Supreme Court No. 101480-5
Court of Appeals No. 83244-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD ERIC NESBIT,

Petitioner.

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Richard Eric Nesbit requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Nesbit, No. 83244-1-I, filed on November 7, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A trial judge comments on the evidence in violation of article IV, section 16 if she says something to the jury that implicitly conveys her attitude about a disputed issue in the case. Here, after the jury viewed a video depicting an alleged assault by Mr. Nesbit, the judge told the jury they might find the video "disturbing" and, if they did, they should seek comfort from friends and family members. A disputed issue in the case was whether Mr. Nesbit's actions amounted to second degree assault with a deadly weapon, or fourth degree simple assault. By conveying her attitude about the seriousness of the assault, the judge commented on a disputed issue in the case, in

violation of article IV, section 16. This presents a significant question of law under the Washington Constitution and an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3), (4).

2. A trial judge should grant a mistrial if irregularities in the trial are so prejudicial that nothing short of a new trial will ensure the defendant's trial is fair. Here, the judge improperly conveyed to the jury her attitude about a disputed issue in the case. And, contrary to the judge's pretrial rulings, a law enforcement witness testified Mr. Nesbit received Miranda warnings during an encounter with police earlier on the day of the incident. These irregularities were so prejudicial that nothing short of a new trial would ensure the trial was fair. The court abused her discretion in denying the motion for a mistrial.

C. STATEMENT OF THE CASE

**1. The State's principal evidence consisted of a video taken on a bus.**

On the evening of March 22, 2020, Claudia Garcia was driving a King County Metro bus on a route between Kent and

Renton. RP 656-58. A man with a dog got on the bus. RP 661, 665. He sat behind another man who was leaning against the window with his eyes closed. RP 662. Some time later, Ms. Garcia looked in the mirror and saw the man with the dog lean against the man seated in front of him. RP 662. She turned her attention back to the route. RP 662. A short time later, she looked in the mirror again and saw the two men grabbing each other and making their way down the aisle to the front of the bus. RP 662-63. The two men were arguing but she could not hear what they were saying. RP 663. Ms. Garcia did not see either man hit the other with a weapon. RP 678.

Ms. Garcia stopped the bus and opened the doors. RP 665. The man who had been leaning against the window said to her, "This guy is crazy. He has a hammer." RP 663. He got off the bus carrying a stick in his hand. RP 665. The man with the dog stayed on the bus and got off about 10 minutes later, at the end of the route. RP 667.

The bus was equipped with audio and video recording equipment that captured the incident on a black and white video. RP 551, 563-64. Gerald Meyer, a Metro Transit Police detective, created a bulletin with images from the video and distributed it among other law enforcement agencies to see if anyone recognized either of the men involved. RP 555.

Kent Police officers responded to the bulletin and said the man with the dog looked like a man they had encountered earlier that day. Several hours before the bus incident, Kent police officers responded to an Alzheimer's care facility after staff members reported a man was hitting the window or door of the facility with a hammer. RP 104, 446. The officers arrested the man, placed him in handcuffs, read him Miranda warnings, and questioned him. RP 447-49. The man said his name was Richard Nesbit and provided an address in Kent. CP 283.

Based on this information, Detective Meyer arrested Mr. Nesbit for the bus incident. RP 562. The State charged him with

one count of second degree assault with a deadly weapon, with a deadly weapon enhancement allegation. CP 1-2.

Detective Meyer never located the alleged victim of the assault. RP 557-58. He checked surrounding hospitals and fire departments but no one had sought treatment for any relevant injuries. RP 565, 602.

**2. The court excluded evidence that Mr. Nesbit was arrested following the incident at the Alzheimer's care facility.**

Prior to trial, the defense moved to exclude evidence of Mr. Nesbit's encounter with the Kent police officers earlier on the day of the incident. CP 100-03; RP 102-03, 122-23. Counsel argued allowing the jury to hear that police had arrested and questioned Mr. Nesbit would be unduly prejudicial. RP 100-03. In particular, the jury should not see the portion of the officers' body camera videos showing Mr. Nesbit in handcuffs sitting on a police car being read Miranda warnings, as that "paint[s] quite a picture of Mr. Nesbit as somebody who is criminal and engaged in criminal behavior." RP 123.

The court agreed the officers' body camera videos from the earlier incident were overly prejudicial and granted the defense motion to suppress them. RP 125. The court excluded evidence of Mr. Nesbit's arrest by the Kent police officers. RP 125-26, 514. But the court allowed the State to admit a few still photos from the video, in order to show what Mr. Nesbit was wearing and help establish he was the same person as the man on the bus later that day. RP 126, 514; Exhibit 5. The court also allowed the Kent police officers to testify they questioned Mr. Nesbit and he provided his name. RP 126, 645.

