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Court of Appeals
Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

YEVGENIY RODYGIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00078-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not impermissibly allow the admission of ER 404(b) evidence.**
- II. The trial court properly denied Rodygin's motion for a mistrial because the alleged irregularity was not so prejudicial that there is a substantial likelihood that it affected the verdict.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Yevgeniy Rodygin was charged by information with Possession of a Stolen Motor Vehicle occurring on or about January 9, 2016 for an incident in which he took and possessed Annette Brown's 2004 Jeep Liberty. CP 6. Prior to trial, Rodygin elected to take advantage of the State's diversion program. RP 156-161, 164-65; RP Div. 4-5. In order to enter the diversion program a defendant must sign a statement admitting to committing the charged crime. RP 158-59, 167-68. Rodygin signed such a statement. RP 160-64, 167-69. Unfortunately, Rodygin was unable to successfully complete the diversion program. RP 164-65.

As a result, Rodygin's case proceeded to a jury trial in front of the Honorable Bernard Veljacic. The jury convicted Rodygin of Possession of a Stolen Motor Vehicle and the trial court sentenced him to 79 days of

confinement with credit for 79 days served. RP 219-220, 227; CP 31, 34.

Rodygin filed a timely notice of appeal. CP 44.

B. STATEMENT OF FACTS

Rodygin and Annette Brown dated for about six or seven months and got engaged to be married, but by January of 2016 they had permanently broken up. RP 129, 138. Nonetheless, on January 8, 2016, Rodygin showed up at Brown's house in Seattle and refused to leave despite Brown's request that he depart. RP 129-130, 139-140. The two argued and Brown left her home because Rodygin continued to refuse to leave. RP 130, 140. Brown did not leave in her 2004 Jeep Liberty, instead, she left it at her home because it did not have current tags, registration documents, or insurance. RP 136, 141.

When Brown returned home the next day, her Jeep was no longer at her house. RP 131. She knew that Rodygin had taken it without her permission because he had sent her some text messages the previous night that indicated that he had. RP 130-31. Brown testified that she did not give Rodygin permission to take the Jeep that night, that she had not given him her permission to take the Jeep in the days leading up to the incident, and that even when they were engaged and living together she still required him to get her permission before taking the Jeep—it was not a shared vehicle. RP 130-31, 138, 140.

Upon returning home, Brown reported to the police that Rodygin stole her Jeep. RP 135-36. Brown also was able to get Rodygin on the phone and she told him that he did not have her permission to be driving her car. RP 135-37, 141. She requested that he drive it back to her house until she learned that he was in Oregon with it, at which point she told him that he should probably turn himself in to a police station. RP 135-37, 141. Brown also told Rodygin that she had reported the car stolen. RP 136.

At some point, Rodygin, while in possession of Brown's car and on the phone with her, stopped at a gas station in Clark County and informed Brown that a police officer was also present at the station. RP 137, 141-42, 148. Brown told Rodygin to give his phone to the police officer and Rodygin complied. RP 141-42, 149, 152. Brown then told the officer that Rodygin had stolen her car. RP 137, 142, 149, 152. The officer checked and was able to verify that Brown's Jeep had been reported stolen RP 150-53.

The police officer then asked Rodygin about the Jeep. RP 150. First, Rodygin told him that he was in possession of the vehicle because the couple (Rodygin and Brown) was moving to California before changing his story to explain that he had the vehicle because Brown had sent him to Portland to get a job at the Spaghetti Factory. RP 150, 154. Brown denied that either of Rodygin's claims was true. RP 137. The

officer arrested Rodygin and seized the keys to Brown's Jeep from him.

RP 150-51.

