

**Court of Appeals No. 42434-7**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**DANIEL WAYNE BURGESS,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 10-1-04683-8  
The Honorable Beverly G. Grant, Presiding Judge**

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**I. ASSIGNMENTS OF ERROR**

1. A trial irregularity deprived Mr. Burgess of a fair trial.
2. The trial court erred in denying Mr. Burgess' motions for mistrial.

**II. ISSUES PRESENTED**

1. Was Mr. Burgess' right to a fair trial denied where a witness spontaneously interjected highly prejudicial hearsay testimony which could be interpreted by the jury as a confession by Mr. Burgess or from which the jury could draw impermissible propensity inferences?
2. Did the trial court err in denying Mr. Burgess' motion for mistrial where the trial court based its ruling on an incorrect legal analysis?

**III. STATEMENT OF THE CASE**

**A. Factual Background**

On August 5, 2010, the Valero gas station located at 4602 North Pearl Street in Tacoma was burglarized. CP 1. The incident was reported to police by a person living across the street who had "witnessed or heard the sound of glass breaking and a couple of males running away from the store." 7/12/11 RP 85. LESA dispatched officers to the scene and gave them a vehicle description and related license plate number. 7/12/11 RP 92. Police soon located and stopped the vehicle, occupied by a juvenile female driver and a female passenger. *Id.*

At the time police contacted the vehicle, the driver, Ana Hourigan, was arrested and charged as an accomplice to burglary. 7/12/11 RP 35; RP 93. Police interviewed the passenger, Natasha Keiszling, and learned that three males had previously been in the car with the two young women, but the females did not know the males' full names. CP 2; 7/12/11 RP 18; RP 28; RP 93-94.

Detective Al Calitis was subsequently assigned to the case and viewed the surveillance tape that the store owner, Sharbell Karout, had provided to the police. 7/12/11 RP 97. “[A] couple days after looking at the video himself,” Mr. Karout gave police the name of Daniel Burgess as one of the individuals on the tape during the burglary. 7/12/11 RP 97.

Detective Calitis showed a single photo of a Daniel Burgess to Ms. Keiszling (7/12/11 RP 98; RP 102), who identified the photograph as one of the men who had been in Ms. Hourigan's vehicle on the night of the burglary. 7/12/11 RP 98; RP 102. Ms. Keiszling had communicated on line once before the burglary with a Daniel Burgess through Facebook, and had met a Daniel Burgess in person one time approximately six months before the burglary. 7/12/11 RP 47.

Detective Calitis arrested Daniel W. Burgess on November 3, 2010. 7/12/11 RP 99.

## **B. Procedural Background**

On November 4, 2010, Mr. Burgess was charged with one count of burglary in the second degree. CP 1. Trial began on July 12, 2011.

At trial, Ms. Hourigan testified that Mr. Burgess might be one of the men who was in the car, but that she wasn't sure:

Q. You had pointed to someone in the courtroom earlier. Do you recognize anyone in the courtroom today?

A. I suspect maybe but I don't know.

Q. What do you suspect?

A. That maybe that could be Daniel over there but I don't know.

Q. You are not sure?

A. I'm not sure.

7/12/11 RP 19.

Ms. Keiszling testified at trial that she was "[o]ne hundred percent" positive that Mr. Burgess was one of the men in Ms. Hourigan's vehicle on the night of the burglary. 7/12/11 RP 54-55.

Mr. Karout testified at trial that he had "never seen [Mr. Burgess] [him]self," but that "[his] cashiers alerted [him] and many customers did."

7/12/11 RP 64.

At trial, Mr. Karout was questioned on cross examination about his identification of Mr. Burgess:

Q. There was a tape, a DVD?

A. Yes.

Q. Two people came through that door that was broken?

A. Yes.

Q. Did you recognize them --

A. I recognize them from the hair.

Q. I thought you just testified you didn't recognize them?

A. I didn't say that.

Q. You said something about your cashiers alerted you?

A. No. I said personally I don't know him but I have seen him on my cameras many times, because they alerted me that the whole neighborhood knows him and they told me like, you know, many incidents.

MR. DEPAN: Objection --

THE WITNESS: Let me explain.

THE COURT: No. Only one person talks at a time because we have to keep an accurate record. If you would

let him finish asking you the question, and then Mr. Depan please let him finish giving his answer.