### 3. The court told the jurors the bus video was potentially "disturbing."

At trial, during Detective Meyer's testimony, the prosecutor played for the jury the video of the incident on the bus. RP 552, 554, 557, 559, 563; Exhibit 1.

At the end of Detective Meyer's testimony, right before excusing the jurors for the day, the court said to them,

> I do want to mention to you, given my admonition that you can't speak about any of the facts related to the case, there may be some things

> in today's video [depicting the incident on the bus] that are disturbing and will stick with you. And I want you to know you can reach out to friends or family to say, 'I'd like some company' or 'I don't want some company', but I'm gonna ask you to abide by the admonition that you not – not to speak about things that we're – we're looking at or considering in today's trial. What I'm trying to say is take care of yourselves. All right. I hope that you have a good evening and we'll see you back here in the morning.

RP 569-70.

After the jury left the courtroom, defense counsel objected to the court's remarks to the jurors suggesting they might find the video "disturbing" and instructing them to "take care of [them]selves" by "reach[ing] out to friends or family" for comfort. RP 570. Counsel argued the remarks amounted to a judicial comment on the evidence in violation of the state constitution. RP 570.

The next morning, defense counsel moved for a mistrial, arguing no other remedy would suffice given "what the jury has heard." RP 579-80. The court reserved ruling. RP 581.

The trial proceeded. Kent Police Officer Levi testified he contacted Mr. Nesbit at a memory care facility in Kent on March 22, 2020. RP 645. The following exchange occurred on direct examination:

> Q. And how did you learn Mr. Nesbit's name?
> A. During the course of our interaction, he provided his name and date of birth to me following Miranda being read to him.
> MR. LERNER: Objection. Move to strike, Your Honor. Motions in Limine.
> THE COURT: Yes. I – I will grant that objection. Move to strike the reference to Miranda, and instruct the jury that that should be disregarded.

RP 645. Officer Levi then testified the man said his name was Richard Nesbit. RP 645.

Outside of the jury's presence, defense counsel renewed the motion for a mistrial. Counsel argued Officer Levi's testimony that Mr. Nesbit had received Miranda warnings, in addition to the court's earlier comment on the evidence, together warranted a mistrial. RP 651, 691. Counsel argued the prejudice created by Officer Levi's testimony could not be cured by an instruction to disregard it. RP 651, 694-95.

The court denied the motion for a mistrial. RP 699. First, the court ruled its remarks to the jury about the bus video did not amount to a comment on the evidence because they did not convey the court's attitude about a disputed issue in the case. RP 695-96. Second, the court ruled Officer Levi's testimony about reading Miranda warnings to Mr. Nesbit was not sufficiently prejudicial because the court sustained the defense objection and instructed the jury to disregard the officer's testimony and refrain from speculating about the reasons for Mr. Nesbit's encounter with the Kent police. RP 698; CP 126.

**4. The seriousness of the assault was a disputed issue in the case.**

The jury was instructed they could consider the lesser-degree crime of fourth degree assault, if they could not agree on a verdict for second degree assault with a deadly weapon. CP 131-33.

In closing argument, the parties disagreed about whether the incident on the bus amounted to second degree assault with a deadly weapon, or simple assault. After playing a portion of

the bus video, the prosecutor argued the item in Mr. Nesbit's hand was a a "deadly weapon" because of the manner in which it was used:

> Those circumstances. You can see from the video stills, and they're blurring, but you can tell what's going on, how far Mr. Nesbit has pulled back his arm just before he hits the sleeping John Doe for the first time. He stood up and has his right arm back at the level of his shoulder in order to get a more forceful swing. This is a circumstance that makes a hammer a deadly weapon.

RP 754-55.

Defense counsel, by contrast, argued the item was not a "deadly weapon" under the circumstances because it caused no injury and no one on the bus reacted as though it *was* a deadly weapon. RP 775-78. Counsel argued:

> What would you expect if somebody was using a weapon under the circumstances in which it's going to cause death or substantial bodily harm? I would expect people calling 911. Maybe you would expect injuries, blood, screams, immediate request for assistance, bystanders and participants trying to get away. Serious attention to follow up on this. But we don't have any of those things.

RP 775-76. In addition, counsel pointed out, the bus driver testified the item looked like merely a "stick." RP 777.

The jury found Mr. Nesbit guilty of second degree assault with a deadly weapon and answered "yes" on the deadly weapon special verdict form. CP 258, 260.