Additionally, at trial, the State presented evidence of Rodygin's entry into the diversion program. RP 156-169. Entry requires a defendant to confess to the crime by signing a statement admitting to elements of the charged crime and a summary or paraphrase of the defendant's description of the crime. RP 158-161, 164, 167-68. Rodygin signed such a statement under penalty of perjury and it was read into the record as well as admitted into evidence. RP 161-64. The most relevant portions of that statement follow:

I hereby freely and voluntarily make the following statement. That I, Yevgeniy Rodygin, in the county of Clark, State of Washington on or about January 9th, 2016, did knowingly receive, retain, possess, conceal, or dispose of a stolen motor vehicle, to wit, a 2004 Jeep Liberty VIN #1J4GL48K94W136479 belonging to Annette Brown knowing that this property had been stolen and did withhold or appropriate this property to the use of a person other than the true owner or person entitled thereto. . . .

In particular, on 1/9/16, I had Annette Brown's 2004 Jeep Liberty in my possession. She had given me permission to drive it on previous occasions but had not given me permission on that day. After she realized I had taken her vehicle from her residence in Seattle, Annette Brown reported it stolen to the Seattle Police Department.

I spoke with Ms. Brown while I was in Clark County, and while she was on the phone, I contacted a Ridgefield police officer and he spoke to her on the phone. She told him she

reported her vehicle stolen and I did not have her permission to have it at that time.

RP 162-63.

ARGUMENT

I. The trial court did not impermissibly allow the admission of ER 404(b) evidence.

Prior to trial, Rodygin filed motions in limine. RP 5; CP 8-9. The relevant motion sought to “to exclude testimony of alleged bad acts of the Defendant which are uncharged and not relevant to the charge before the court, specifically: allegations of the Defendant’s drug use, possession of drugs, unlawful imprisonment, *theft of other property*, assault and interfering with domestic violence reporting.” CP 8 (emphasis added). The parties discussed this motion the morning of the trial and were in agreement that Brown’s testimony would generally be limited to the fact that she got into an argument with Rodygin, that he refused to leave her home, and that when she returned to her home that her Jeep was gone. RP 7-8. Rodygin’s drug possession and drug use was specifically discussed as excluded as part of this motion, but the theft of other property was not really addressed.¹ RP 6-8.

¹ Nonetheless, the fair inference from the discussion of the motion is that Rodygin’s other, potential bad acts, which would include the theft of property, would not be elicited from Brown.

When Brown testified, the State asked her what she observed upon returning home:

[BROWN]. That the -- well, I had already known that he had taken the car because we had text messages throughout the night, but all of my stuff was gone in my house.

[STATE]. Okay. So how did you know he had taken the car; he told you?

[BROWN]. He told me.

MR. STAPLES:² Judge, can we have a conference outside the presence of the jury?

RP 131-32. Once the jury was absent, Rodygin asked for a mistrial based on the fact Brown said “but all of my stuff was gone in my house.” RP 132-34. The trial court denied the motion. Rodygin also stated, “I’ll just, I guess just to clean up the record, so I’ll note if I didn’t say it in the moment that I did object to that statement, and I ask that it be struck.” RP 134. When the jury returned the trial court explicitly informed it to “disregard the statement, ‘All my stuff was gone from my house,’ made by the witness” and stated that “I’m striking that from the record.”³ RP 135.

² Mr. Staples was Rodygin’s trial counsel.

³ The trial court continued by stating to the jury “And, again, please – you don’t know what that – if that has anything to do with this case or Mr. Rodygin, so please disregard that.” RP 135. As far as the jury was concerned Brown’s statement could have been an accusation that Rodygin left her home open for theft when he left with her Jeep as her vagueness allowed for interpretations other than that Rodygin stole her property, which she pointedly did not say.

Rodygin now contends that the trial court “over objection, . . . admitted the complaining witness’s reference to” the theft of other property. Brief of Appellant at 8. He further claims that the trial court “abused its discretion when it overruled the defense objection to the excluded testimony, permitting the jury to consider it.” Br. of App. at 8.⁴ These contentions appear to inaccurately reflect the record. *See* RP *supra*. Because the trial court did not allow the admission of the evidence—it ordered it stricken from the record once an objection was made—it did not impermissibly allow the admission of ER 404(b) evidence. Nor did it overrule Rodygin’s objection, which though late coming, was sustained when the jury returned by virtue of the trial court’s curative instruction. RP 135. Thus, to the extent that an error occurred upon Brown mentioning the theft of her other property the error was not the trial court’s.

