147 Wash.App. 1026 (2008) | Cited 0 times | Court of Appeals of Washington | November 17, 2008

Unpublished Opinion

Michael Wambach challenges his conviction for first degree attempted robbery. Wambach argues that the trial court abused its discretion in denying his motions for a mistrial based on improper witness testimony. He also contends that cumulative error deprived him of a fair trial. We conclude that there was no substantial likelihood that prejudice affected the jury's verdict, and we affirm.

FACTS

Michael Wambach was charged with one count of first degree attempted robbery. At trial, witnesses testified to the following events.

On April 17, 2007, a man wearing sunglasses and a beanie cap entered Credit Union Northwest in Seattle. He walked up to a bank teller and slipped a note under the bulletproof window. The bank teller, Jessica Hedlin, saw that the note demanded $100s, $50s, and $20s and stated, "[N]o tracers." Report of Proceedings (RP) (July 24, 2007) at 99. Hedlin realized she was being robbed. She told the man that she could not read the note. He told her to give it back, and she pushed it back under the barrier. He took the note and left. Hedlin testified that the experience was "very nerve-wracking." Id. at 106.

Sean Dean, the credit union's operations manager, overheard Hedlin saying, "I can't read this." He looked back and saw that "she had really big eyes" as she passed a note back through the window. Id. 121--22. He realized that Hedlin was being robbed. He saw the man turn and walk quickly out the door. Meanwhile, Cathy Rosenfelder, the credit union's chief executive officer, heard an angry loud voice in the lobby. She came out of her office and saw a man run past her on his way out the door. She heard Hedlin yell, "I've been robbed." Id. at 75. They immediately locked the building and activated the alarms. Hedlin called 911.

The man's image was captured on the credit union's surveillance system, and police gathered a photographic still for use in a bulletin. On the day of the incident, police contacted Chris Stanhope and showed him the bulletin.[1] Stanhope identified the man in the photograph as his friend, "Little Mike."[2] A few days later, Stanhope found a demand note and a beanie hat in his truck after Little Mike had borrowed it. Stanhope turned the items over to the police. Hedlin later identified the note as the one she was given during the incident.[3]

Two days after the attempted robbery, police officers observed a man walking in downtown Seattle who looked like the individual in the surveillance photograph. The man was Michael Wambach. Wambach was wearing clothing, sunglasses, and rings that resembled those worn by the individual in the surveillance photo. They arrested Wambach and transported him to police headquarters, where he was questioned by Detectives Dag Aakervik and James Rodgers.[4]

Detective Aakervik told Wambach that they believed he attempted to rob the credit union. Wambach lowered his head and smiled. Detective Aakervik asked Wambach if he was armed or had anyone else with him at the time of the robbery, and Wambach replied that he was alone and did not have a gun. Detective Aakervik asked Wambach if he was drunk or high on drugs at the time of the robbery, and Wambach said that was not. Wambach said that the demand note and the clothes he was wearing during the robbery were "gone in the garbage." RP (July 25, 2007) at 38. Detective Aakervik asked Wambach about the sunglasses he wore during the robbery. Wambach produced a pair of sunglasses, which police confiscated. When asked to describe "what did you do, how did you do it," Wambach said that he walked into the credit union and gave the teller a note, but did not get any money and left. Id. Wambach also admitted he was the man in the surveillance photo but said, "I didn't do anything." Id. The interview, which was not recorded, ended shortly thereafter. Wambach declined to give a written statement.

Police assembled a montage containing Wambach's photograph. Hedlin and Rosenfelder were unable to identify anyone in the montage. Approximately two months later, Hedlin was shown the montage again, along with Dean. Both picked the same photograph from the montage as the man who attempted the robbery, but the photograph they chose was not Wambach's.

Prior to trial, Wambach sought a motion in limine to exclude testimony that the credit union had been robbed a month earlier. The State offered to stipulate that Wambach did not commit the previous robbery, but the trial court granted Wambach's motion and advised the prosecutor "to make sure they know not to talk about prior robberies at your credit union." RP (July 19, 2007) at 64. The court added,

She [defense counsel] raised the fact that the police officers were investigating other robberies. They need to be advised very carefully that the fact they were interested in apprehending somebody who did a series of bank robberies shouldn't be mentioned.

The information from the officer, for example, that they were looking for someone who had done a series of robberies, should not come in front of the jury. That is something that could slip out very easily if the officers are not advised.

Id. at 61.

At trial, the prosecutor asked Hedlin whether something unusual happened on the afternoon of April

17. While describing the incident, Hedlin stated, "I kind of knew the moment the guy was walking up to me and pulling the note out that he was going to rob me because there was businesses that were being robbed in the area." RP (July 24, 2007) at 95--96. Wambach objected on the ground that it was a non-responsive narrative, and the trial court sustained the objection.

