SUPREME COURT NO. 99928-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK JOHNSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 54101-7-II
Cowlitz County No. 19-1-00671-08

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Rules

A. IDENTITY OF PETITIONER

Petitioner, MARK JOHNSON, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Johnson seeks review of the May 25, 2021, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUE PRESENTED FOR REVIEW

A prospective juror made statements during voir dire based on his years of experience that law enforcement officers put in hard and honest work in developing cases, and that the prosecutor's office provides checks and balances, so that charges are only filed if they can be proved. Two other prospective jurors with law enforcement expertise confirmed those statements. Where the prejudicial impact of these expert-like comments on the presumption of innocence could not be overcome, did the court err in denying Johnson's motion for mistrial?

D. STATEMENT OF THE CASE

Appellant Mark Johnson was charged in Cowlitz County Superior Court with second degree assault, possession of methamphetamine, two counts of tampering with a witness, and 13 counts of violating a protection order. All but the possession count were charged as domestic violence

offenses. CP 31-38. The case proceeded to jury trial before the Honorable Patricia M. Fassett.

During voir dire defense counsel acknowledged that there were likely prospective jurors on the venire who had already made up their minds that Johnson was guilty, simply because allegations had been made. RP 135. Counsel asked the prospective jurors whether anyone felt they could not hold the State to its burden and give Johnson a fair trial. Juror No. 22, who had previously said he was a retired law enforcement officer who had worked his whole life in police work[1], answered as follows:

> Well, I feel like – excuse me – I'd give him a very fair trial, but to be honest, after all the years I've worked as an officer, and I know how hard and honest these officers work on their case reports and they don't go forward with them unless they feel they have a case that they felt – they feel they can prove, and when then it goes beyond that to the Prosecutor, who is the checks and balances, and he looks at it and – he or she – and if he does not concur with that, it doesn't go any further. So, as a former officer and a citizen, there's doubt in my mind. I can't not tell you that.

RP 126-37.

Defense counsel then asked if anyone else felt the same way. Juror No. 62, who had previously said he is currently with the Cowlitz County Sherriff's office[2], responded, "Same thing. I'm current and so … I know all of it has to happen." RP 137.

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[1] RP 62.
[2] RP 64.

Juror No. 13 joined in, saying she used to be a King County Sheriff's deputy and "I do also know the extent that goes in to doing the reports on something, and the checks and balances." RP 137. She did not think that knowledge would taint her judgment, however. *Id*.

When the prospective jurors left the room defense counsel noted that both Juror No. 22 and Juror No. 62 had cited professional knowledge and experience of the judicial process, corroborating and bolstering the State's case by saying they know from personal experience the hard work police officers do vetting the facts, and charges would not have been brought unless the prosecutor determined there was something there. And Juror No. 13 chimed in on that. RP 149. Counsel argued that such bolstering by jurors who hold themselves out as experts pollutes the whole jury pool, and he moved for a mistrial. RP 150-52. He argued further that any attempt to question the remaining jurors about whether they were swayed by these statements would only ring the bell louder. RP 153.

The court said it was not inclined to grant a mistrial, but it would allow either party to reopen voir dire. RP 159. It acknowledged the defense concern that questioning on the topic would ring the bell louder, but the State argued that further voir dire was required, regardless of that concern. RP 160. The court decided it would question the jurors. RP 160.

After excusing several jurors for cause, including Jurors 22 and 62, the court informed the remaining jurors,

> There was a comment made by a juror, a former law enforcement officer about what goes on to get to this point in a criminal case, and we want to know if that comment, in and of itself, had any way changed anyone's perspective about this case or affected your ability to feel that you can move forward fairly and impartially to hear the facts of this case.

RP 173. There was no response from the venire. *Id*.

Defense counsel conducted additional voir dire and addressed the prior comments with other potential jurors. RP 173-75. He did not renew the motion for mistrial, and a jury was selected. RP 177. Johnson was convicted on all counts, and on appeal he challenged the court's refusal to grant the mistrial motion. The Court of Appeals affirmed.[3]

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT'S REFUSAL TO DECLARE A MISTRIAL DEPRIVED JOHNSON OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The Washington Constitution guarantees a criminal defendant the right to a fair trial by "unbiased jurors." Wash. Const., art. I, § 22; *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). The Sixth Amendment to the United States Constitution also guarantees the right to a

[3] The Court of Appeals also remanded to vacate the possession of methamphetamine conviction and for the trial court to reconsider imposition of the Jury demand fee. Johnson is not seeking review of those decisions.

fair trial by impartial jurors. U.S. Const. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979); *see also United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 945-46, 71 L.Ed.2d 78 (1982).