At sentencing, the court imposed an exceptional downward sentence based on Mr. Nesbit's history of mental illness and traumatic brain injury. CP 26-27, 32, 276, 329. The court found Mr. Nesbit's "capacity to appreciate the wrongfulness of his conduct was limited by his mental illness." CP 328-29; RP 837-38.

Mr. Nesbit appealed and the Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**The prejudice created by the trial judge's comment on the evidence, combined with Officer Levi's testimony suggesting Mr. Nesbit was engaged in criminal conduct earlier on the day of the incident, prevented Mr. Nesbit from receiving a fair trial.**

The trial judge's statement to the jury characterizing the bus video as potentially "disturbing" amounted to an

unconstitutional comment on the evidence. Further, a police officer's testimony that the police read Miranda warnings to Mr. Nesbit during an unrelated encounter earlier on the day of the incident suggested the police believed Mr. Nesbit had been engaging in criminal activity. These two trial irregularities prejudiced Mr. Nesbit to such a degree that he must receive a new trial.

1. The trial judge commented on the evidence by implicitly conveying to the jury her attitude about a disputed issue in the case.

By telling the jurors they might find the incident depicted on the bus video "disturbing," RP 569-70, the judge implicitly conveyed to the jurors she believed the incident was distressing and serious. This amounted to an unconstitutional comment on the evidence.

a. Article IV, section 16 precludes a judge from making statements to the jury that implicitly convey her attitude about a disputed issue in the case.

Article IV, section 16 provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

The purpose of article IV, section 16 is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). It is solely the role of the jury, not the judge, to assess the weight and credibility of the evidence. State v. Bogner, 62 Wn.2d 247, 249, 382 P.2d 254 (1963). Article IV, section 16 recognizes "that the ordinary juror is always anxious to obtain the opinion of the court . . . and that such opinion, if known to the juror, has a great influence upon the final determination of the issues." Id.

"It is not the quantum of any particular comment, but all comment whatever, that is inhibited by the constitution." State v. Walters, 7 Wash. 246, 250, 34 P. 938 (1893). Therefore,

"courts should be extremely careful to confine their instructions solely to declaring the law. All remarks and observations as to the facts before the jury are positively prohibited." Id.

A judge's remark constitutes a comment on the evidence if the judge's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The judge's statement need not be explicit; it is sufficient if the judge's personal feelings about the issue are merely implied. State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

b. The judge commented on the evidence by implicitly conveying her attitude about the seriousness of the assault.

After the jury viewed the bus video, the judge told them, "there may be some things in today's video that are disturbing and will stick with you." RP 569-70. The judge said the jurors could "reach out to friends or family to say, 'I'd like some company' or 'I don't want some company,'" as long as they did

not talk about the details of the trial. Id. The judge encouraged the jurors to "take care of yourselves." Id.

The court's remarks implicitly conveyed to the jury the judge believed the video *was* disturbing. The remarks conveyed the judge's belief that viewing the video could affect someone emotionally and they might need comfort from loved ones in order to recover. By making these comments, the judge communicated her opinion that the assault depicted on the video was serious and extreme and more than a simple assault.

Contrary to the trial court's conclusion, RP 695-96, and the Court of Appeals' opinion, the seriousness of the assault *was* a disputed issue in the case. The parties disputed whether the assault amounted to a second degree assault with a deadly weapon, or was merely a simple fourth degree assault.

The element distinguishing the crime of second degree assault with a deadly weapon from fourth degree assault is the use of a "deadly weapon." To prove the charged crime of second degree assault, the State bore the burden to prove

beyond a reasonable doubt that Mr. Nesbit assaulted John Doe with a "deadly weapon: to-wit, a hammer." CP 1-2, 130; RCW 9A.36.021(1)(c).

The Court of Appeals' opinion fails to recognize that merely possessing a hammer during an assault is not sufficient to prove the crime of second degree assault with a deadly weapon. See In re Pers. Restraint of Martinez, 171 Wn.2d 354, 366, 256 P.3d 277 (2011) ("[M]ere possession is insufficient to render 'deadly' a dangerous weapon other than a firearm or explosive"). The State bore the burden to prove the hammer qualified as a "deadly weapon" in fact. "'Deadly weapon' means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm."[1] CP 129 (jury instruction); see RCW 9A.04.110(6).

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[1] "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which

Whether an object qualifies as a deadly weapon in fact is a question for the jury. State v. Taylor, 97 Wn. App. 123, 126, 982 P.2d 687 (1999). Relevant considerations include "the assailant's intent, his ability to cause substantial injuries, the degree of force, and the potential or actual injuries inflicted." State v. Hoeldt, 139 Wn. App. 225, 230, 160 P.3d 55 (2007). "Ready capability" is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995).