Even if Rodygin has accurately characterized the error, however, the error was harmless. First, “[j]uries are presumed to follow jury instructions absent evidence to contrary” and this jury was instructed to disregard the challenged statement. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675

⁴ *See also* Br. of App. at 9 (“Mr. Rodygin’s objection to Ms. Brown’s testimony concerning uncharged crimes should have been sustained.”) (citing RP 131).

P.2d 1213 (1984)); RP 135; CP 15⁵. Second, the evidence of Rodygin's guilt was overwhelming. Brown testified unequivocally that she did not give Rodygin permission to drive her vehicle, which she indicated would have been the result even had Rodygin asked for permission since the Jeep lacked current tags, registration documents and insurance coverage, and she reported the car stolen. RP 136, 141. When combined with Rodygin's evasive answers to the police about why he had Brown's Jeep and his full confession to diversion, there is no chance that he would have been acquitted in the absence of Brown's statement about her missing property.

II. The trial court properly denied Rodygin's motion for a mistrial because the alleged irregularity was not so prejudicial that there is a substantial likelihood that it affected the verdict.

Reviewing courts apply an abuse of discretion standard in reviewing the trial court's denial of a mistrial. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (citation

⁵ Jury instruction No. 1 contains the following language: "If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict. . . . If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict."

omitted). The same standard applies to a trial court's decision to deny a motion for a new trial. *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011).

A trial court abuses its discretion when “no reasonable judge would have reached the same conclusion.” *Rodriquez*, 146 Wn.2d at 269. Moreover, a trial court's denial of a motion for mistrial “will only be overturned when there is a “substantial likelihood that the error prompting” the motion for a “mistrial affected the jury's verdict.” *Id.* at 269-70. In evaluating the effect of a trial error or irregularity, courts “examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Emery*, 174 Wn.2d at 765 (citations and internal quotation omitted). When the error at issue involves an “improper witness statement[.]” the “trial court has wide discretion to cure” the error in a manner it sees fit. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citation omitted).

Here, Rodygin argues that the introduction of Brown's statement that “all of my stuff was gone in my house,” “undoubtedly affected the verdict.” Br. of App. at 15. This claim fails because of the overwhelming evidence of Rodygin's guilt, because the error was of minor seriousness, and because Rodygin cannot show that the trial court abused its

discretion when it denied the motion for a mistrial and, instead, provided curative instructions to the jury.

While the intentional violation of a pretrial order by a professional witness would generally be considered a “serious” irregularity or error, the same cannot be said for the statement made by Brown, who is not a professional witness and cannot be said to have intentionally violated a pretrial order. This is especially true since Brown did not explicitly accuse Rodygin of taking the “stuff” she claimed “was gone” from her house upon her return. *Gamble*, 168 Wn.2d at 177-78; RP 131. And though the error did not involve cumulative evidence, i.e., the missing property was not otherwise discussed, the trial court did properly instruct the jury to disregard the statement soon after it was made and again instructed the jury before closing arguments to not consider “evidence . . . [that] was stricken from the record . . . in reaching your verdict.” RP 135; CP 15.

Accordingly, the trial court’s decision to deny Rodygin’s motion for a mistrial was not an abuse of discretion. And the trial court’s denial of the mistrial should not be overturned since there is not a “substantial likelihood that the error prompting” the motion for a “mistrial affected the jury’s verdict.” *Rodriguez*, 146 Wn.2d at 269-70. The jury’s verdict was amply supported by Rodygin’s written confession to the crime, his

evasive answers to the police while in possession of Brown's Jeep, and Brown's undisputed testimony that Rodygin did not have permission to take her car; it did not at all depend on the complained about statement.

CONCLUSION

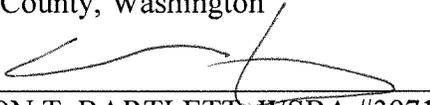
For the reasons argued above, this Court should affirm Rodygin's conviction.

DATED this 13th day of September, 2018.

Respectfully submitted:

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