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No. 67505-2-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC ARTHUR COOPER,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

By:

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A. ASSIGNMENTS OF ERROR

The trial court erred in failing to declare a mistrial when the investigating officer referenced Cooper's booking photo.

Issue Relating the Assignment of Error

Where the investigating officer violates the trial court's in limine ruling and conveys a defendant's prior arrest history to the jury, should the convictions be reversed?

B. STATEMENT OF THE CASE

On the evening of November 29, 2010, Tyler Anway went to bed at approximately 11 p.m., only to be awakened in the early morning hours when his front door being kicked in. RP 512-13. As Anway made his way to the front door from his bedroom, he saw Eric Cooper, a man he had met "a couple of times," inside his house. RP 506, 515. Anway did not invite Cooper into the house. RP 515-16. According to Anway, Cooper approached and struck him in the face. RP 517. Cooper continued to strike Anway, who retreated to a rear bedroom of the house. RP 518-19. Anway stated he saw Chris Bingham, a man he knew marginally longer than Cooper, Anthony Robles, and Daniel Miller, who Anway had met "a couple of times" in the house as well RP 506, 520.

Anway stated generally that all of the men began “beating me up.” RP 521. According to Anway, while he was being assaulted, the men would take items from the room, leave, and then return. RP 523. At some point, the men fled. RP 526. Anway heard the men drive away. RP 595.

Darrin Keatts was also in the house in the early morning hours of November 30, 2010. RP 793. Keatts heard banging on the front door, looked through the peep hole of the door, and saw Cooper, a man he said he knew well. RP 770, 795-802. Keatts said he heard Cooper say angrily that the two had to talk. RP 803. Keatts immediately turned and fled the house. RP 803. As he left the house, Keatts heard a loud bang. RP 806. RP 806. Keatts ran down the street and hid in the bushes. RP 807. With the help of a neighbor, Keatts was able to call the police. RP 808.

Cooper was charged with first-degree burglary and first-degree robbery. CP1-2.

Prior to trial, the court granted the defense motion *in limine* prohibiting testimony that the photographs used in creating the montage were booking photographs of the defendants from prior arrests. RP 68. Despite the *in limine* order, Detective Schrimpsheer testified:

Q: Now, I assume you can't just make a montage out of thin air. Do you need something to get started before you actually meet a witness?

A: Typically, you take a photograph, *and normally, that's a booking photograph.*

...

Q: Without being specific, how do you get started, is what I'm saying, are you given a name from which to work or a description?

A: I'm normally given the name of an individual, yes.

Q: Okay. Do you remember what happened in this case?

A: In this case, *I was given the numbers of the booking* – of the montage forms that were already –

RP 705-06 (emphasis added). Objections were made to both comments.

Id. The first objection was sustained; the second objection necessitated a sidebar. *Id.*

At the conclusion of the detective's testimony, the defendants moved for a mistrial based on the detective's violation of the *in limine* order:

The reason I was concerned about the montage photos was the booking issue and they were in jail, now let it out the bag, these are booking photos, they were in jail. I also note, your Honor, that the Court granted a motion to restrict the State's witnesses from mentioning other – that the photos were taken from booking photos.

...

[W]e're not challenging that Mr. Anway identified these three individuals. But now [the State has] thrown in to the fact that these individuals are – the jury can imply convicted felons, which they are, but that's not something

that for [the jury] to know, and that's something we religiously try to keep out of their view.

RP 720-21.

The trial court denied the motion, noting:

I'm not going to grant a mistrial. I instructed [the jury] not to consider it, but certainly, if the Court of Appeals thought it was prejudicial, I have no problem with whatever they choose to do later. I just don't think it is.

RP 721.

Cooper's defense was that Anway and Keatts were not credible witnesses. He suggested that Anway falsely reported the burglary in order to obtain a \$2,500 insurance settlement. RP 630-635. In fact, the jury did not find Keatts credible and Cooper was acquitted of the additional charges relating to a different incident with Keatts. CP 16-17.

But Cooper was convicted of the first degree robbery and the first degree burglary regarding Anway. CP 16-17. He was sentenced to 171 months in prison. CP 21. This timely appeal followed. CP 27

C. ARGUMENT

- 1. The court abused its discretion in failing to declare a mistrial for Detective Schrimpsheer's violation of the in limine ruling.*

A court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that he will be tried fairly. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

The remedy for a violation of an in limine order by a prosecution witness is a mistrial. *State v. Escalona*, 49 Wn.App. 251, 256, 742 P.2d 190 (1987). In determining the effect of an irregularity in trial proceedings, courts examine (1) the seriousness of the irregularity; (2) whether the irregularity involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard the irregularity. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Detective Schrimpsheer's reference to Cooper's booking photo improperly implied he was guilty because he was already a convicted felon. The defense argued, and the trial court agreed in granting the in limine motion, that testimony that the photos for the photo montage were the booking photos of the defendants from prior arrests was inadmissible and more prejudicial than probative. Nevertheless, the investigating detective violated the order twice telling the jury the photos were booking photos of the defendants.

In *Escalona*, supra, the defendant was charged with assault while armed with a deadly weapon, a knife. 49 Wn.App. at 252. Before trial, the court granted a defense motion in limine to exclude any reference to Mr. Escalona's prior conviction for the same crime. *Id.* At trial, Vela, the State's primary witness, testified that Escalona "already has a record and had stabbed someone." *Id.* at 253. Although the trial court instructed the jury to disregard the statement, Escalona moved for a mistrial, which was denied. *Id.*

On appeal, this Court held that the trial court abused its discretion in denying Mr. Escalona's motion for a mistrial, concluding that the prejudicial effect of Vela's statement could not be cured due to "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement." *Escalona*, 49 Wn.App. at 256.

In analyzing the first *Weber* factor, the seriousness of the irregularity, this Court held that Vela's statement was "extremely serious" in light of ER 609 and 404(b). *Id.* at 255. This Court emphasized the weakness of the evidence against Mr. Escalona, pointing out that the State's entire case essentially rested on Vela's testimony, which contained many inconsistencies. *Id.* This Court next determined that the second *Weber* factor, whether the statement was cumulative, undermined the trial

court's ruling since it ruled in limine to exclude evidence relating to the prior conviction. *Id.* Finally, in applying the third *Weber* factor, whether the trial court's instruction to disregard the statement could cure the error, the *Escalona* Court determined that Vela's statement was inherently prejudicial due to "the logical relevance of the statement," reasoning that "the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Mr. *Escalona* acted on this occasion in conformity with the assaultive character he demonstrated in the past." *Id.* at 256.

Here, as in *Escalona*, the detective's statements were extremely serious in light of ER 609 and ER 404(b). The detective's statements were not cumulative or repetitive of other evidence. In fact, the trial judge had ruled that this information could not be admitted. Finally, the court's instruction to the jury to disregard the detective's remark could not "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." *Escalona*, 49 Wn.App. at 255, quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Further, a "bell once rung cannot be unrung." *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976).

In light of the *Escalona* decision and the relative weakness of the state's witnesses and evidence, the trial court's failure to declare a mistrial was an abuse of discretion.

D. CONCLUSION

This Court should reverse Cooper's convictions and remand for a new trial.

Respectfully submitted this day of 22rd day of February, 2012.



Suzanne Lee Elliott
WSBA 12634

Certificate of Service by Mail

I declare under penalty of perjury that on February 22, 2012, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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