

NO. 50303-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

DAVID LOPEZ-SANCHEZ,

Respondent.

Appeal from Clark County Superior Court
Honorable Gregory Gonzales
No. 16-1-00323-1

BRIEF OF APPELLANT

Edward Penoyar, WSBA #42919
Joel Penoyar, WSBA #6407
Attorneys for Defendant/Appellant

Post Office Box 425
South Bend, Washington 98586
(360) 875-5321

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I. INTRODUCTION

Defendant appeals convictions for burglary, assault, and malicious mischief arising from an argument with his ex-partner of four years at her apartment. The victim testified that the defendant was kicked out, then re-entered the premises by breaking the door and that he assaulted her, leaving a red mark on her face. Throughout the victim's testimony, she repeatedly referenced prior "abuse" and assault by the defendant, which was specifically prohibited by the properly entered orders in limine. The State was explicitly admonished by the trial court for continuing to elicit such statements from the victim. At sentencing the State proceeded to speak on behalf of the absent victim and concerning matters not in the trial record. Defendant seeks review of these errors and of the sufficiency of evidence in general, since by the victim's own testimony, defendant's intent in re-entry was to get his keys.

II. ASSIGNMENTS OF ERROR

A. The State intentionally elicited testimony about the defendant's prior bad acts. This testimony had been specifically prohibited by a properly entered order in limine and ER 404(b), was highly prejudicial, and was not cured by the curative instruction.

B. The real facts doctrine was violated at sentencing when the court considered information outside the trial record.

C. Insufficient evidence was presented to support a finding that the alleged crimes occurred.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. WHETHER the victim's repeated references to prior "abuse" and assault by defendant, which the court instructed the jury to disregard, was so prejudicial as to make that instruction ineffective.

B. WHETHER the trial court erred when it permitted to the State to speak on behalf of the absent victim at sentencing, alleging facts outside the trial record, without acknowledgment by the victim granting that authority to the State.

C. WHETHER a rational trier of fact could have come to the conclusion that burglary in the first degree occurred when by the victim's own admission, the defendant stated he was re-entering the premises for purposes of retrieving keys.

IV. STATEMENT OF CASE

Defendant was found guilty by jury trial of one count of Burglary in the First Degree – Domestic Violence (RCW 10.99.020, RCW 9A.52.020(1)(b)); Assault in the Fourth Degree – Domestic Violence (RCW 10.99.020, RCW 9A.36.041) occurring on November 20, 2015, and Malicious Mischief in the Third Degree – Domestic Violence (RCW 10.99.020, RCW 9A.48.090(1)(a)) occurring on November 20, 2015; as well as Bail Jumping (RCW 9A.76. I 70(1),(3)(c)) occurring on July 28, 2016, according to the Felony Judgment and Sentence. CP 63-73

The victim B.J. testified that she broke up with defendant on November 20, 2015m whereupon he broke down her apartment door and assaulted her. VRP 77-174. The defendant failed to appear at two court

dates some months later. VRP 297. The victim testified that she and defendant had been in a relationship for four years, and that she recently found out defendant had a child and a relationship with another woman. VRP 94. On the day of the incident, the victim testified that the defendant asked if he could come over to her apartment, and she told him she left the door unlocked for him. VRP 91. She testified that he arrived intoxicated and with a box of beer. VRP 96. She testified that they began arguing about the relationship and she informed him that the relationship was finally over. VRP 93. She testified that she called the defendant a “puto mal” which was interpreted at trial as “son of a b***,” whereupon he left the premises in anger. VRP 102. The victim testified she feared for her safety and locked the door after he left. VRP 99. She then testified that he returned and began loudly knocking on the door to get back in so he could get his car keys. VRP 99. She testified that he ultimately broke the door lock to gain entry and then assaulted her in the face with a closed fist. VRP 148. She then testified that she fled the apartment. VRP 149.

The victim testified she went to the management office of the apartment building and called 911. VRP 151. Law enforcement arrived and defendant was not present. VRP 152.

Defendant testified that he was never present at the scene. VRP 393. Except for the victim, no witnesses were produced who saw defendant at the complex that day, including the maintenance worker. VRP 215.

V. ARGUMENT

- A. The State intentionally elicited testimony about the defendant's prior bad acts. This testimony had been specifically prohibited by a properly entered order in limine and ER 404(b), was highly prejudicial, and was not cured by the curative instruction.**

The trial court admonished the State for eliciting testimony from the victim regarding: “abuse” “constant aggression”, that defendant was a “heavy drinker”, that she ‘knew that he would hit me,’ and that she “previously petitioned for a protection order” in violation of the order in limine and ER 404(b). Defense counsel repeatedly objected, yet his motion for mistrial was improperly denied by the court.