The State's burden in regard to the deadly weapon sentence enhancement was similar. The State bore the burden to prove "the presence of a deadly weapon in fact." State v. Tongate, 93 Wn.2d 751, 755, 613 P.2d 121 (1980). An implement qualifies as a "deadly weapon" for purposes of the

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causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

sentence enhancement if it "has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." CP 135 (jury instruction); see RCW 9.94A.825.

Whether the assault was committed with a "deadly weapon" was a disputed issue in the case. The jurors were instructed they could consider the crime of simple fourth degree assault, if they could not agree on a verdict for second degree assault. CP 131-33. In closing argument, the prosecutor urged the jurors to find this was more than a simple assault because of the manner in which the assailant used a hammer. RP 754-55. The prosecutor said the hammer amounted to a "deadly weapon" because the assailant stood up and pulled back his arm holding the hammer "in order to get a more forceful swing" before "hit[ting] the sleeping John Doe." RP 754-55.

The defense, by contrast, urged the jury to find the item in the assailant's hand was *not* a "deadly weapon." RP 775-78. Counsel said the item was not used in a manner readily capable

of causing substantial bodily harm or death because John Doe was not injured and none of the onlookers on the bus gave "[s]erious attention" to the altercation. RP 775-76. Further, the bus driver testified the implement looked like merely a "stick." RP 777.

By implicitly conveying her opinion that the assault was more serious than a simple fourth degree assault—a disputed issue in the case—the trial court commented on the evidence in violation of article IV, section 16.

c. The trial judge's comment on the evidence requires this Court to reverse the conviction.

The judge's comment on the evidence is alone sufficient to warrant a new trial.

A judicial comment on the evidence is presumed prejudicial. State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). The burden is on the State to show the defendant was not prejudiced, unless the record affirmatively shows no prejudice could have resulted. Id.

The State's burden to show no prejudice could have resulted is "high." Id. at 559-60. The State makes this showing when, without the erroneous comment, no one could realistically conclude the element was not met. State v. Boss, 167 Wn.2d 710, 721, 223 P.3d 506 (2009).

Here, the State cannot show the judge's comment on the evidence did not influence the jury. As defense counsel argued in closing argument, a reasonable person could conclude the State did not prove the "deadly weapon" element. RP 775-77. A reasonable person could find the assailant did not use the implement in his hand in a manner readily capable of causing substantial bodily injury or death. After all, John Doe apparently suffered no injuries at all. He does not appear injured on the video. See Exhibit 1. He readily grabbed the implement out of the assailant's hand and exited the bus. Id. He did not report any injury to a nearby hospital or fire department. RP 565, 602. Further, the other passengers on the bus did not respond to the altercation with alarm, as one might expect if

they believed John Doe were at risk of substantial bodily harm or death. See Exhibit 1.

In State v. Lampshire, 74 Wn.2d 888, 891, 447 P.2d 727 (1968), when the prosecutor objected to the materiality of the defendant's testimony, the trial judge stated in the presence of the jury, "Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel." During her testimony, the defendant had testified concerning the bowel condition of her six-year-old daughter, and also about a visit she and her sister Betsy had made to their mother in Colorado. Id. at 892. The judge's remark was a comment on the evidence because it "implicitly conveyed to the jury his personal opinion concerning the worth of the defendant's testimony." Id. The comment was prejudicial because it undermined the credibility of the defendant's testimony. Id. The error was not cured by the court's subsequent instruction to the jury to disregard comments of court and counsel because "the damage was done when the

remark was made and it was not capable of being cured by a subsequent instruction to disregard." Id.

Similarly, here, the damage was done when the judge remarked upon the "disturbing" nature of the bus video. The video was the State's principal evidence; no one testified they actually witnessed the assault. The judge's comment suggested to the jury how they should respond to the video. It suggested they should disregard Mr. Nesbit's defense that this merely a simple assault. The judge's comment could not be cured by a subsequent instruction to disregard. The conviction must be reversed.

2. Given the prejudice created by the judicial comment, together with the prejudice created by Officer Levi's improper testimony suggesting Mr. Nesbit was engaged in criminal activity earlier on the day of the incident, the trial court abused its discretion in denying the motion for mistrial.

As discussed, the prejudice created by the judicial comment alone warrants a new trial. Officer Levi's improper testimony that Mr. Nesbit received Miranda warnings earlier on

the day of the incident provided an additional reason to grant a mistrial.

a. A trial court must grant a mistrial if irregularities during the trial prejudice the defendant to such a degree that only a new trial will ensure the trial is fair.

