

FILED
Court of Appeals
Division II
State of Washington
8/24/2018 12:51 PM

NO. 51662-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY PETERS,

Appellant.

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

The Honorable Randall Krog, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied the appellant's mistrial motion.

Issue Pertaining to Assignment of Error

The primary complainant as to assault charges repeatedly testified that the appellant was known to be an unsuitable and dangerous person. Did the court err when it denied the appellant's resulting mistrial motion?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charged appellant Timothy Peters with two counts of second degree assault¹ (Counts 1 and 2) and two counts of fourth degree assault² (Counts 3 and 4).³ CP 58-60. The complainant as to Counts 1, 2, and 4 was Larry Thompson. The complainant as to Count 3 was Justin Morales. CP 59.

As to Counts 1 and 2, the court instructed the jury on the lesser offenses of fourth degree assault. CP 78. The jury deadlocked on Count 2,

¹ RCW 9A.36.021(1)(c) (assault with a deadly weapon). The State alleged the deadly weapons in question were a knife and a brick. CP 58-60.

² RCW 9A.36.041.

³ Over defense objection, the trial court permitted the State to amend the information on the day of trial to add Counts 2-4. The court refused to permit the addition of a fifth count. RP 1-7. The State later withdrew deadly weapon sentence enhancement allegations after Peters objected based on lack of notice. RP 247-53.

on both the greater and lesser charges, but it convicted Peters of the remaining charges.⁴ CP 91-95.

As to Count 1, the trial court sentenced Peters to 15 months of confinement, within the standard range. The court ran the misdemeanor Count 3 and 4 sentences concurrent to that sentence. CP 102; RP 332.

Peters timely appeals. CP 118-19.

2. Trial testimony and mistrial motion

On September 4, 2017 Timothy Peters rode his motorcycle to visit Mark Allen, who lived near the end of Jemtegaard Road in Skamania County. RP 152, 212. Allen owned much of the surrounding land, including a farm and several associated structures. RP 186.

Peters estimated he was driving within the official speed limit. But he usually slowed when passing a barn located along that road. That day, however, Peters did not see any people or animals near the barn. RP 213-14.

On the way back from Allen's residence, Peters noticed that several large six-by-six wooden beams had been placed across the road.⁵ RP 214-15. Peters stopped his motorcycle. RP 215. To the side of the road, Peters

⁴ Based on jury deadlock, the court declared a mistrial as to that count. RP 335-36.

⁵ Peters believed the individuals who attacked him must have removed the beams before the police arrived. RP 230.

saw a man holding a shotgun. RP 216. Out of the corner of his eye, Peters saw another man run up to him from behind. That man grabbed Peters by the throat and choked him into unconsciousness. RP 216.

While passing in and out of consciousness, Peters was beaten. He sustained several injuries, including a concussion and a crushed larynx. RP 216-18, 224-26. Police officers (who eventually arrived at the scene) documented several injuries. Exs. 15, 16, 18.

Allen, the landowner, arrived during the altercation. He brought a shotgun. At one point, Allen ordered Peters to remain on the ground. RP 219. Peters testified he never brandished any weapon. RP 234.

Peters felt relief when Deputy William Helton arrived; he gratefully crawled into the back of Helton's patrol car. RP 219, 224-25. Peters made statements to Helton at the scene. But, because of the beating, Peters had a poor memory of the statements. RP 227, 229-30, 232. Indeed, some of Peters's on-scene statements were inconsistent with his trial testimony. See Ex. 21 (excerpts from deputy's body camera recording, played at RP 266-75). Peters's testimony, however, was accurate. RP 233-34.

Larry Thompson lived on Jemtegaard Road and rented a home on Allen's property. RP 151. Justin Morales, a caretaker at Allen's farm, lived on the farm with his girlfriend Catherine Sandoval. RP 152.

The day of the incident, Thompson was on the phone with Morales when he heard a motorcycle travel past at a high rate of speed. Thompson suspected it was Peters, who had visited the farm before. RP 155. Thompson had asked several people, including Allen, about Peters. RP 153-54.

The State asked Peters about his “relationship” with Peters. Thompson responded,

A: *There is no relationship.*

Q: Okay.