1. LAW

A trial court's denial of a motion for a mistrial is reviewed on appeal for abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A “court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons.” *State v. Hummel*, 165 Wn.App. 749, 777, 266 P.3d 269 (2012) (citing *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009)).

A “trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Thus, an appellate court must determine whether testimony in violation of orders in limine was so prejudicial that a defendant was denied the right to a fair trial. In making this determination, an appellate court considers (1) the seriousness of the claimed trial (evidentiary)

irregularity; (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard.

State v. Escalona, 49 Wn.App. 251, 255, 742 P.2d 190 (1987):

(1) Seriousness of the Irregularity: In *Escalona*, the court concluded that witness testimony that violated an order in limine was a serious trial irregularity. *Id.* There, the defendant was charged with assault in the second degree while armed with a deadly weapon. *Id.* at 252. Before trial, the court granted a motion in limine to exclude any testimony regarding the defendant's prior conviction for the same crime. *Id.* At trial, the victim testified that he was nervous when the defendant threatened him with a knife because the defendant had a record and had stabbed someone before. *Id.* at 253. The court concluded the irregularity was serious because the “rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes.” *Id.* at 255. Accordingly, that court held that the trial court abused its discretion by denying a motion for a mistrial.

(2) Cumulative of Other Evidence: Next, an appellate court considers whether testimony was cumulative of other properly admitted evidence. Evidence is merely cumulative if it is in addition to other properly-admitted evidence; cumulative evidence is not necessarily prejudicial error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970)).

(3) Cured by Instruction: Finally, an appellate court considers whether the trial court's curative instruction was sufficient to cure the prejudicial effect of the testimony.

An appellate court presumes that a jury “follow[s] the court's instruction to disregard testimony.” *Escalona* at 255. But in some cases, no instruction is capable of removing the prejudice created by evidence that is “of such a nature as to likely impress itself upon the minds of jurors.” *Id.*

In *Escalona*, after finding the trial irregularity to be particularly serious, the court concluded that the curative instruction was insufficient to cure the testimony because the testimony was “logically relevant” and in

such a close case “it would be extremely difficult, if not impossible for the jury to ignore this seemingly relevant fact.” *Escalona*, at 256.

2. ANALYSIS

Here, defense counsel properly moved for a mistrial after the State repeatedly elicited testimony from the victim about prior bad acts. VRP 100. The trial court explicitly admonished the State for the prosecutor’s behavior and directly acknowledged that intentional violations of ER 404(b) had taken place:

MS. WECHSELBLATT: I just want to --

THE COURT: You may make a record after I finish. So you need to stop interrupting me, please. On top of that, we've had numerous violations by the alleged victim regarding 404B evidence. Mr. Anderson brought it to the Court's attention that you have asked questions and somehow generated a response from the alleged victim that there was prior domestic violence or prior physical abuse between the two. Mr. Anderson asked that those statements not come in. Again, based upon a statement made by the alleged victim, I allowed the last statement to come in and admonished the State, or at least ensured or requested that the State not have information come in as such.

See VRP 240.

Defense counsel had dutifully began his objections much earlier in the victim’s testimony:

MR. ANDERSON: Your Honor, I included in my motions in limine an offer -- a request for an offer of proof from the State, if any prior bad acts were to be offered under ER 404B. The witness previously in her testimony referred to the defendant's aggression. I did not object at that point, but now she's used the word “aggression” again and also added the word “abuse.”

See VRP 83.

The Court did not appear satisfied with the State’s response:

MS. WECHSELBLATT: Well, I spoke with her, as I told Your Honor, during motions in limine, that I needed to instruct her that she could not go into any prior abuse. I did that. I think that she's trying to abide by that the best she understands it to be. I think aggression can mean many things. It doesn't have to mean physical aggression. You know, I don't –

THE COURT: Sounds like you are making the lines fuzzy. You already got in heavy drinker.

See VRP 84.

THE COURT: Ms. Wechselblatt, I understand 100 percent, but you need to advise the witness she is not to mention any form of domestic violence, any form of prior bad acts. You know it as well as I do.

MS. WECHSELBLATT: Yeah.

THE COURT: She should not discuss it. She's already introduced the phrase “constant aggression.”

See VRP 85.

The State appeared to admit that it was asking leading questions, in violation of ER 611(c), which the court stopped:

MS. WECHSELBLATT: And I was at some point trying to lead her a little bit, and I kept getting objections. So what I would ask the Court –

THE COURT: You can't lead her as well.

See VRP 86.