A trial court should grant a mistrial if irregularities during the trial proceedings are so prejudicial that nothing short of a new trial can ensure the defendant will receive a fair trial. State v. Taylor, 18 Wn. App.2d 568, 579, 490 P.3d 263 (2021). The court considers any prejudice from error against the backdrop of the trial as a whole. Id.

The court utilizes a three-part test to determine whether the defendant was so prejudiced as to require a new trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). The Court considers: (1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the

remark, an instruction the jury is presumed to follow. Babcock, 145 Wn. App. at 163. But 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. Id. at 164.

b. The court abused its discretion in denying Mr. Nesbit's motion for a mistrial.

First, Officer Levi's improper testimony was a serious trial irregularity. Prior to trial, the court had granted the defense motion to exclude evidence of the nature of Mr. Nesbit's encounter with Kent police at the memory care facility earlier on the day of the incident. RP 125-26, 514. The court ruled the officers could testify only that they questioned Mr. Nesbit and he provided his name. RP 126, 645. The court prohibited the officers from testifying they arrested Mr. Nesbit, given the prejudicial nature of such testimony. RP 125-26, 514.

In violation of the court's ruling, Officer Levi testified Mr. Nesbit provided his name and date of birth "following

Miranda being read to him." RP 645. The court sustained the defense objection and instructed the jury to disregard the reference to Miranda. RP 645. But the prejudice caused by the officer's testimony, which suggested the police arrested Mr. Nesbit during this encounter, could not be cured by an instruction to disregard it.

Evidence that a defendant was previously arrested or convicted on another charge is improper and inadmissible. State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 794 (2000); ER 404(b). Testimony referring to a prior unrelated criminal investigation carries a great potential for prejudice. State v. Montague, 31 Wn. App. 688, 690-91, 644 P.2d 715 (1982). Statistical studies show that even with a limiting instruction, a jury is more likely to convict a defendant with a criminal record. State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds in State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). That is because "[i]t is difficult for the jury to erase the notion that a person who has

once committed a crime is more likely to do so again." Id. The danger of such evidence "is its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality." Id.

That Officer Levi's testimony suggested Mr. Nesbit was arrested but not convicted of a crime is not material. "Lay jurors, as a rule, do not readily distinguish between an arrest and a conviction and are, therefore, prone to assume that, because a man has been taken into custody or to jail by the police, he must necessarily be guilty of some criminal misconduct." Lundberg v. Baumgartner, 5 Wn.2d 619, 627, 106 P.2d 566 (1940).

Second, Officer Levi's testimony was not cumulative of other evidence presented. *No* evidence was properly admitted showing that Kent police officers arrested Mr. Nesbit earlier that day during an unrelated criminal investigation.

Finally, the irregularity could not be cured by an instruction to disregard the testimony. "While it is presumed

that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impact created where evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971). In particular, the prejudice created by the improper admission of evidence of unrelated criminal conduct cannot be cured by a limiting instruction. Id.; Jones, 101 Wn.2d at 120.

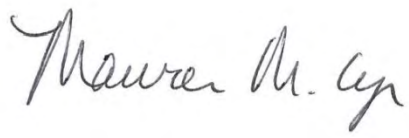
In sum, the prejudice created by two serious trial irregularities prevented Mr. Nesbit from receiving a fair trial. The trial court should have granted his motion for a mistrial.

## E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 22nd day of November 2022. I certify this brief complies with RAP 18.17 and contains 4,686

words, excluding those portions of the document exempted from the word count by the rule.



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# APPENDIX

FILED
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Court of Appeals
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State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ERIC NESBIT,

Appellant.

No. 83244-1-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Nesbit was convicted of one count of assault in the second degree with a deadly weapon after attacking a sleeping bus passenger with a hammer, unprovoked. Nesbit argues that the trial court made an unconstitutional judicial comment on the evidence in advising the jury that while they may find the video evidence disturbing, they were not permitted to communicate about the case. Nesbit also argues that a police officer's testimony, that Nesbit was read Miranda[1] warnings prior to identifying himself to police, was unfairly prejudicial requiring a mistrial despite the fact the court granted defense's objection, struck the testimony, and instructed the jury to disregard. Nesbit contends that the trial court abused its discretion in denying his motions for a mistrial. We disagree and

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

affirm.

FACTS

On March 22, 2020, Kent police officers responded to a report that a man with a dog was standing outside of an Alzheimer's care facility threatening to break the front window with a hammer. At least three officers arrived and, with their weapons drawn, instructed the man to lay on the ground with his arms out. The man complied, so officers handcuffed him and seated him on the push bar at the front of a police vehicle to speak to him. An officer read Miranda rights to the man, who agreed to speak. During this interaction, the man identified himself as Richard Nesbit. Nesbit was subsequently released and told he would receive a citation for misdemeanor harassment in the mail.

