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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

36041-1-II

STATE OF WASHINGTON
RESPONDENT,

VS.

DUSTIN JON SCOTT
APPELLANT.

BRIEF OF RESPONDENT

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A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court did not err in denying Mr. Dustin Scott's motion to dismiss the case.

B.

STATE'S RESPONSE TO APPELLANT'S ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

1. The conversation that South Bend Police Chief David Eastham had with Raymond Police Department Sergeant Chuck Spoor at the entrance of the courtroom during the course of the trial did not prevent Mr. Scott from receiving a fair trial. The trial court took steps to ameliorate the purported misconduct. Therefore, the trial court did not error in denying Mr. Scott's motion to dismiss the case.

C.

STATEMENT OF THE CASE

The State of Washington accepts the Appellant's version of the Statement of the Case. However, the State would note that what is denominated as "ARGUMENT" under Section D.1.a. of the

Appellant's Brief at 11-14 is more appropriately characterized as part of the Statement of the Case.

D.

ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN DENYING MR. SCOTT'S MOTION TO DISMISS THE CASE.

a. Introduction.

The Appellant, Dustin Scott, contends that this case should have been dismissed because of governmental misconduct. The alleged misconduct occurred when two police officers had a brief conversation about their testimony just outside the courtroom door during the first day of trial. South Bend Police Chief David Eastham asked Raymond Police Sergeant Chuck Spoor about a factual detail of the case. This brief conversation occurred in the courtroom rotunda just after Chief Eastham had testified on direct examination. Mr. Scott's defense attorney sought a dismissal of the case based on an alleged violation of an in limine ruling excluding witnesses. Defense counsel also argued that the case should have been dismissed because Chief Eastham's statement to Sergeant Spoor could have affected Sergeant Spoor's testimony. [The statement by Chief Eastham to Sergeant Spoor occurred before

Sergeant Spoor testified.] Michael Sullivan, the trial judge, exercised his discretion and denied the defense motion to dismiss, but he allowed the defense the opportunity to reopen its case to explore the issue of whether the out-of-court statement between the two police officers affected their in-court testimony. Mr. Scott now asserts that Chief Eastham's behavior was so egregious as to merit a dismissal of the case.

b. Manifest Abuse of Discretion is the Legal Standard That Applies to This Case.

Mr. Scott correctly points out that a trial judge's ruling on a motion to dismiss is reviewed for manifest abuse of discretion. State v. Rohrich, 149 Wash. 2d 647, 654, 71 P.3d 638 (2003). Appellant's Brief at 15-16. In order for Mr. Scott to succeed, he must show that the trial judge's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id. "A decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' . . . and arrives at a decision 'outside the range of acceptable choices' [citations omitted]." Id. "A decision is based 'on untenable grounds' or made

'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id.

c. The Trial Judge Crafted an Appropriate Remedy in Response to the Alleged "Serious Misconduct" of Chief Eastham.

In this instance, Mr. Scott has made no claim that the trial judge applied the wrong legal standard. Instead, Mr. Scott hides behind the shibboleth of "serious misconduct." Appellant's Brief at 19. Mr. Scott asserts, without demonstrating, that the remedy crafted by the trial judge was ineffectual. Mr. Scott fails to articulate why the decision of the trial judge to allow further testimony was unreasonable.

At the beginning of the second day of trial, the trial judge was confronted with an allegation from defense counsel that two police officers had improperly communicated with one another. The trial judge held an evidentiary hearing outside the presence of the jury to determine the exact nature of the alleged misconduct. Because Sergeant Spoor testified that the alleged improper remark of Chief Eastham did not affect his testimony on the previous day, the trial judge determined that the best course of action was to let

the defense reopen its case to address the issues of bias and witness collusion.

While Mr. Scott refers to the trial judge's remedy as a "toothless" sanction, Appellant's Brief at 18, the procedure advanced by the judge allowed both sides to argue their interpretation of the significance of the comment made by Chief Eastham to Sergeant Spoor outside of the courtroom and outside the presence of the jury. As such, the trial judge chose a remedy that was not outside the range of acceptable choices. Moreover, it cannot be said that no reasonable person would have done what the trial judge did. Consequently, the trial judge did not engage in a manifest abuse of discretion.

Before concluding this point, two additional comments need to be made. First, Mr. Scott implies that there is per se misconduct when one witness talks to another witness about the case. But, in this instance, the trial judge never explicitly issued an order preventing witnesses from talking to each other. 2 RP at 18. Further, the trial judge specifically found that no violation of a court order occurred. 2 RP at 20. Hence, the trial judge's decision to

allow the defense to reopen its case was eminently reasonable, given that no explicit violation of a court order occurred.

Second, Mr. Scott cites cases such as State v. Cory, 62 Wash. 2d 371, 382 P.2d 1019 (1963) and State v. Granacki, 90 Wash. App. 598, 959 P.2d 667 (1998) for the proposition that egregious governmental misconduct occurred in this case. However, the cases cited by Mr. Scott involved eavesdropping on privileged communications, reading defense counsel's trial notes/strategy without authorization, and talking to a juror during the lunch hour. Mr. Scott asserts that the conduct in these cases is "a difference in form not kind," when compared to the present case. Appellant's Brief at 17. The State of Washington respectfully disagrees with this assertion. Both Cory and Granacki are characterized by flagrant actions that extended over a period of time. The alleged impropriety here in no way rises to the level of vileness delineated in Cory and Granacki.

d. The Actions of Chief Eastham Are Not So Serious As To Justify Reversal of Mr. Scott's Conviction.

The remedy that Mr. Scott seeks is a dismissal of his conviction for Assault in the Third Degree. As stated in State v. Baker:

Dismissal of charges is an extraordinary remedy. It is available only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial.

78 Wash. 2d 327, 332-333, 474 P.2d 254 (1970).

In this instance, Mr. Scott received a fair trial, and the alleged impropriety occasioned by Chief Eastham's laconic remark to Sergeant Spoor did not materially affect Mr. Scott's rights. The remedy fashioned by the trial judge allowed Mr. Scott the opportunity to attack the credibility of the State's witnesses. Consequently, the prejudice of which Mr. Scott complains does not come close to meriting a reversal of the conviction. In allowing the case to be reopened, the trial judge ensured that both sides were accorded fundamental fairness. As noted by Justice Cardozo:

But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance.

Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934).

In this case, the trial judge struck the appropriate balance. Judge Sullivan did not abuse his discretion. Mr. Scott's argument

to have his conviction reversed does not pass muster.

E.

CONCLUSION

For the reasons discussed above, the Appellant's argument should be rejected. Mr. Scott's conviction for Assault in the Third Degree should be upheld.

Respectfully Submitted by:

A handwritten signature in cursive script that reads "David J. Burke". The signature is written in black ink and is positioned above a horizontal line.

DAVID J. BURKE, WSBA#16163
Pacific County Prosecuting Attorney

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
) NO 36041-1-II
 Respondent.)
) AFFIDAVIT OF MAILING
 vs.)
)
 DUSTIN JON SCOTT,)
)
 Petitioner.)
 _____)

STATE OF WASHINGTON)
) ss.
 COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Pacific County Prosecutor.

That on 10/25, 2007, I mailed a two copies of the State's Brief of Respondent to Peter B. Tiller, Attorney for Appellant at the following address:

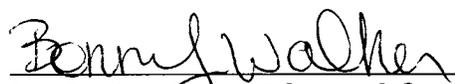
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SUBSCRIBED & SWORN to before me this 25th day of
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