MR. DEPAN: That's true, Your Honor. But when I asked him a question he goes into three paragraphs. I think that's nonresponsive and I have to object.

THE COURT: Well, I can't tell if it's nonresponsive until I hear the answer. The answer is the answer. It may not be the answer that you want but it is his answer. So go ahead, please.

MR. DEPAN: Your Honor, I would object to testimony about what the whole neighborhood knows, everybody knows, everybody knows him. That's highly prejudicial and objectionable.

THE COURT: If that's the objection that's sustained but you have to state what the objection is. All right.

So sir, just answer the question that is being asked of you.

THE WITNESS: Okay.

THE COURT: So let's try that again.

Q. (By Mr. Depan.) What I asked you is did you know him personally? Do you know this man personally?

A. Never talked to him but I seen him on the video.

Q. Okay. And you've seen him on the video. This video?

A. No.

Q. That you gave to the police?

A. No. Many times they point at like say 9 o'clock he came in with another person, and he bragged about breaking in, and then I look and I see it.

MR. DEPAN: Objection, Your Honor.

THE COURT: Sir, only answer the question that is being asked of you. If it's a yes or no answer, then yes or no.

THE WITNESS: My answer is not going to apply as yes or no. That's what I'm telling him, how I know him.

THE COURT: Well, but he didn't ask you how you knew him. All right. Next question.

MR. DEPAN: I would ask the jury be instructed regarding that last response as nonresponsive and that it be struck.

THE COURT: All right. What I need to do is  
excuse the jury for another five minutes.

7/12/11 RP 69-71.

Mr. Depan immediately moved for a mistrial. 7/12/11 RP 71. The prosecutor argued that “the record can be sanitized” and that Mr. Depan “opened the door” and was “stuck with the answer.” 7/12/11 RP 71-72. The Court admonished Mr. Karout a second time and told the prosecution: “I need to caution you, counsel. If he does it again and if a motion is made I will entertain a mistrial.” 7/12/11 RP 72. Judge Grant added, that she was denying the motion for a mistrial “subject to renewal. If it happens again it will be granted.” 7/12/11 RP 72.

The Court stated, “what I am going to do is call the jury back in, and I’m going to tell them that they should disregard his entire answer except for the fact that he acknowledged that he had seen him before.” 7/12/11 RP 72.

However, the answer objected to by Mr. Depan at this point did **not** include any acknowledgment by Mr. Karout that he had seen Mr. Burgess before. *See* 7/12/11 RP 70, lines 16-20. The answer objected to was, “No. Many times they point at like say 9 o’clock he came in with another person, and he bragged about breaking in, and then I look and I see it.” 7/12/11 RP 70, lines 17-19.

When the jury returned, Judge Grant told them,

I am going to have the court reporter read to you the question that was asked and the answer that you are to consider. The other part of the answer has been stricken and you will not consider it beyond this point.

(WHEREUPON, the court reporter read back as requested by the Court.)

7/12/11 RP 74.

Neither the question asked by Mr. Depan nor the answer permitted by the Court is transcribed. From the record, it is unclear what question and what portion of Mr. Karout's answer were read back to the jury. *See also* 7/12/11 RP 113, line 25 - RP 114, lines 1-11.

Mr. Depan renewed the motion for a mistrial following a lunch break. 7/12/11 RP 78-80. The Court stated:

I am deeply concerned because I warned him once and then he repeated it, I think, twice in different subject areas. I don't know. You might be able to get by with it one time but two times I'm not too sure. It's hard to un-ring the bell, and it does put the defense in a precarious situation. . . . He wasn't asked about the reputation. I know that you can't control sometimes your witnesses. I'm inclined to grant the mistrial on that basis because of the gravity of the statements and how they were made . . . I think that the defendant has been highly prejudiced by the statements made by your witness that were not solicited.

7/12/11 RP 80-81.

Nevertheless, the Court did not grant a mistrial at that time.

7/12/11 RP 80-81. The prosecutor responded to the Court's comments that

“admissibility of evidence such as this is solely within Your Honor’s discretion,” and that the Court had “appropriately struck from the record his statements regarding reputation in the neighborhood,” and asked for “a brief recess so that I can pull some authority on this and find some examples so I can argue more effectively to your Honor.” 7/12/11 RP 81.

