09CA0678 Peo v. Vallejos 04-22-2010

COLORADO COURT OF APPEALS

Court of Appeals No. 09CA0678
Adams County District Court No. 08CR838
Honorable Thomas R. Ensor, Judge
Honorable C. Vincent Phelps, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Timothy Neal Vallejos,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE CONNELLY
Webb and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced April 22, 2010

John W. Suthers, Attorney General, John T. Lee, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Mark Evans, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Timothy Neal Vallejos, was convicted after a jury trial of burglary and was sentenced to probation. His appeal challenges evidentiary rulings and an aspect of the prosecutor's closing argument. We affirm.

I. Background

Defendant concededly took metal racks from inside a storage shed owned by a company that ran a seasonal Christmas tree business. The disputed issue at trial was whether defendant believed he had permission to take the metal racks.

The company's seasonal business was not operating when defendant took the metal racks. The company had allowed an adjoining recycling business to use the lot on which the shed was located (but not the shed itself) to park its trucks and trailers.

Police, responding to a call from employees of the recycling business, arrested defendant inside his truck on the lot. The racks were in the back of the truck. Defendant also had bolt and wire cutters: the prosecution charged defendant with possessing those items as burglary tools, but the jury acquitted on that charge.

Defendant admitted, in interviews on the scene and at the police station, having entered the shed and taken the metal racks. He also admitted having taken metal racks, which he then sold to a recycling company, the day before. Defendant claimed a man on a forklift on the lot, who said he worked for the company that owned the shed, said defendant could take the metal racks.

The company's owner testified that none of his employees had worked on the lot at the time. And employees of the adjoining business testified that they did not keep any forklifts on the lot.

After arresting defendant, police officers inspected the shed. An officer testified at trial, without objection, that the point of entry was a side door that previously had been kept closed by a wooden board found on the floor. The officer further testified, again without objection, that he found fresh footprints on the dusty floor leading from that side door to the larger open doors from which the metal racks had been removed. The officer finally testified, again without objection, that these larger doors had been opened from the inside by removing the wire that held them shut.

After viewing these fresh footprints, police asked defendant why he had moved around inside the shed beyond where the metal racks were located. Defendant claimed he had been looking for somewhere to urinate.

II. Discussion

A. Testimony on Matching Footprints and Tire Tracks

Defendant argues that the trial court improperly allowed an officer to offer expert opinions without proper notice and without following the procedures for expert testimony. The challenged testimony came after testimony – neither objected to at trial nor challenged on appeal – that there were fresh footprints on the shed's dusty floor. An officer then opined, over objection, that those footprints "appear[ed]" to "match" defendant's shoes. The officer further opined, also over objection, that fresh tire marks outside the shed "appeared to match the tires" on defendant's truck.

We review evidentiary rulings for abuse of discretion. *See People v. Stewart*, 55 P.3d 107, 122 (Colo. 2002). Even if we find some error in the trial court's ruling, we will not reverse if the error was harmless. Crim. P. 52(a). Properly viewed, the challenged

rulings involve application of state evidentiary rules and do not raise any constitutional issue. Accordingly, the harmless error standard looks to whether the rulings contributed to the conviction. *See Fletcher v. People*, 179 P.3d 969, 976 (Colo. 2007) (evidentiary error "is not reversible but is considered harmless when the error did not substantially influence the verdict or impair the fairness of the trial"); *Stewart*, 55 P.3d at 124 ("If a reviewing court can say with fair assurance that, in light of the entire record of the trial, the [evidentiary] error did not substantially influence the verdict or impair the fairness of the trial, the error may properly be deemed harmless.") (internal quotations omitted).

Initially, we cannot accept defendant's broad contention that any testimony comparing footprints or tire tracks is necessarily expert in nature. While forensic experts specialize in such comparisons, there may be circumstances in which untrained lay witnesses properly could conclude based on their own observations of similarities between the observed items that one appeared to match the other.

We do agree with defendant, however, that this officer's testimony crossed the sometimes blurry line, *see Stewart*, 55 P.3d at 123, between lay opinion testimony admissible under CRE 701 and expert opinion testimony admissible only under CRE 702. The officer testified that over his fifteen years of investigating burglary cases he had been trained in comparing footprints and had done so at least fifty times. Similarly, the officer testified to his training and experience in comparing tire prints. In closing argument, the prosecutor cited the officer's training and experience. Accordingly, the ultimate opinions regarding the matching footprints and tire tracks should not have been allowed without compliance with the procedural prerequisites for admitting expert testimony. *See Stewart*, 55 P.3d at 124.