A: *I don't hang out with those types of people.*

Q: Okay.

[Defense counsel]: Objection Your Honor. Non-responsive.

[The court]: Sustained. Disregard.

RP 154 (emphasis added).⁶

Thompson's testimony continued. He and Morales were in the farm's barn working on Morales's car when Peters rode up. Peters stopped outside the barn, where Sandoval was smoking a cigarette. RP 155, 157.

⁶ Before trial, the trial court had ruled that evidence regarding the “character” of witnesses would be excluded. RP 11.

According to Thompson, Peters got off his motorcycle and asked if Sandoval knew who he was. Angry about the obstructions in the road,⁷ Peters stated, “I’m gonna kick some [ass].” RP 156. Morales walked out of the barn and told Peters he recognized him—Morales had previously met Peters at the farm⁸—but that Peters needed to slow down. RP 158. At that point, Peters put his “hands on” Morales. RP 159.

Thompson, having followed Morales out of the barn, stepped between Peters and Morales. RP 159. Peters announced he would fight Thompson. RP 161. Thompson told Peters to take his “best shot.”⁹ RP 161, 179-80. Peters struck Thompson in the jaw. RP 161. Thompson pulled Peters to the ground, and the men exchanged several blows. RP 161-62, 180.

Thompson eventually suggested they stop fighting and extended his hand to Peters. RP 162, 180. But Peters pulled a folding knife from his pocket and made “sweeping” motions toward Thompson.¹⁰ RP 162.

⁷ Morales said he was concerned the motorcycle had driven too fast, and he placed a post in the road to force the motorcyclist to slow on the return trip. RP 97.

⁸ RP 95 (Morales testimony).

⁹ The jury was instructed that an act is not an assault if performed with the assaulted person’s consent. CP 74 (instruction 10).

¹⁰ Morales identified the knife was, in fact, a Leatherman tool. RP 107.

When the prosecutor asked what happened next, Thompson volunteered that he had done “his homework” on Peters. RP 164. Defense counsel objected, and the court sustained the objection. RP 164.

Again asked what happened next, Thompson testified that Morales retrieved a shotgun leaning against an old hitching post. RP 164. The prosecutor asked Thompson to explain why there was a gun there:

Q: Now you mentioned that [Morales] got your shotgun.

A: Yes sir.

Q: And – and how did that shotgun end up at the barn[?]

A: I grabbed it when I went down to go get the brake fluid.

Q: Okay. And what was your reason for grabbing the shotgun?

A: Because I had done homework on –

Q: And –

[Defense counsel]: Objection Your Honor.

Q: - and just what was your reason – what was –

A: *[M]y reason was is I know that he packs either a gun or a knife with him –*

[Defense counsel]: Objection Your Honor.

[The court]: Sustained.

A: - I was –

[The court]: Don't answer –

A: - sorry.

[The court]: Disregard

Q: It's okay.

[The court]: - the last statement.

RP 165-66 (emphasis added).

Continuing, Thompson testified Morales pointed the shotgun at Peters and told Peters to drop the knife. RP 166. The prosecutor then returned to Thompson's reason for bringing the shotgun to the barn. RP 166.

Q: So the shotgun at the – at the property was – was your shotgun, is that correct?

A: Yes [sir].

Q: And you – where did you bring it from?

A: My house.

Q: Okay. And when did you bring it to [the barn]?

A: After I had walked up and saw that the 6 x 6 [post] was drug [sic] across the road. I was concerned about who the actual person was. *And when I walked down to my house to grab the brake fluid a little voice in the back of my head was . . . if it is this person you need to make sure that you're armed because of what you've heard about this person.*

[Defense counsel]: Objection Your Honor. And I –

[The court]: I'm going . . . to have the jurors step out[.]

RP 166 (emphasis added).

After the jurors left the courtroom, defense counsel moved for a mistrial, pointing out that Thompson had repeatedly answered questions in a non-responsive manner.¹¹ RP 166. Further, Thompson seemed “hell-bent” on painting Peters as a bad person. RP 167. A limiting instruction would only draw more attention to Thompson’s testimony. But counsel reluctantly agreed that such an instruction should be given in order to preserve the defense objection. RP 168.