Later that day, near midnight, Nesbit, wearing the same clothes and with the same dog, as seen at the Alzheimer's facility, boarded a King County Metro bus. Nesbit sat toward the back of the bus with one person sitting in the row ahead of him, who appeared to be asleep with his head against the window. The bus proceeded for several minutes without incident.

The bus driver testified that her attention was grabbed when in the mirror she noticed the two men were upright, grabbing at each other, and coming toward her at the front of the bus. The victim of the attack stated "This guy is crazy. He has a hammer." In the scuffle, the bus driver saw what appeared to her to be a "big stick." The two men appeared to be fighting over the hammer. The driver was "very scared" and stopped the bus, opening the door for one or both of the men to get off the bus to break up the fight. The victim of the attack

got off the bus and the bus drove away with Nesbit still on it. The bus continued until it reached the last stop, at Kent Station, where Nesbit and the other passengers exited.

Security cameras installed on the bus captured the attack on video. The video shows Nesbit board the bus with his dog and take a seat toward the back at approximately 11:46 p.m. The victim can be seen sitting in the row ahead of Nesbit. The victim appears to fall asleep with his head against the window a short time later. Nesbit remains seated and appears calm for several minutes. At 11:57 p.m. Nesbit pulls a hammer out of a bag on the seat next to him and strikes several blows to the victim's head. The victim wakes up, shields his head with his arms, then stands up and grabs the hammer in Nesbit's hands. The two grapple over the hammer while moving toward the front of the bus. The bus stops and the victim exits through the front door of the bus at 11:58 p.m. Nesbit then returns to his seat, still holding the hammer, and the bus proceeds.

The driver did not immediately call emergency services, but after finishing her shift, wrote a "security incident report." This report was assigned to detectives with the King County Sheriff's Office Metro Transit Police Division to investigate. Detectives were able to identify Nesbit as the attacker, based on the body worn camera footage of his interaction with Kent police earlier that day and the dog he had with him at both incidents. They were unable to locate the victim of the attack. Nesbit was subsequently charged with one count of assault in the second degree with a deadly weapon.

Prior to trial, the defense submitted a motion in limine to exclude all

evidence of Nesbit's interaction with Kent police on March 22, 2020 under ER 404(b), arguing that it was unfairly prejudicial evidence of a prior bad act. The trial court granted the motion in part, explaining the overall encounter is "more prejudicial than probative." The court excluded the video of the encounter, but allowed still photos taken from the body worn camera footage to be used for the purpose of identification. The trial court also limited the testimony of the responding officer by ruling that "[t]he officer can testify that, 'I encountered him, I was questioned, and he provided the name', you know, things of those – of that nature can still be admitted to draw the connection between the earlier contact and the weight, and in the allegation that we're dealing with Mr. Nesbit was identified."

The case proceeded to trial in August 2021. The video of the attack was admitted and displayed for the jury on the first day of trial. At the close of the day, before dismissing the jury, the trial court stated:

> I do want to mention to you, given my admonition that you can't speak about any of the facts related to the case, there may be some things in today's video that are disturbing and will stick with you. And I want you to know you can reach out to friends or family to say, 'I'd like some company' or 'I don't want some company,' but I'm gonna [sic] ask you to abide by the admonition that you not – not speak about things that we're – we're looking at or considering in today's trial. What I'm trying to say is take care of yourselves.

The defense then objected outside the presence of the jury, explaining the concern that it was a judicial comment on the evidence and implied to jurors there was something to be concerned about in the video. The defense subsequently moved for a mistrial. The trial court reserved ruling on the motion.

The next day, Kent police officer Matthew Levi testified about his

interaction with Nesbit at the care facility on March 22. When asked how he came to learn Nesbit's name, Levi stated "during the course of our interaction, he provided his name and date of birth to me following Miranda being read to him." The defense immediately objected and moved to strike the comment as violating the motion in limine. The trial court sustained the objection and struck the statement from the record. It also instructed the jury to disregard the comment. The defense moved for a mistrial on the basis of Levi's testimony regarding Miranda rights. The trial court again reserved ruling.

After argument from both parties, the trial court denied the motion for a mistrial regarding judicial comment, explaining that the thrust of the comment was to implore the jurors not to communicate about the case, but to lean on their support systems if they needed to process what they had viewed. The trial court also explained that the comment did not go to any issues in the case, as the main issue was identification of the attacker, not the severity of the assault. The court finally reasoned that by the end of the trial the jurors would have been instructed to disregard any judicial comments on the evidence three separate times.