The erroneous denial of a motion for mistrial violates the right to a fair trial. *See State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial."). A trial court should grant a mistrial when a trial irregularity 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). A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *Id*. Denial of a motion for mistrial must be overturned when there is a substantial likelihood the prejudice affected the verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

The appellate court determines the prejudicial effect of a trial irregularity by examining (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. *Babcock*, 145 Wn. App. at 163; *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

The trial irregularity in this case was the jury's exposure to unfairly prejudicial information. When a prospective juror shared his knowledge about how carefully evidence is evaluated by the police before it's even presented to the prosecutor, whose evaluation serves as checks and balances before a charging decision is made, it was clear to the court that his bias made him unsuitable to serve as a juror. RP 136-37, 159-60. The remaining venire heard this opinion, as well as that the juror had spent his life doing police work, giving him a certain expertise in this area. RP 62. Two other prospective jurors, each with law enforcement expertise, joined in to confirm the truth of the juror's statements. RP 64, 137. Exposure to this expert opinion wears away the presumption of innocence, leaving the impression that the State is well on its way to meeting the burden of proof before any evidence is presented at trial. This constitutes a serious irregularity. Because no evidence had yet been presented, the juror's statements cannot be considered cumulative evidence. These factors support Johnson's motion for mistrial.

The Ninth Circuit held that denial of a mistrial was prejudicial under similar circumstances in *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997). In *Mach*, the defendant was charged with sexual conduct with a minor. During voir dire, a prospective juror stated that she was a social worker with Child Protective Services. She said she would have difficulty being impartial given her line of work and that she had never, in her three years in that position, heard of any case in which a child had lied about being sexually assaulted. She repeated this information at least three times. Finally, the judge reminded the juror and the venire that the reason for trial is to determine what happened based on the evidence presented and the arguments of counsel. *Mach*, 137 F.3d at 632.

Mach moved for a mistrial, arguing that the entire panel had been tainted by the prospective juror's statements. The court denied the motion but struck the juror for cause. Mach again moved for a mistrial, arguing the problem was the effect the juror's statements had on the other panel members, but the court again denied the motion. *Id*.

On review the Ninth Circuit noted that the juror presented as an expert and had stated four times that she had never known of a case where a child lied about being sexually assaulted. At a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to

determine whether the venire had been tainted by her expert-like statements.

> Given the nature of Bodkin's [the prospective juror] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury.

Id. at 633. The Court concluded that the jury's exposure during voir dire to repeated statements from an expert in the relevant field resulted in the swearing in of a tainted jury, such that all the evidence presented at trial was received by a jury biased from the outset. *Id*. Reversal was required under the harmless error standard, given the nature of the information presented by the prospective juror and its connection to the case. *Id*. at 634. Because the verdict turned on whether the jury believed the child or the defendant, there could be no doubt that the prospective juror's statements had a tremendous impact. *Id*.

Division Two of the Court of Appeals distinguished *Mach* in *State v. Strange*, 188 Wn. App. 679, 354 P.3d 917, *review denied*, 184 Wn.2d 1016 (2015). In *Strange*, the defendant was charged with child molestation and voyeurism. During voir dire a prospective juror stated the belief that if an accusation of child molestation is made something must have happened. *Strange*, 188 Wn. App. at 682. The juror denied having much

experience with the subject however. *Id*. The court noted that the Ninth Circuit in *Mach* had relied on the fact that the prospective juror there had a certain amount of expertise and had made multiple statements that she had never known a child to make false accusations of molestation. *Id*. at 685-86 (citing *Mach*, 137 F.3d at 632-33). Neither of those circumstances was present in *Strange*. None of the jurors claimed any expertise or claimed to speak authoritatively, and the venire did not hear multiple statements during voir dire which could potentially bias them regarding the central issue at trial. *Id*. at 686-87.

The situation here is far more similar to *Mach* than *Strange*. Juror No. 22 presented himself as an expert in police investigations, having stated that he spent his life doing police work and he knows from years of experience what has to happen before charges are filed. RP 62, 136-37. He gave his assurance that police officers are hard-working and honest in preparing a case and that prosecutors serve to provide checks and balances, so that charges are not filed unless they are supported by the necessary evidence. RP 136-37. Two other prospective jurors with similar expertise agreed with the accuracy of these statements. RP 137. With this "expert opinion" the jury would be far more likely to presume Johnson guilty from the fact that charges were filed or to overlook any shortfall in the State's evidence.