The court denied the mistrial motion. RP 168. When the jury returned, the court instructed the jurors to disregard Thompson’s testimony as previously directed, and, specifically, to disregard Thompson’s “opinion testimony” regarding Peters. RP 171.

Resuming his testimony, Thompson testified that Peters put the knife in his pocket and walked toward his motorcycle. But on the way, Peters picked up a chunk of brick and held it up as if he planned to throw it

¹¹ The court had also sustained several objections to other non-responsive testimony by Thompson. E.g. RP 155, 157, 159, 160.

at Thompson.¹² RP 172. Peters started his motorcycle and announced he was leaving. RP 173.

But Thompson decided he did not want Peters to leave. He pulled Peters off his motorcycle and to the ground. RP 174. Thompson acknowledged he used “[a]sphalt and knuckles and a – and a elbow” to strike Peters during their fight. RP 184.

Law enforcement arrived approximately 45 minutes after the incident. RP 184. Deputy Helton testified that, by then, all the participants were standing in a semicircle. RP 68. Helton asked what happened. RP 68. Peters acknowledged he had been driving too fast and said he was sorry. RP 68. But, as Thompson recounted *his* version of events, Peters grew agitated, so Helton asked Peters to sit in his patrol car. RP 69.

Once in the car, Peters reported that the farm-dwellers had assaulted him and stolen his money. RP 72, 77. Helton offered to look for the money in Peters’ backpack. RP 72. Helton found a Leatherman folding knife and a small amount of marijuana, but the money was gone. RP 72.¹³

¹² This act formed the basis for the Count 2 charge, on which the jury ultimately deadlocked. E.g. RP 295 (State’s closing argument).

¹³ Sandoval testified that after the fight, she found several items on the ground and placed them in Peters’s backpack. RP 145.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED PETERS'S MISTRIAL MOTION FOLLOWING REPEATED, INCURABLY PREJUDICIAL REFERENCES TO HIS PURPORTED DANGEROUSNESS AND BAD CHARACTER.

The trial court erred when it denied Peters's mistrial motion following Thompson's repeated assertions—in violation of an order in limine—that Peters was dangerous and of bad character. Because no instruction could have cured the resulting prejudice, this Court should reverse each of Peters's assault convictions and remand for a new trial.

1. This Court must carefully consider three relevant factors to determine whether a serious trial irregularity warrants a new trial.

A reviewing court is guided by three factors in determining whether a mistrial is required. Consideration of the factors reveals a mistrial was warranted.

This Court reviews a trial court's denial of a motion for mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In evaluating whether a mistrial should have been granted, this Court considers (1) the seriousness of the irregularity; (2) whether the evidence conveyed to jurors was cumulative of other evidence, and (3) whether admission of the illegitimate evidence could be cured by an instruction to disregard. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)

(where witness revealed previously excluded evidence that Escalona had committed a similar crime in the past, reversal was required, even though the trial court attempted to cure the error).

Character evidence is generally inadmissible. But an exception exists for “evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.” ER 404(a)(1). To be admissible, however, such character evidence must be proved in one of only two ways:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

ER 405(a), (b). As to reputation evidence under ER 405(a), a witness's personal opinion is insufficient to lay a foundation for such evidence. See State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993) (similar analysis under ER 608).

Under ER 404 (b), moreover, evidence of “other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). Regardless of relevance or probative value, evidence that

relies on the propensity of a person to commit a crime cannot be admitted to show the person was more likely to commit that crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Here, before trial, the trial court preemptively excluded evidence regarding any witness's character. RP 11.

When testimony violates a pretrial order excluding certain evidence, the ultimate question is whether testimony violating the order deprived the accused of a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010) (citing State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)).

2. Because Peters satisfies each of the three relevant factors, a mistrial was the only suitable remedy.

A mistrial was warranted because Peters satisfies each of the three Escalona factors. This Court should reverse the trial court and remand for a new trial on each of the three assault convictions.

As for the first factor, the irregularities were repeated and serious, pervading the testimony of the State's star witness. Thompson asserted that (1) Peters was the sort of person he would not associate with, (2) based on Thompson's inquiries in the community, Peters was known to carry weapons, and (3) based on such inquiries, Thompson knew Peters was the sort of dangerous person that needed to be repelled with a shotgun.

