

NO. 41830-4-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

KYLE WAGAR,

Appellant.

11 APR 01 PM 12:17  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

APPELLANT'S BRIEF  
FILED IN CASE  
NO. 41830-4-II

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge

---

---

BRIEF OF APPELLANT

---

---

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	6
THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL BASED ON EVIDENCE OF WAGAR'S PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE. ....	6
D. <u>CONCLUSION</u> .....	10

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Bowen  
48 Wn. App. 187, 738 P.2d 316 (1987)..... 8

State v. Escalona  
49 Wn. App. 251, 742 P. 2d 190 (1987)..... 7

State v. Hardy  
133 Wn.2d 701, 946 P.2d 1175 (1997)..... 8

State v. Johnson  
124 Wn.2d 57, 873 P.2d 514 (1994)..... 7

State v. Perrett  
86 Wn. App. 312, 936 P.2d 42  
review denied, 133 Wn.2d 1019 (1997) ..... 8

State v. Rivers  
129 Wn.2d 697, 921 P.2d 495 (1996)..... 7

RULES, STATUTES AND OTHER AUTHORITIES

ER 609 ..... 5, 6, 7

A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motion for a mistrial based on evidence of appellant's prior assault conviction.

Issue Pertaining to Assignment of Error

Appellant was accused of unlawfully possessing a firearm and disposing of it in a bush when confronted by law enforcement officers. At trial, he denied doing so, and the jury's verdict turned on whether jurors believed him. The parties stipulated prior to trial that jurors would not be told that appellant had a prior conviction for assault in the second degree. Despite this agreement, the prosecuting attorney improperly elicited evidence of the prior conviction, prompting defense counsel to move for a mistrial. Did the trial court err when it denied the defense motion?

B. STATEMENT OF THE CASE

The Thurston County Prosecutor's Office charged Kyle Wagar with one count of unlawful possession of a firearm in the first degree. CP 4. An element of this crime is a prior conviction for a "serious offense." Wagar had convictions for two qualifying offenses: robbery in the first degree and assault in the second degree. CP 4.

To avoid the prejudice resulting from jurors learning the precise nature of these prior crimes, the defense and prosecution stipulated that jurors would simply be told Wagar had a prior conviction for a serious offense. The offenses would not be identified further. RP<sup>1</sup> 22. Defense counsel noted that in light of the stipulation, there was simply no reason for jurors to hear more about these crimes. The trial judge responded, "That is correct." RP 22. The jury instructions also did not identify the precise crimes. RP 117-118; CP 46.

Evidence at trial established that on the evening of September 14, 2010, Chehalis Tribal Police Officers Matthew Bogart and Arick Burnett were on duty and having dinner at the Lucky Eagle Casino. RP 28-29, 49. They were contacted by an off duty Centralia Police Officer – Chad Withrow – who previously worked as a Chehalis Tribal officer and knew Officer Bogart. RP 29-30, 78-79. Withrow told the officers he had spotted Kyle Wagar playing cards in the casino, was familiar with Wagar, and believed Wagar might pose a public safety threat. RP 31, 79-82.

---

<sup>1</sup> "RP" refers to the verbatim report of proceedings for November 29, December 8, and December 9, 2010.

Officer Bogart stepped outside for better radio reception and confirmed with dispatch some of the information Withrow had shared about Wagar while Officer Burnett watched Wagar on the casino floor. RP 31-32, 60-62, 69. Wagar had his right hand in his right pocket most of the time while he was inside the casino. RP 73. Before the officers could contact Wagar, he left the casino. RP 33, 63. Wagar exited the parking lot and began walking down a main street. As the officers ran toward Wagar, they saw him look over his shoulder in their direction before bending down, removing an object from his pocket, and placing it in a nearby bush. He immediately faced the officers with his hands in the air. RP 34-36, 64, 71, 75.

Neither officer saw what the object was. RP 35, 51, 65-66. Wagar was frisked and was not carrying any weapons. RP 36, 65. According to Officer Bogart, he asked Wagar what he had placed in the bush and Wagar said "a cigarette." RP 37-38. Bogart looked in the bush and found a small, loaded .22 caliber revolver. RP 37-39. He did not find a cigarette. RP 38. Casino surveillance cameras recorded the incident, including the moment Wagar dropped an unidentified object in the bush. RP 40-47, 96-100; exhibit 4.

The Washington State Patrol Crime Laboratory examined the revolver but found no fingerprints. RP 89. The revolver, which had its serial number "obliterated," was found to be functional. RP 120-122.

Before the State rested, the court read the stipulation informing jurors that Wagar had previously been convicted of a serious offense. RP 128-129.

Wagar then testified in his own defense. RP 131. According to Wagar, as the officers approached him, they called his name. At the time, his right hand was in his right pocket, which contained a small glass pipe he used for ingesting drugs. Rather than get caught with drug paraphernalia, he quickly broke the pipe into two pieces and threw them into the bush. He then turned to face the officers and complied with their commands. RP 138-139. An officer asked him what he had placed in the bush and noted that it looked like a cigarette. Although it was actually the glass pipe, Wagar agreed with the officer's suggestion that it was a cigarette. RP 140.