In *Mach*, the Ninth Circuit suggested that at the very least the court should have conducted further voir dire before ruling on the motion for mistrial. *Mach*, 137 F.3d at 633. With that in mind, the trial court in this case attempted to contain the damage done by the prospective juror's expert-like statements, while taking into account the defense concern about over-emphasizing the importance of those statements. The court asked the remaining venire whether the officer's comments "changed anyone's perspective about this case or affected your ability to feel that you can move forward fairly and impartially to hear the facts of this case." RP 173. Unsurprisingly, there was no response to the court's vague query.

The lack of response does not serve as assurance that there was no prejudicial impact. It is not clear that the jurors would have understood how to answer the court's question, as vague as it was. Defense counsel asked some questions attempting to gauge the impact of the prior comments without being too specific, managing to solicit comments from potential jurors that they were pro law enforcement. RP 173-75. As defense counsel argued, however, any attempt to be more direct regarding the impact of the expert-like statements on the presumption of innocence would have served only to further emphasize the problematic comments, ringing the bell louder rather than removing the prejudice. RP 153; *see*

Babcock, 145 Wn. App. at 164-65 (court's instruction ineffective in removing prejudicial impression of inherently prejudicial evidence).

As in *Mach*, the jury's exposure during voir dire to the prospective jurors' assurances regarding the state's case resulted in the swearing in of a tainted jury. Defense counsel's argument that the jury should not be swayed by the sheer number of charges but should instead decide each count based on the evidence could not overcome the fact that all the evidence presented at trial was received by a jury biased from the outset. RP 548; *see Mach*, 137 F.3d at 633.

The Court of Appeals' decision that the trial court did not abuse its discretion by denying the mistrial motion and that Johnson was not denied his right to a fair trial presents a significant constitutional question this Court should address. Review should be granted pursuant to RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Johnson's convictions.

DATED this 24th day of June, 2021.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Mark Johnson,* Court of Appeals Cause No. 54101-7-II, as follows:

Mark Johnson/DOC#419109
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
June 24, 2021

Filed
Washington State
Court of Appeals
Division Two

May 25, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK STEVEN JOHNSON, Appellant.	No. 54101-7-II UNPUBLISHED OPINION

VELJACIC, J. — Mark Steven Johnson appeals his convictions for possession of methamphetamine, second degree assault—domestic violence, two counts of tampering with a witness—domestic violence, and 13 counts of violation of a court order—domestic violence. Johnson argues he was denied his right to a fair trial when the trial court denied his motion for a mistrial. He also argues the trial court erred in imposing a jury demand fee as a legal financial obligation (LFO). While this appeal was pending, Johnson filed a supplemental brief asking this court to remand to the trial court to vacate his possession of methamphetamine conviction in light of our Supreme Court's recent decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The State concedes that the conviction must be vacated. We accept the State's concession regarding Johnson's possession conviction and remand to the trial court to vacate that conviction. We affirm Johnson's remaining convictions, but permit the trial court on remand for resentencing to reconsider whether to impose the jury demand fee.

FACTS

Johnson and his wife were involved in an altercation that led to Johnson's arrest. Officers found methamphetamine inside the Johnsons' home that belonged to Johnson. Johnson continued to contact his wife in violation of multiple no contact orders. Ultimately, the State charged Johnson with possession of methamphetamine, second degree assault—domestic violence, two counts of tampering with a witness—domestic violence, and 13 counts of violation of a court order—domestic violence. The matter proceeded to a jury trial.

During voir dire, defense counsel asked the jury panel:

> So, . . . you've been asked by the judge, you've been asked by [the prosecutor]. Now it's my turn: who thinks that's too hard of a burden to handle? Who feels like they want to give him a fair trial but, you know what, in all honesty I just might not be the right person to do it.

1 Report of Proceedings (RP) at 136. Potential juror 22 responded:

> Well, I feel like—excuse me—I'd give him a very fair trial, but to be honest, after all the years I've worked as an officer, and I know how hard and honest these officers work on their case reports and they don't go forward with them unless they feel they have a case that they felt—they feel they can prove, and when then it goes beyond that to the Prosecutor, who is the checks and balances, and he looks at it and—he or she—and if he does not concur with that, it doesn't go any further. So, as a former officer and a citizen, there's doubt in my mind. I can't not tell you that.

l RP at 136-37. Defense counsel inquired if other panel members had that "kind of . . . same thing?" l RP at 137. Potential juror 62 stated, "Same thing. I'm current, and so that's—I know—I know all of it has to happen." l RP at 137. Potential juror 13 also stated that 18 years ago she was a King County Sheriff's deputy and that she knows

> "the extent that goes in to (sic) doing the reports on something, and the checks and balances. So, I see what he's saying, but I—I don't think that would taint my opinion, just because I know you have to look at all of the evidence and you have to look at all that stuff and see if it fits. . . . I don't think that that would taint my judgment."

l RP at 137.