Some of this testimony is strikingly similar to the forbidden testimony in Escalona. There, Escalona was accused of assaulting another man with a knife. The assault complainant revealed (in non-responsive testimony) that Escalona had previously stabbed someone.

During cross examination the complainant was asked about a prior occasion—not involving Escalona—during which he had been assaulted with a knife. Indeed, the complainant had told police that he was nervous when he saw Escalona with a knife because of the prior assault. Escalona, 49 Wn. App. at 253. The following exchange took place between defense counsel and the complainant:

Q. Back in 1981 were you assaulted with a knife?

A. Yes.

Q. You were stabbed on the street, is that right?

A. Yes.

Q. By several people.

A. Four.

Q. By four people?

A. Yes.

Q. Not Mr. Escalona?

A. No.

Q. That was before you knew Mr. Escalona?

A. Yes.

Q. And you were very nervous on this particular day, is that correct?

A. This is not the problem. [Escalona] already has a record and had stabbed someone.

Id.

Defense counsel immediately moved to strike the answer and asked that the jury be excused. The judge ordered the statement stricken and excused the jury. Counsel moved for a mistrial, but the court denied the motion. When the jury returned, the judge instructed the jury to disregard the complainant's last answer. Id. at 253-54.

This Court, observing that the irregularity was "extremely serious," id. at 255, ultimately determined Escalona's assault conviction should be reversed. Id. at 256.

Here, although there was no direct assertion that Peters had a criminal record, Thompson's testimony was worse in several respects. According to Thompson, Peters was a bad person known to carry weapons. He was, moreover, so dangerous Thompson felt compelled to arm himself.

The trial court had excluded all character evidence. Yet Thompson, via testimony that he had done his "homework" on Peters, asserted that Peters had a reputation for violence and was quite simply a bad person.

Such evidence was placed before the jury without the proper substantive or procedural “bona fides.” ER 404; ER 405. Thus, the first factor weighs in Peters’s favor.

The next factor considers whether the invalid testimony was cumulative of properly admitted evidence. Escalona, 49 Wn. App. at 255. It was not. The evidence was clear that even Peters thought he might have been driving too fast. But such a minor transgression is a far cry from the type of bad behavior suggested by Thompson’s persistent, and ultimately successful attempts, to paint Peters as a dangerous person.

The final question is whether any curative instruction was adequate. Id. Like the previous two factors, this final factor also weighs in favor of mistrial as the only appropriate remedy. While it is presumed that juries follow a court’s instructions to disregard testimony,¹⁴ no instruction can “remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” Id. (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Peters testified that he was attacked, and his money stolen, by the farm-dwellers. Complainant Thompson bolstered his own version of events

¹⁴ See State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

(and the State's case) with unsupported claims that Peters was known to be a bad and dangerous person who carried weapons. On this record, the trial court's instruction to disregard the evidence was incapable of curing the enduring prejudice created by Thompson's persistent efforts at painting Peters in a bad light. Introduction of the evidence therefore deprived Peters of his right to a fair trial. Gamble, 168 Wn.2d at 178.

In summary, because the only appropriate remedy was a mistrial, reversal is required. The remedy is a new trial on each of the convictions. Escalona, 49 Wn. App. at 257.

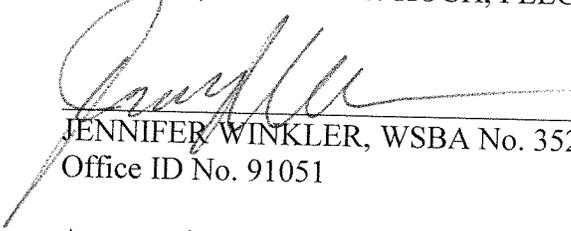
D. CONCLUSION

The trial court erred when it denied Peters's mistrial motion following repeated, incurably prejudicial references to his purported bad character and dangerousness. This Court should reverse each assault conviction and remand for a new trial.

DATED this 24th day of August, 2018.

Respectfully submitted,

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August 24, 2018 - 12:51 PM

Transmittal Information

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Superior Court Case Number: 17-1-00058-1

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