The Court did instruct the jury to disregard the statement “I would not tolerate the abuse anymore,” but to do so had to *repeat* it to the jury, aggravating the prejudice. VRP 88

Later, the court again instructed the State that its witness's statements were on the “threshold” of admissibility when the witnesses said the she “knew” defendant “would hit” her:

Q. Did you want him to come back into your home?

A. Not after I told him. Not after I told him what I told him because I knew he would hit me.

See VRP 100

[Defense objected]

MR. ANDERSON: Your Honor, when two people in a relationship, particularly a romantic relationship that's lasted four years, every couple has arguments from time to time, and voices get raised, and people don't generally make an assumption that the other person is going to hit them, unless something like that has happened before. That just comes from human experience. It's the only rational explanation that the jury might think that she would have that suspicion that he would hit her is if he had hit her before. That's the question they're asking themselves. This is the second time they've heard this testimony. It's pretty much impossible to unring the bell at this point. A curative instruction is not going to do the trick.

THE COURT: Ms. Wechselblatt, you're right on the threshold of crossing this one more time.

See VRP 102.

All three considerations in *Escalona* are met in this instance: (1) The repeated court-acknowledged violations of ER 404(b) culminating in *admonishment* – a clear “trial irregularity” (2) the testimony was not at all merely cumulative to any other admissible evidence, and (3) the curative instruction was completely ineffectual at removing the improper and unproven representation of defendant as a serial abuser against the victim. The trial court abused its discretion in denying a mistrial because it was manifestly unreasonable to conclude that the victim’s statements did not deprive defendant of a fair trial. The judgment and sentence should be vacated.

B. The real facts doctrine was violated at sentencing when the court considered information outside the trial record.

1. LAW

RCW 9.94A.530(2) sets forth the “Real Facts Doctrine,” that a sentencing court

may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. **Where the defendant disputes material facts**, the court must either not consider the fact or **grant an evidentiary hearing on the point.** [emphasis added.]

The purpose of this limitation is “to protect against the possibility that a defendant's due process rights will be infringed upon by the sentencing judge's reliance on false information.” *State v. Herzog*, 112 Wn.2d 419, 431–32, 771 P.2d 739 (1989); Wash. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”) and to prevent *ex parte* contact with the judge, *sua sponte* investigation and research of a judge, and sentencing based on speculative facts. *State v. Grayson*, 154 Wn.2d 333, 340 111 P.3d 1183, 1187 (2005). A violation of the real facts doctrine requires remand for re-sentencing.

The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, also acknowledges and provides for the rights of victims. RCW 9.94A.500 provides in pertinent part that “[t]he court shall ... allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.”

In *State v. MacDonald*, the Supreme Court stated: “Additionally, chapter 7.69 RCW does not give the State the right to speak for victims when they have not requested the State's assistance in communicating with the court. *State v. Carreno–Maldonado*, 135 Wn.App. at 86, 143 P.3d 343 (2006); RCW 7.69.030(14) (requires a reasonable effort enabling “victims and survivors of victims[] to present a statement personally or by representation [] at the sentencing hearing for felony convictions”).” See *State v. MacDonald*, 183 Wn.2d 1, 17, 346, 134 P.3d 748, 756 (2015).

2. ANALYSIS

Here, the trial court erred when it permitted the State to represent that the victim witnessed defendant was “making faces at her” during the trial and when it permitted the State to speak for the absent victim without her apparent consent or presence at sentencing:

We're also asking for 100-year post conviction no contact order with Ms. Jimenez. Ms. Jimenez was notified of the sentencing today. It's my understanding she did not want to attend. I do not see Ms. Jimenez in the audience.

See VRP 531.

THE COURT: Did she provide your office any information about what she feels the punishment should be?

MS. WECHSELBLATT: She did not. As the Court probably could intuit to some extent, she was on board with the prosecution. She felt disrespected by the defendant during times in trial. Apparently he was making faces at her, shaking his head. I didn't view any of that.

THE COURT: I didn't see that myself.

MS. WECHSELBLATT: So I do know that this was something that was a great burden on her. And so I do know that she was happy with the result of this trial. I don't have her specific information from

her as to what particular type of amount of time she would like to see. I do know that the no contact order has always been a very important piece for her.

THE COURT: Very well. Thank you.

See VRP 533

These representations that the victim was “on board with the prosecution,” “felt disrespected by the defendant,” was shouldering “a great burden” and was “happy with the result,” is all ‘non-acknowledged’ information the statute seeks to exclude from sentencing. No evidence was presented the victim authorized the State to speak for her such a manner, in direct violation of *MacDonald supra*.