The Court acquiesced, stating “What I think we’ll do is let’s proceed with the trial, and then in the morning that will give you both time to present and to do some discovery on this matter.” 7/12/11 RP 81-82.

Trial continued, and the jury heard the testimony of police officers who had responded to the scene of the burglary, located Ms. Hourigan’s vehicle, and questioned Ms. Keiszling, as well as the testimony of Detective Calitis, who investigated the burglary, then arrested and interviewed Mr. Burgess. 7/12/11 RP 83-103.

The next morning, the prosecutor submitted a brief “In Response to Defendant’s Motion for Mistrial.” CP 33-37. Counsel for Mr. Burgess and the prosecutor presented argument on the motion for mistrial (7/12/11 RP 105-113). The Court acknowledged that Mr. Karout “may have had his own agenda,” that Mr. Karout’s statements “were highly hearsay” and “were not elicited by the questions . . . posed” by Mr. Depan, but that “there was enough evidence without his testimony that the jury could infer

innocence or guilt, and I don't think it was determinative on his statements." 7/12/11 RP 114.

Mr. Burgess was found guilty of burglary in the second degree (CP 56) and sentenced to 43 months in prison. CP 65.

Notice of Appeal was filed on August 2, 2011. CP 72.

#### IV. ARGUMENT

**Mr. Burgess was denied a fair trial by the erroneous admission of propensity evidence and hearsay testimony that Mr. Burgess purportedly confessed to committing the burglary.**

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *See State v. Post*, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *affirmed*, 118 Wn.2d 596, 826 P.2d 172 (1992). In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court examines the following factors:

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

*State v. Escalona*, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)).

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

The evidence that Mr. Burgess was the person who committed the burglary was limited to the video of the burglary and Mr. Karout’s statements to police and to the jury that Mr. Burgess was the burglar. However, during Mr. Karout’s direct and cross-examination, he volunteered that unknown individuals, possibly his cashiers or possibly members of the community, had told Mr. Karout that Mr. Burgess had been involved in “many incidents” including ones where Mr. Burgess had come into Mr. Karout’s store and bragged about breaking in, possibly to Mr. Karout’s store or possibly to some other location. RP 69-70.

*1. The introduction of Mr. Karout’s statements was a serious irregularity.*

First, Mr. Karout’s statements were volunteered and were not

made in response to and question posed by the prosecutor or defense counsel. The jury had no context in which to place Mr. Karout's statements since the statements were not made in response to a specific question. There was no framework to guide the jury's interpretation of the information contained in Mr. Karout's answer.

Second, Mr. Karout's statements were a repetition of the hearsay statements of either Mr. Karout's employees or of patrons of Mr. Karout's business.<sup>1</sup> Because Mr. Karout's testimony was hearsay, it was inadmissible.<sup>2</sup>

Third, the jury could have relied on Mr. Karout's statements to make forbidden propensity inferences about Mr. Burgess and his guilt of the charge in the instant case. The jury could have heard Mr. Karout's statements about "many incidents" involving Mr. Burgess and about Mr. Burgess bragging he had broken in as evidence that it was known in the community that Mr. Burgess committed numerous other criminal acts. From this evidence the jury could have inferred that since Mr. Burgess had committed numerous other crimes he probably committed the burglary at issue in this case. ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *See*

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<sup>1</sup> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

<sup>2</sup> "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

*State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 (“once a thief always a thief” is not a valid basis to admit evidence), *review denied*, 106 Wn.2d 1003 (1986). Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Fourth, the jury could interpret Mr. Karout’s testimony about Mr. Franklin’s hearsay statement bragging he had broken in as a confession. While a confession might, in certain circumstances, be admissible as a statement of a party opponent under ER 801(d)(2), in this case a second layer of hearsay lies between Mr. Burgess’ statement and the admissibility of that statement in court. The first layer of hearsay is when Mr. Burgess allegedly made the statement overheard by Mr. Karout’s cashier. The second layer of hearsay is when the cashier repeated the statement to Mr. Karout. In order to be admissible, there must be an exception to the hearsay rule for each layer of hearsay in a statement. ER 805; *State v. Alvarez-Abrego*, 154 Wn.App. 351, 366, 225 P.3d 396, *review denied* 168 Wn.2d 1042, 233 P.3d 889 (2010) (“In instances of multiple hearsay, each level of hearsay must be independently admissible.”) Here, there was no hearsay exception that would allow admission of the statements of Mr.