At the end of voir dire, Johnson requested a mistrial, claiming that the entire panel had been tainted by potential juror 22's statement that he was previously in law enforcement and that a case does not go any further unless the prosecutor thinks there's merit to the charge. The State responded that potential juror 22 "did not profess any expertise in domestic violence/assault cases" rather, he was discussing "police work in general." 1 RP at 155. The trial court agreed and denied the motion for a mistrial but allowed additional voir dire on the issue.

Both potential jurors 22 and 62 were removed for cause. The trial court then asked the remaining panel members if statements about law enforcement and "what goes on to get to this point in a criminal case" affected his or her ability to be fair and impartial. l RP at 173. None of the panel members indicated that their ability to be impartial had been tainted by prior statements.

The court allowed both parties to ask further questions. Defense counsel asked the panel if its ability to be impartial was diminished in light of prior statements. The following dialogue took place with potential juror 26:

> [DEFENSE COUNSEL]: And I'm curious about—I'll starting with No. 26, I've been picking on you a little bit. Did hearing from those other jurors, law enforcement folks, I mean one with a lot of experience—
>
> JUROR [26]: Right.
>
> [DEFENSE COUSNEL]: —kind of, you know, their feeling—
>
> JUROR [26]: It's a little bit of extra information to know some people in law enforcement. I think I could try to be impartial, but I am—I am presuming innocence, but I'm probably not as straight down the middle as I should be.
>
> [DEFENSE COUNSEL]: More inclined to the prosecution?
>
> JUROR [26]: Yeah.

1 RP at 173-74. With potential juror 46, the following inquiry took place:

> [DEFENSE COUNSEL]: Okay. And is anybody else, based on this long conversation, day-long conversation now we've had today, that recently was broken up after law enforcement kind of weighed in—people with law enforcement . . . experience, is anybody else kind of now, where before, were kind of like, oh, that's kind of an iffy bet, I'm going to try. Is anybody else moved by those statements to more inclined to prosecute? More inclined to believe somebody probably did something? 46?
>
> JUROR [46]: I was aware of that process—
>
> [DEFENSE COUNSEL]: Okay.
>
> JUROR [46]:—I'm pro law enforcement, but I also have a lot of personal friends that are officers and some of them are—
>
> [DEFENSE COUNSEL]: Okay.
>
> JUROR [46]: . . . [S]o I think I can be impartial. But I am pro law enforcement.

1 RP at 174-75. Defense counsel then followed up with potential jurors 10, 11, and 12 by asking:

> [DEFENSE COUNSEL]: Okay. And in no[] way—I hope I'm not coming across as anti-law enforcement, and I greatly support our—I know them well, we work with them well, [the prosecutor] works with them very closely, as well. Just simply hearing from them and them kind of weighing in on the process, I mean, that's what was spoken about. That's—that's the key issue that's kind of led to another pause for us to have to come back. Hearing about the process, was that something too far for anybody else?
>
> Then—is it Juror No. 10, was that one step too far for you? Or are you right where you were before those statements?
>
> JUROR [10]: I'm not [indiscernible].
>
> [DEFENSE COUNSEL]: Fine? Okay. And 11?
>
> JUROR [11]: Yes.
>
> [DEFENSE COUNSEL]: Same for you? 12?
>
> JUROR [12]: (No audible response.)

1 RP at 175.

Johnson did not renew his motion for a mistrial. The trial court allowed both parties to use their peremptory challenges.[1] After the jury was selected, the court inquired if this was the jury Johnson selected and he answered "Yes, Your Honor." 1 RP at 177.

The jury found Johnson guilty as charged. Based on an offender score of 16, the court sentenced Johnson to 84 months of total confinement. The court also imposed 18 months of community custody for the assault conviction and 12 months of community custody for the possession conviction.

During the sentencing hearing, the trial court stated it was "strik[ing] the filing fee" and "the drug enforcement fund" but did not address why. 2 RP at 592. The court did not check the box on the judgment and sentence stating that it found Johnson indigent. On the judgment and sentence, the trial court crossed off the criminal filing fee and the drug enforcement fund fee but did not cross off the $250 jury demand fee. The trial court subsequently entered an order, finding Johnson indigent for appeal purposes. Johnson appeals.

ANALYSIS

I. POSSESSION CONVICTION

Johnson contends that we should vacate his possession of methamphetamine conviction in light of *Blake*. The State concedes the convictions should be vacated but argues we should not remand for resentencing given Johnson's high offender score.