Later that day, the prosecutor asked Sean Dean what it was about the note being passed and Hedlin's big eyes that made him think Hedlin was being robbed. Dean responded, "Well, we had just been robbed," but the prosecutor immediately stopped him from continuing. Id., at 122. Following a sidebar, the trial court instructed the jury "to disregard any evidence that you may have heard about what, if anything, may have happened at this branch before the date at issue." Id. at 123. The prosecutor resumed with the same question. This time, Dean responded, "We had just gone through an FBI training. And we were just really aware of robberies that [were] going on. We had like been getting FBI e-mails of robberies in the area." Id. Wambach moved to strike as to relevance. The court sustained the objection and instructed the jury to "disregard any testimony about anything else going on in this area. We are focused only on what happened on this date, if anything." Id. at 123--24.

Wambach moved for a mistrial. The prosecutor reiterated that she had admonished the witnesses about prior robberies at the credit union, but that she did not think the admonishment extended to robberies in the Puget Sound area. The trial court denied Wambach's mistrial motion.

[I]t is true that my in limine rulings have been violated. It is clear to me that that is not a deliberate violation. That the prosecutor has been trying very hard to make sure that the in limine rulings are followed. . . .

. . . [I]t is clear to me that there has been very quick instructions to the jury, which is a very attentive and obedient jury, not to consider this testimony. And I'm positive that they are following these instructions.

. . . . . I really want to zero in on the facts of this case and whether or not the State has proven this case. I really want to avoid reference to other robberies.

Id. at 144--45.

On the fourth day of trial, defense counsel questioned Detective Aakervik regarding the circumstances of Wambach's questioning at the police station.

Q: And you immediately confronted him and said, we know you did this; isn't that correct?

A: Well, we took his handcuffs off, put him in a room, [and] offered him something to drink. And, gathered up some paperwork and went in and my partner and I interviewed him.

Q: Okay, but you confronted him saying, we know you did this?

A: That is correct.

Q: You didn't say, did you rob a bank recently, or did you try to rob a bank recently?

A: No.

Q: What you said was, we know you robbed a bank and we're trying to get the details; isn't that correct?

A: In a very firm-yes. In a very firm voice. Nothing loud or anything like that. But, in a firm, confident voice we told him, we know you are responsible for this. There's no question, there's no mystery about what's going on here. And, we do have some questions we would like to talk to you about.

RP (July 25, 2007) at 53--54.

During redirect, the prosecutor asked Detective Aakervik why he confronted Wambach at the interview. Detective Aakervik responded, "In this case we just-we were pretty confident we had the right person." Id. at 62. Wambach objected and moved to strike, which the trial court sustained. Following a sidebar, the court informed the jury to disregard Aakervik's response. The prosecutor then asked Detective Aakervik about his tone of voice while questioning Wambach. Detective Aakervik replied,

Not so much louder, it was more, I guess I would say conveying more of a confidence. We confronted him with it. We basically let him know we know you did it. There is no doubt about it.

My experience has been you go in and ask somebody, did you do this, they are always going to say no. But if you confront them, like in this case, you are going to get a reaction from the person. Whether they are innocent or they are guilty, you should get some type of reaction.

Id. at 63. Wambach objected. The court sustained the objection but did not instruct the jury to disregard the testimony.

Wambach again moved for a mistrial. He argued that because his defense was identity, Detective Aakervik's testimony that police were confident they had the right person deprived him of a fair trial.[5] Wambach also asserted cumulative error. The court denied the mistrial motion, noting that it had sustained a prompt objection, and instructed the jury to disregard the testimony. The court, however, emphasized that it would declare a mistrial if there was another error.

The jury convicted Wambach as charged. Wambach appealed.

ANALYSIS

Mistrial Motions

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). An abuse of discretion occurs "only 'when no reasonable judge would have reached the same conclusion.'" State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). Denial of a motion for mistrial will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The court "'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" Hopson, 113 Wn.2d at 284 (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). The mere possibility of prejudice is insufficient to warrant a new trial. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). "Only errors affecting the outcome of the trial will be deemed prejudicial." Mak, 105 Wn.2d at 701.

In determining whether the effect of an irregularity affected the trial's outcome, we consider (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). Moreover, the objectionable testimony is examined "against the backdrop of all the evidence." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). "[T]he trial judge is best suited to determine the prejudice of a statement." Id.

Although juries are presumed to follow court instructions to disregard testimony, "no instruction 'can remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Babcock, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (quoting Escalona, 49 Wn. App. at 255). In Escalona, 49 Wn. App. at 254--56, testimony that defendant "'already has a record and had stabbed someone'" warranted a mistrial where the charge was assault with a knife and the State's case was weak. But in Hopson, 113 Wn.2d at 284, testimony that victim had known the defendant "'three years before he went to the penitentiary the last time'" was not sufficiently serious to materially affect the outcome of the trial, where there was overwhelming evidence favoring conviction and no testimony concerning the nature or number of defendant's prior convictions.