On cross-examination, the deputy prosecuting attorney established that Wagar knew he could not possess firearms. RP 141-142. The prosecutor continued, however:

Q: By the way, what was the serious offense that you were convicted of?

A: It was robbery and assault.

Q: Robbery in the first degree; is that correct?

A: Yes, sir.

Q: And assault in the second degree?

A: Yes, sir.

Q: Any other?

A: What's that?

Q: Any others?

RP 143-144.

Outside the jury's presence, defense counsel moved for a mistrial based on the prosecutor's violation of the stipulation not to reveal the precise crimes qualifying as serious offenses. RP 144-145. Counsel conceded the robbery was admissible under ER 609 as impeachment, but noted the assault was not. RP 145. Remarkably, the prosecutor argued that Wagar had opened the door to the assault by answering his question. RP 146. The motion for mistrial was denied, but the court instructed the prosecutor to move on. RP 147.

Jurors convicted Wagar, the court imposed a standard range sentence of 46 months, and Wagar timely filed his Notice of Appeal. CP 49, 54, 60-70.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL BASED ON EVIDENCE OF WAGAR'S PRIOR CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

The defense and prosecution stipulated jurors would not learn the nature of Wagar's prior criminal history when they agreed to simply tell jurors he had a prior conviction for a serious offense. Nonetheless, the prosecutor elicited evidence indentifying the crimes as robbery and assault.

ER 609 provides:

**(a) General Rule.** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of punishment.

ER 609(a).

Once Wagar took the stand, his conviction for robbery was per se admissible under ER 609(a)(2). State v. Rivers, 129 Wn.2d 697, 705, 921 P.2d 495 (1996). In contrast, convictions for assault are only admissible under ER 609(a)(1) and only when the trial court specifically rules them admissible after weighing probative value against prejudicial impact. Id. at 705-706. This did not occur at Wagar's trial. Therefore, the prosecutor erred when he had Wagar reveal his conviction for assault in the second degree.

When examining a trial irregularity such as this, the question is whether the evidence so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P. 2d 190 (1987). In determining whether a trial irregularity may have had this impact, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254. Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, informing jurors that Wagar had a prior assault conviction was very serious. Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes."). It is now well accepted, by scholars and courts, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. See Hardy, 133 Wn.2d at 710-711. In Wagar's case, evidence of his assault conviction portrayed him as violent – someone who had physically attacked or threatened another individual – and precisely the type of person one would expect to carry a firearm.

Looking at the second factor, whether the evidence was cumulative, also supports the conclusion a mistrial was necessary. Evidence of the assault conviction was not cumulative of any other

properly admitted evidence concerning that crime. In fact, it was contrary to the parties' earlier efforts to keep this information from jurors.

The third factor is whether the court instructed the jury to disregard the evidence. It did not. Thus, the jury was free to use the evidence when deciding Wagar's credibility. See CP 42 (jurors instructed they may consider this evidence in determining Wagar's credibility). This was important evidence in a case where not a single witness saw a gun in Wagar's hand. Nor did the surveillance video reveal what he had in his hand. Moreover, there were no fingerprints on the revolver. The jury's verdict turned on whether jurors believed Wagar's claim that he did not place the gun in the bush. Once jurors heard evidence of the prior assault, they were more likely to convict.

The trial court abused its discretion when it denied the motion for mistrial.

D. CONCLUSION

This court should reverse Wagar's conviction and order a new trial.

DATED this 30<sup>th</sup> day of August, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41830-4-II
	)	
KYLE WAGAR,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **DESIGNATION OF EXHIBITS -- SUPPLEMENTAL** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] THURSTON COUNTY CLERK'S OFFICE  
2000 LAKERIDGE DRIVE SW  
BLDG. 2  
OLYMPIA, WA 98502-6001
  
- [X] JOHN SKINDER  
THURSTON COUNTY PROSECUTOR'S OFFICE  
2000 LAKERIDGE DRIVE SW, BUILDING 2  
OLYMPIA, WA 98502-6001

11 AUG 31 PM 12:47  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY  
COURT OF APPEALS  
DIVISION II

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF AUGUST 2011.

x *Patrick Mayovsky*

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

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 KYLE WAGAR, )  
 )  
 Appellant. )

COA NO. 41830-4-II

COURT OF APPEALS  
DIVISION II  
11 SEP -2 AM 8:59  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JOHN SKINDER  
THURSTON COUNTY PROSECUTOR'S OFFICE  
2000 LAKERIDGE DRIVE SW, BUILDING 2  
OLYMPIA, WA 98502-6001
  
- [X] KYLE WAGAR  
DOC NO. 794834  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST 2011.

x Patrick Mayovsky