Karout's cashier to Mr. Karout.

2. *Mr. Karout's statements were not cumulative of any other evidence.*

As discussed above, evidence of Mr. Burgess' purported other criminal activity or the fact that Mr. Karout's cashier allegedly heard Mr. Burgess confess to breaking into Mr. Karout's store were inadmissible. No other evidence of this sort had been introduced to the jury at the time Mr. Karout testified.

3. *The limiting instruction giving to the jury was insufficient to mitigate the prejudice caused to Mr. Burgess by the introduction of Mr. Karout's statements.*

It is true that a limiting instruction was given to the jury. 7/12/11 RP 74. It is unclear from the record exactly what portion of Mr. Karout's answers the jury was instructed to disregard. However, it is ultimately irrelevant what portion of the answers the jury was instructed to disregard since Mr. Karout's spontaneous statements were so prejudicial to Mr. Burgess that no limiting instruction could have mitigated the prejudice to Mr. Burgess by the statements.

The United States Supreme Court has written and the Washington Supreme Court has concurred that "[t]he naive assumption that prejudicial

effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction.” *State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), citing *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949).

Here, the jury heard evidence that Mr. Karout’s cashiers as well as numerous people in the neighborhood were familiar Mr. Burgess and his “many incidents” of prior misconduct. Even worse, the jury heard that Mr. Burgess had bragged about committing the burglary in the very place he had allegedly burglarized. It is difficult to imagine evidence more prejudicial than evidence that a defendant confessed to the crime charged. It is exceedingly unlikely that the jury set aside their knowledge that Mr. Burgess was well known in the community for his criminal acts and that he bragged about committing the burglary at issue in this case. No limiting instruction given by the court could have cured the prejudice to Mr. Burgess by Mr. Karout’s improper testimony.

4. *The trial court erred in refusing to grant Mr. Burgess’ motions for mistrial.*

A trial court’s ruling on a motion for mistrial is reviewed for an abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Brown*,

132 Wn.2d 529, 572, 940 P.2d 546 (1997).

A mistrial should be granted only when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” In other words, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial.

*State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

As argued above, Mr. Karout’s unprompted statements so prejudiced Mr. Burgess that he was denied a fair trial. Indeed, the trial court recognized the highly prejudicial nature of Mr. Karout’s testimony and initially indicated it was inclined to grant Mr. Burgess’ motion for mistrial. 7/12/11 RP 80-81. But the trial court ultimately denied the motions for mistrial, stating, “there was enough evidence without his testimony that the jury could infer innocence or guilt, and I don’t think it was determinative on his statements.” 7/12/11 RP 114.

The trial court’s decision was flawed since the issue was not whether or not the State had presented sufficient proof to permit the jury to determine Mr. Burgess’ guilt or innocence, but whether or not Mr. Karout’s testimony had so tainted the jury that the jury could no longer be trusted to weigh Mr. Burgess’ guilt dispassionately and on the basis of only properly admitted evidence. Further, at the time the motion for mistrial was made, the only witnesses who had testified were Ms.

Hourigan, Ms. Keiszling, and Mr. Karout. No police officers had yet testified about the investigation or the evidence collected suggesting Mr. Burgess was guilty. Contrary to the trial court's conclusion, at the time the motion for mistrial was made there was not a large amount of evidence which suggested that Mr. Burgess was guilty.

The trial court abused its discretion in denying Mr. Burgess' motion for mistrial because its ruling was based on untenable grounds and reasons.

#### **VI. CONCLUSION**

Mr. Burgess was denied a fair trial by the improper introduction of highly prejudicial evidence. For the reasons stated above, this court should vacate Mr. Burgess' conviction and remand his case for a new trial.

DATED this 20<sup>th</sup> day of December, 2011.

Respectfully submitted,

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Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on December 20, 2011, she delivered by e-mail to the Pierce County Prosecutor's Office, [pcpatccf@co.pierce.wa.us](mailto:pcpatccf@co.pierce.wa.us) Tacoma, Washington 98402, and by United States Mail to appellant, Daniel W. Burgess, DOC # 31391, Coyote Ridge Corrections Center, 1301 North Ephrata, Post Office Box 769, Connell, Washington 99326, copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on December 20, 2011.

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Norma Kinter

# ARNOLD LAW OFFICE

**December 20, 2011 - 4:15 PM**

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