In *Blake,* our Supreme Court determined RCW 69.50.4013, Washington's strict liability drug possession statute, is void for violating the due process clauses of the state and federal constitutions because it criminalized unintentional, unknowing possession of controlled

[1] This portion of the report of proceedings is not included in our record.

substances. 197 Wn.2d at 193-94. In light of *Blake*, we accept the State's concession and vacate Johnson's possession of methamphetamine conviction, but because the conviction affected both Johnson's offender score (which we recognize is above 9) and community custody, we remand for the trial court to consider what effect, if any, the Supreme Court's decision in *Blake* has on Johnson's sentence.

II. MISTRIAL MOTION

Johnson contends he was denied his right to a fair trial because the trial court denied his motion for a mistrial. He argues that the trial court erred by denying his motion for a mistrial because the jury was tainted by exposure to prejudicial information during voir dire. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. *State v. Gaines*, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). 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). More than "a possibility of prejudice" must be shown. *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

Courts look to three factors to determine whether a trial irregularity warrants a new trial: "'(1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction.'" *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011) (quoting *State v Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992)).

Because the trial judge is in the best position to determine prejudice, we review the decision to grant or deny a mistrial for abuse of discretion. *Babcock*, 145 Wn. App. at 163. The standard is extremely deferential. We will reverse the denial of a mistrial only if a trial irregularity was so

significant that no reasonable judge would have denied the motion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

Here, potential jurors 22 and 62 indicated that they had law enforcement experience and were aware of the process for charging an individual with a crime. Both potential jurors were removed. At the end of his voir dire, Johnson requested a mistrial, claiming that the entire panel had been tainted by potential juror 22's statement that he was previously in law enforcement and that a case does not go any further unless the prosecutor thinks there is merit to the charge. The trial court denied the mistrial but permitted additional questioning of the jury panel to determine if it could be impartial. The court then asked the remaining panel members if statements about law enforcement and "what goes on to get to this point in a criminal case" affected his or her ability to be fair and impartial. l RP at 173. None of the panel members indicated that their ability to be impartial had been tainted by prior statements.

The court allowed both parties to ask further questions. Defense counsel asked the panel members individually if their ability to be impartial was diminished in light of prior statements. After additional voir dire, there was no renewal of the motion for a mistrial. The court allowed Johnson to use his peremptory challenges and then inquired if the jury was the one he had selected. Johnson replied "Yes, Your Honor." 1 RP at 177.

Based on these facts, the offending statements were insignificant as they had no impact on the potential jurors. Further, the trial court's response to Johnson's concerns was adequate as evidenced by Johnson's decision not to renew his motion for a mistrial and his affirmative response when he selected the jury. The statements were not cumulative, nor was there need for a curative instruction in light of the insignificance of the statements. Johnson fails to show a trial irregularity sufficient to warrant a new trial under *Perez-Valdez*, 172 Wn.2d at 818. Accordingly, the court

did not abuse its discretion by denying his request for a mistrial. Similarly, Johnson fails to show he was denied his right to a fair trial.

III. LFO

Johnson argues that the trial court's imposition of the jury demand fee was improper because he is indigent, and he asks us to remand with instructions to the trial court to strike this fee. The State concedes there was no inquiry into Johnson's ability to pay.[2]

RCW 10.46.190 prohibits the imposition of a jury demand fee if the person is indigent as defined in RCW 10.101.010(3)(a)-(c). A trial court must conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay discretionary LFOs. *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018).

Our record does not contain any information as to whether Johnson meets the criteria for indigency under RCW 10.101.010(3)(a)-(c). And the trial court did not indicate on the judgment and sentence that it found Johnson to be indigent.

Because there was no inquiry into Johnson's financial circumstances, we accept the State's concession. The jury demand fee, allowed by RCW 10.46.190, can be revisited upon resentencing, consistent with RCW 10.01.160 and *Ramirez*.

CONCLUSION

We accept the State's concession regarding Johnson's possession conviction and remand to the trial court to vacate that conviction. We affirm Johnson's remaining convictions, but permit the trial court on remand for resentencing to reconsider whether to impose the jury demand fee.

[2] The State also "agrees that the trial court's imposition of the $200 criminal filing fee and $100 domestic violence assessment should be vacated." Br. of Respondent at 12. But the trial court crossed off the criminal filing fee and Johnson does not contest the domestic violence assessment. For these reasons, we do not accept this portion of the State's concession.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Sutton, J.

Glasgow, A.C.J.

GLINSKI LAW FIRM PLLC

June 24, 2021 - 11:35 AM

Transmittal Information

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