The trial court also denied the motion for mistrial on the basis of Officer Levi's statement about Miranda warnings. The court reasoned that it sustained the objection to the comment, instructed the jury to disregard it, and that the jury had both received a limiting instruction telling them they were not permitted to "speculate or consider the circumstance under which the person in the photographs came into contact with police officers" immediately before Levi's

testimony and would receive it again before deliberation.

Before deliberation, the jury instructions addressed both areas of concern. Instruction number 1 charged "[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." Instruction number 7 mirrored the instruction preceding Levi's testimony, charging that

> The still photographs marked at Exhibit 5 are being offered only for the purpose of identification. You are not to speculate or consider the circumstance under which the person in the photographs came into contact with police officers or in which the photographs were taken. Any such circumstances are relevant for purposes of this trial only in so far as you determine the evidence admitted does or does not identify Mr. Nesbit in relation to the alleged charge in this trial.

In instruction number 1, jurors were told that

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

The jury found Nesbit guilty of assault in the second degree and found that he was armed with a deadly weapon at the time he committed the assault. Nesbit now appeals arguing that the trial court abused its discretion in denying his motions for a mistrial based on the judicial comment and mention of Miranda warning.

## DISCUSSION

### Standard of Review

"Decisions involving evidentiary issues lie largely within the sound

discretion of the trial court and ordinarily will not be reversed on appeal absent a showing of abuse of discretion." State v. Nava, 177 Wn. App. 272, 289, 311 P.3d 83 (2013). "Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus 'manifestly unreasonable,' (2) rests on facts unsupported in the record and is thus based on 'untenable grounds,' or (3) was reached by applying the wrong legal standard and is thus made 'for untenable reasons.'" State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Miranda Testimony

Nesbit asserts that the trial court abused its discretion in failing to grant his motion for a mistrial following an officer's testimony that he was read Miranda rights. Nesbit contends that this statement was so prejudicial that it could not be cured by instruction and required a new trial. We disagree.

In this case, the prosecution sought to admit evidence of Nesbit's interaction with Kent police officers prior to the assault on the bus to prove his identity. While evidence of other crimes, wrongs, or acts are inadmissible to prove character or propensity to commit a crime, it is admissible for other purposes, including identity. ER 404(b). Nesbit moved in motions in limine to exclude the entire episode in Kent. The court limited testimony about the Kent interaction to the fact the officer encountered Nesbit, questioned him, and Nesbit provided his name. Given Nesbit's motion was to exclude the entire encounter, it

follows that the court's ruling restricted testimony as to only what the court stated could be admitted.

Violating a ruling in limine generally amounts to a serious trial irregularity. State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998). A trial court has broad discretion to rule on irregularities during trial because it is in the best position to determine whether the irregularity caused prejudice. State v. Wade, 186 Wn. App. 749, 773, 346 P.3d 838 (2015); State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). We consider three factors to determine whether an irregularity warrants a new trial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and (3) whether an instruction could cure the irregularity. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011).

In context, the mention of Miranda did not amount to a serious trial irregularity that is so prejudicial it required a mistrial. Thompson, 90 Wn. App. at 46. The witness gave improper testimony, but the trial court did not admit it and immediately instructed the jury to disregard the testimony, followed by additional curative instruction before deliberation began.

Prior to hearing from Levi, the jury was instructed that they were "not to speculate or consider the circumstance under which the person in the photographs came into contact with police officers, or in which the photographs

were taken" and that they were only to determine whether or not the evidence identified Nesbit.

During his testimony, Levi did not testify about why he was interacting with Nesbit, whether Nesbit was restrained during the interaction, or whether Nesbit was arrested. When asked how he learned Nesbit's name, Levi stated "during the course of our interaction, he provided his name and date of birth to me following Miranda being read to him." The defense objected and moved to strike, which the trial court sustained and granted. The trial court then immediately instructed the jury to disregard the reference to Miranda. Levi then testified that after their interaction Nesbit was permitted to go about his business and "left the premises of where we had contacted him." This testimony would prevent any juror from concluding that Nesbit had engaged in wrongful behavior that led to an arrest.

Before deliberation, the jury was instructed "[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." They were again instructed that they were not to "speculate or consider" why Nesbit had come into contact with Kent Police earlier in the day and that this evidence was for the limited purpose of identification of Nesbit.

Juries are presumed to follow all instructions that the trial court gives to them. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Even if the testimony about Miranda warnings created a risk of prejudice, the court's oral instructions at the time it sustained the objection and the written trial instructions cured the irregularity.