We nonetheless conclude that the evidentiary error in allowing this testimony was harmless. We analyze the tire track and footprint testimony separately for harmlessness.

Testimony that the tire tracks matched defendant's truck tires was clearly harmless, given defendant's theory of defense. Defendant indisputably drove his truck onto the lot before entering

the shed. Matching tire tracks outside the shed to defendant's truck thus did nothing to diminish defendant's professed belief that he was authorized to haul away the metal racks.

Similarly, testimony that footprints inside the shed matched defendant's shoes would appear to be harmless, given defendant's admissions that he had been inside the shed. Defendant argues, however, that this testimony undermined the defense because it helped prove *where* defendant had entered the shed: through an inconvenient side door rather than through the larger doors from which the metal racks ultimately were loaded onto the truck. We are not persuaded this additional nuance prejudiced defendant under the particular circumstances of this case.

There was no dispute that, at the time defendant was caught red-handed with the metal racks, both the side door and the larger doors were open. And there was unobjected-to testimony that the former was the initial point of entry because the latter could be opened only from the inside. Defendant admitted to the police, moreover, that he had walked in parts of the shed away from the larger doors and metal racks; he claimed he had done so because

he was looking for a place to urinate. Thus, the testimony opining that defendant had created the dusty footprints was in some sense cumulative of defendant's own admissions.

We are confident the officer's testimony regarding the matching footprints had no effect on the jury's verdict. It was clear, and essentially undisputed, that someone had opened both the side door and the larger doors without permission. Even without the objectionable testimony, the inference that defendant was the person who did so was compelling. More important, as the prosecutor argued in closing, even if the doors had been opened by someone else before defendant arrived, the evidence that defendant had knowingly entered the shed unlawfully with intent to steal the metal racks was compelling. Defendant admittedly had taken metal racks from the shed the day before and his claim that a self-professed company employee on a forklift had authorized him to do so was squarely contradicted by the owner's testimony that no employee was on the lot and by the adjoining business's employees' testimony that no forklift was on the lot.

B. Testimony of Prior Sightings of the Truck

Defendant next argues that the trial court violated CRE 404(b) by allowing the adjoining business's employees to testify that they had previously seen defendant's truck on the company's lot. At trial, defense objected to this testimony on relevancy grounds, which the People contend was insufficient to preserve a Rule 404(b) objection. We will assume the objection sufficed. Even so, we review the rulings with great deference, given the trial court's "substantial discretion" under Rule 404(b). *See Yusem v. People*, 210 P.3d 458, 463 (Colo. 2009).

There was no reversible error in allowing testimony that witnesses had previously seen defendant's truck on the lot. Defendant admittedly had been there on at least one other day: the prior day when he admittedly took metal wire racks. An employee testified in response to defense questioning that on one of the earlier days when he saw defendant's truck, defendant had come into the recycling business to sell wooden pallets. The employees had no knowledge of defendant having committed a crime on any of the prior days. Accordingly, the concerns underlying Rule 404(b) were minimal, if not nonexistent, with respect to the prior sightings.

Allowing the evidence was not an abuse of discretion and certainly did not create a risk of prejudice sufficient to require reversal of a conviction supported by ample evidence of guilt.

C. Closing Argument

Finally, defendant contends the trial court reversibly erred in overruling an objection to an aspect of the prosecutor's closing argument. We review the trial court's ruling with deference, because "[w]hether a prosecutor's statements constitute misconduct is generally a matter left to the trial court's discretion." *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005).

The argument prompting objection involved whether defendant had acted "knowingly." The prosecutor asked a series of rhetorical questions in addressing this element – including whether defendant was "out of his mind" or "sleepwalking" – before answering, "Of course he knew what he was doing." Defense counsel then objected, and the trial court overruled the objection, stating it was closing argument and each side would be given "some latitude." The prosecutor continued, explaining the jury had the court's instruction on knowingly and he would not re-read it. But he

proceeded to ask some rhetorical questions more closely tied to that definition – such as whether defendant knew "what he was doing," "the nature of his conduct," and "that he didn't have permission" to enter the shed – which he again answered affirmatively in his argument.

We conclude the trial court did not abuse its discretion in allowing the prosecutor's argument. While the challenged argument was perhaps imbued with some excessive rhetorical flair, read as a whole, the prosecutor's closing did not mislead the jury on what was required under the court's legally correct definition of the knowingly element.

III. Conclusion

The judgment of conviction is affirmed.

JUDGE WEBB and JUDGE TERRY concur.