Wambach's first mistrial motion addressed three allegedly objectionable remarks: (1) Dean's reference to a prior robbery at the credit union, (2) Dean's reference to "robberies in the area," and (3) Hedlin's reference to "businesses that were being robbed in the area." Wambach argues that the evidence allowed the jury to speculate that he committed the prior robberies and therefore to infer that he likely committed this offense. He further contends that the court's admonishments did not

cure the prejudice because the jury heard the testimony more than once.

We conclude that the trial court did not abuse its discretion in denying Wambach's first mistrial motion. Regarding the seriousness of the irregularity, the record shows that the court's in limine ruling regarding other robberies was specific to prior robberies at Credit Union Northwest. The trial court also ruled that police were to avoid references to a larger investigation of bank robberies. But there is nothing in the record to suggest that the court's in limine rulings prohibited lay witnesses from mentioning other robberies. The court apparently believed it had so ruled, but this was not made clear until after Wambach brought his first mistrial motion. Accordingly, Dean's reference to a prior robbery at the credit union was the only comment that directly violated the trial court's in limine rulings.

Moreover, the trial court instructed the jury to disregard Dean's remark regarding the prior robbery at the credit union and his subsequent remark regarding other robberies in the area. Unlike the prejudicial testimony in Escalona, Dean's remark did not reference any prior misconduct by Wambach. Nor was there any testimony suggesting that Wambach was responsible for the prior robbery at the credit union or any other robbery in the area.

And the evidence against Wambach was overwhelming, despite the fact that Dean and Hedlin failed to correctly select Wambach's photograph from a montage. Wambach's image was captured on the credit union's surveillance system and subsequently identified by Stanhope, who found the demand note used in the attempted robbery in his truck after Wambach borrowed it. When arrested, Wambach was wearing the same clothes captured in the surveillance photograph. During questioning by police, Wambach described his role in the incident and identified himself from the surveillance photograph.

Wambach's second mistrial motion addressed two allegedly objectionable remarks: (1) Detective Aakervik's statement that "we were pretty confident we had the right person" and (2) his subsequent statement that "[w]e basically let him know we know you did it. There is no doubt about it." RP (July 25, 2007) at 63. Wambach argues that these statements constituted an impermissible opinion on his guilt. He contends that identity was the central issue in the case and that there is a serious likelihood the jury convicted him not on the strength of the evidence but because of Detective Aakervik's opinion testimony.

The State argues that Detective Aakervik's statements were not impermissible opinion evidence when viewed in context and that any error was harmless.

In general, witnesses may not express an opinion as to the defendant's guilt. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Such testimony is unfairly prejudicial because it "'invad[es] the exclusive province of the finder of fact.'" City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). In determining whether

testimony is an impermissible opinion of guilt, the court considers (1) the particular circumstances of the case, (2) the type of witnesses called, (3) the nature of the testimony and the charges, (4) the type of defenses invoked, and (5) the other evidence before the trier of fact. State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004).

A police officer's improper opinion testimony may be especially prejudicial because it carries a "special aura of reliability." Demery, 144 Wn.2d at 765. But statements made by police officers during a taped interview accusing the defendant of lying do not carry this aura of reliability because such statements are part of a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview. The officers' statements are not testimony and are admissible to provide context to the relevant responses of the defendant.

Id.

When viewed in the context of the record, we do not think that Detective Aakervik's second statement constituted an improper comment on Wambach's guilt. That statement was made as Detective Aakervik was describing what he told Wambach during the interview. Detective Aakervik explained that he confronts suspects in this manner to get a reaction, whether the suspect is innocent or guilty. As in Demery, 144 Wn.2d at 765, Detective Aakervik was describing "a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview."

Detective Aakervik's first statement, however, cannot be justified under the rule of Demery. That statement was not part of a narrative recounting Detective Aakervik's questioning of Wambach; rather, it directly informed the jury of Detective Aakervik's opinion of guilt. The possibility of prejudice is heightened by the fact that the statement was made by a police officer. Nevertheless, we conclude that the trial court did not abuse its discretion in denying Wambach's second mistrial motion. The trial court promptly told the jury to disregard the statement. And, as previously discussed, the evidence of Wambach's guilt was overwhelming. There is no substantial likelihood that prejudice affected the jury's verdict.

Cumulative Error

"The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial." State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Wambach bears the burden of proving "an accumulation of error of sufficient magnitude" to make retrial necessary. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005). We conclude that he has not met this burden.

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In sum, we conclude that the trial court did not abuse its discretion in denying Wambach's mistrial motions, and we affirm.

1. Police described Stanhope as a "source."

2. Stanhope also positively identified Wambach in court as his friend, "Little Mike."

3. The demand note found in Stanhope's truck stated, "100, 50, 20 DO NOT TOUCH AN ALARM 4 1 MIN, YOU ARE BEING (drawing of an eyeball) GIVE NOTE BACK, NO TRACER'S, NO DYE."

4. Wambach does not challenge on appeal the admissibility of statements he made during this interview.

5. Prior to this point in the trial, Wambach's defense elected at omnibus and advanced on the first day of trial was "general denial."