Judicial Comments

Nesbit next argues that in admonishing the jury that they may find some parts of the video evidence "disturbing," the trial court unconstitutionally commented on the evidence necessitating reversal of the conviction. We disagree.

Trial judges are constitutionally prohibited from commenting on evidence. CONST. art. IV, § 16. The purpose of this rule is to prevent the jury from being influenced by a trial judge's personal opinion on the credibility, weight, or sufficiency of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). To be a comment on the evidence, it must appear that the trial court's attitude toward the merits of the case is reasonably inferable from the nature or manner of the court's statements. State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). A judge's opinion may be conveyed directly or by implication, based on the particular facts and circumstances of the case. Jacobsen, 78 Wn.2d at 495.

Here, Nesbit argues that when the trial court told the jury "there may be some things in today's video that are disturbing and will stick with you" before admonishing them not to discuss the case outside of court it amounted to a comment on the evidence prohibited by article IV, § 16. Nesbit asserts that this conveyed to the jury that the conduct amounted to assault in the second degree, rather than the lesser included offense of assault in the fourth degree.

However, the distinguishing factor between assault in the second degree with a deadly weapon and assault in the fourth degree is not simply the severity or how "disturbing" the assault was to viewers. To convict of assault in the

second degree, as charged here, the State must prove that the defendant assaulted another person with a deadly weapon. RCW 9A.36.021. The jury was instructed that to convict Nesbit of this offense they must find beyond a reasonable doubt that:

> (1) [O]n or about March 22, 2020, the defendant assaulted John Doe, an unknown person, with a deadly weapon: to wit, a hammer; and
>
> (2) That this act occurred in the State of Washington.

The jury was also instructed that if they did not find beyond a reasonable doubt that the defendant was guilty of assault in the second degree, they should consider assault in the fourth degree. They were instructed that to convict of assault in the fourth degree, they must find beyond a reasonable doubt that:

> (1) [O]n or about March 22, 2020, the defendant assaulted John Doe, an unknown person; and
>
> (2) That this act occurred in the State of Washington.

The distinguishing factor at issue in this case is the use of a deadly weapon, not the severity of the assault.

The trial judge's remark here was not an unconstitutional comment on the evidence. The judge made no remark on the presence of a deadly weapon or whether an assault occurred. The judge only stated that the jury may find some parts of the video evidence "disturbing" and that they should lean on their support systems if they found it difficult to deal with. This statement did not convey the trial court's personal opinion on the credibility, weight, or sufficiency of the evidence and was not unconstitutional. As noted by the State, and reflected in the record, Nesbit's own defense attorney began opening argument with

> "Well, let's just be straight up with each other from the start. Okay? You're gonna [sic] see a video of an attack that happened on the bus. The video is disturbing."

In a similar unpublished case, this Court found that where a trial court warned the jury that photograph exhibits of a domestic violence victim's injury were "somewhat graphic" and that jurors "may want to look at it quickly or not at all" did not rise to the level of an impermissible comment because they did not go to the weight, credibility, sufficiency, or materiality of the evidence. State v. Tek, No. 42227-1-II, slip op. at 9 (Wash. Ct. App. Apr. 23, 2013) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2042227-1-II%20%20Unpublished%20Opinion.pdf. There the court noted that the statements "did not indicate that the photo was more or less important or probative, rather only that it was potentially disturbing to observe" which was not an issue at trial. Tek, No. 42227-1-II, slip op. at 9. The court stated "it is more likely that the judge – like most people – was cautious of others' sensitivity to blood and exposed tissue." Tek, slip op. at 9. This is analogous to this case, where whether the assault was "disturbing" was not at issue, but the judge appears to have been concerned about the effect the video of the assault would have on the jurors.

The trial court's comment did not amount to an unconstitutional judicial comment on the evidence. Whatever risk that the jury could view it as such was cured with jury instruction number 1 advising that it would be improper for the judge to express the judge's personal opinion about the value of evidence, that the judge did not intentionally do so, and that the jury should disregard it if it

appeared to the jury the judge had done so.

CONCLUSION

The trial court did not abuse its discretion in denying Nesbit's motions for a mistrial.

We affirm.

Cobun, J.

WE CONCUR:

Birk, J.

Brennan, J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83244-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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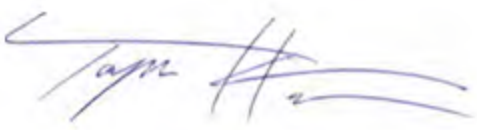

TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: November 22, 2022

## WASHINGTON APPELLATE PROJECT

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