These representations impermissibly invited the court to muse *sua sponte* both as to the character of the defendant and the completely unknown intent of the victim. The resulting imposition of a no-contact order is an onerous burden for any individual to bear, which was levied against the defendant with no input from the victim or defense. The parties had been in a consensual relationship for four years. The defense had no opportunity to rebut with mitigating evidence about their shared social connections outside their relationship, mutual gathering places, or other evidence that would require a more careful drafting of any no-contact order. The court was further left in the dark as to whether the victim may, for example, have presented information that would have warranted a downward deviation at sentencing, among other possibilities. Because the sentence was not based on “real facts,” this matter should be remanded for resentencing.

C. Insufficient evidence was presented to support a finding that the alleged crimes occurred.

1. LAW

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014); *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In a sufficiency of the evidence challenge, the defense admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan* at 106. Appellate courts do not review credibility determinations. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). The appellate court considers circumstantial and direct evidence as equally reliable. *Miller* at 105.

RCW 9A.52.020

Burglary in the first degree.

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

RCW 9A.48.090

Malicious mischief in the third degree.

(1) A person is guilty of malicious mischief in the third degree if he or she:

(a) Knowingly and maliciously causes physical damage to the

property of another, under circumstances not amounting to malicious mischief in the first or second degree; or

(b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.

(2) Malicious mischief in the third degree is a gross misdemeanor.

2. ANALYSIS

Here, no reasonable trier of fact could come to the conclusion that defendant was even present on the day of the crimes, or, even if he was, that a burglary occurred. As to the first point, no one except for the victim witnessed the defendant on the premises, despite the fact that a maintenance worker was working there that day. VRP 215. The defendant did not have a vehicle, and therefore would have had to leave on foot. VRP 169.

As to the second point, the testimony as that the defendant was an invitee to the premises who entered lawfully to retrieve his keys. The victim testified that she voluntarily left the door unlocked for the defendant:

A. It was before I got there, because he had called me and he told me that he was going to come and I told him that the door was unlocked, that he could come in.

Q. Okay. And was it common for to you leave the door unlocked for him?

A. That day, yes, because I knew he was coming.

Q. Okay. Did he have a key to your apartment?

A. No.

Q. Okay. So you left the door unlocked because you knew he would

be coming over later that day?

A. Yes.

Q. Okay. And you were fine with him being in the apartment when you weren't there?

A. Yes, I told him he could come in.

See VRP 91.

After the argument, the victim testified that she locked him out, while he was requesting to retrieve the keys to the vehicle:

A. Yes. So I said that at the moment when I was closing the door.

Q. Okay. And when you closed the door, had he left anything behind?

A. He was still asking about those keys.

See VRP 97.

Q. Okay. And once he left the apartment, what did you do?

A. At the moment that I told him that bad word, I knew his reaction was going to be very aggressive, and I knew that he would assault me.

MR. ANDERSON: Objection.

THE COURT: Basis?

THE WITNESS: So the only thing --

THE COURT: Hold on one second.

Even if the defendant were present that day, the victim's own testimony confirmed that his stated intention was to reenter the premises to get the keys, not "with intent to commit a crime against a person or property therein." No nexus was made in this testimony of the victim connecting his entry into the premises with the assault: for example, no threats were uttered

regarding physical violence. The parties had been in a relationship for four years and the victim had customarily left the premises free and open to his entry; therefore, any attempt to use physical force to reenter the premises should not have been construed as malicious mischief because no malice was shown; defendant was an invitee. The judgment and sentence should be vacated to the crimes of burglary in the first degree, malicious mischief, and assault in the fourth degree.

VI. CONCLUSION

The judgment and sentence should be vacated on the basis of sufficiency of evidence and trial irregularities. In the alternative, the matter should be remanded for resentencing.

Respectfully submitted this 3rd day of October, 2017.

/s/ Edward Penoyar
EDWARD PENOYAR, WSBA #42919
JOEL PENOYAR, WSBA #6407
Attorneys for Appellant
PO Box 425
South Bend, WA 98586
(360) 875-5321
Email: edwardpenoyar@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

Anne Cruser
Clark County Prosecutor's Office
anne.cruser@clark.wa.gov
cntypa.generaldelivery@clark.wa.gov
pamela.bradshaw@clark.wa.gov

and mailed postage prepaid to Appellant:

David R. Lopez-Sanchez, DOC #398702
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED this 3rd day of October, 2017, South Bend, Washington.

/s/ Tamron Clevenger _____
TAMRON CLEVINGER, Paralegal
to Joel Penoyar & Edward Penoyar
Attorneys at Law
PO Box 425
South Bend, WA 98586
(360) 875-5321
tamron_penoyarlaw@comcast.net

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