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Division II
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NO. 54101-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK JOHNSON,

Appellant.

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

The Honorable Patricia M. Fassett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Denial of appellant's motion for mistrial denied him a fair trial by an impartial jury.

2. The court erroneously imposed a jury demand fee.

Issues pertaining to assignments of error

1. A prospective juror made statements during voir dire based on his years of experience that law enforcement officers put in hard and honest work in developing cases, and that the prosecutor's office provides checks and balances, so that charges are only filed if they can be proved. Two other prospective jurors with law enforcement expertise confirmed those statements. Where the prejudicial impact of these expert-like comments on the presumption of innocence could not be overcome, did the court err in denying appellant's motion for mistrial?

2. The sentencing court struck the criminal filing fee, apparently finding appellant indigent, but failed to check the box on the Judgment and Sentence indicating its finding and failed to strike the jury demand fee. Where an indigent defendant cannot be required to pay a jury demand fee, is remand required to enter the indigency finding and strike the jury demand fee?

B. STATEMENT OF THE CASE

Appellant Mark Johnson was charged in Cowlitz County Superior Court with second degree assault by strangulation, possession of methamphetamine, two counts of tampering with a witness, and 13 counts of violating a protection order. All but the possession count were charged as domestic violence offenses. CP 31-38; RCW 9A.36.021(1)(g); RCW 69.50.4013(1); RCW 9A.72.120; RCW 26.50.110(1); RCW 10.99.020. The case proceeded to jury trial before the Honorable Patricia M. Fassett.

During voir dire defense counsel acknowledged that there were likely prospective jurors on the venire who had already made up their minds that Johnson was guilty, simply because allegations had been made. RP 135. Counsel asked the prospective jurors whether anyone felt they could not hold the State to its burden and give Johnson a fair trial. Juror No. 22, who had previously said he was a retired law enforcement officer who had worked his whole life in police work¹, answered as follows:

Well, I feel like – excuse me – I’d give him a very fair trial, but to be honest, after all the years I’ve worked as an officer, and I know how hard and honest these officers work on their case reports and they don’t go forward with them unless they feel they have a case that they felt – they feel they can prove, and when then it goes beyond that to the Prosecutor, who is the checks and balances, and he looks at it and – he or she – and if he does not concur with that, it doesn’t go any further. So, as a former officer and a citizen, there’s doubt in my mind. I can’t not tell you that.

RP 126-37.

¹ RP 62.

Defense counsel then asked if anyone else felt the same way. Juror No. 62, who had previously said he is currently with the Cowlitz County Sherriff's office², responded, "Same thing. I'm current and so ... I know all of it has to happen." RP 137.

Juror No. 13 joined in, saying she used to be a King County Sheriff's deputy and "I do also know the extent that goes in to doing the reports on something, and the checks and balances." RP 137. She did not think that knowledge would taint her judgment, however. *Id.*

When the prospective jurors left the room defense counsel noted that both Juror No. 22 and Juror No. 62 had cited professional knowledge and experience of the judicial process, corroborating and bolstering the State's case by saying they know from personal experience the hard work police officers do vetting the facts, and charges would not have been brought unless the prosecutor determined there was something there. And Juror No. 13 chimed in on that. RP 149. Counsel argued that such bolstering by jurors who hold themselves out as experts pollutes the whole jury pool, and he moved for a mistrial. RP 150-52. He argued further that any attempt to question the remaining jurors about whether they were swayed by these statements would only ring the bell louder. RP 153.

² RP 64.

The court said it was not inclined to grant a mistrial, but it would allow either party to reopen voir dire. RP 159. It acknowledged the defense concern that questioning on the topic would ring the bell louder, but the State argued that further voir dire was required, regardless of that concern. RP 160. The court decided it would question the jurors. RP 160. After excusing several jurors for cause, including Jurors 22 and 62, the court informed the remaining jurors,

There was a comment made by a juror, a former law enforcement officer about what goes on to get to this point in a criminal case, and we want to know if that comment, in and of itself, had any way changed anyone's perspective about this case or affected your ability to feel that you can move forward fairly and impartially to hear the facts of this case.

RP 173. There was no response from the venire. *Id.*

The case proceeded to trial. Johnson's wife, J.J., testified that on June 4, 2019, she and Johnson were arguing after he accused her of cheating. RP 243. She ran out of the house, got into her car, and locked the doors. RP 246, 248. Johnson followed her and was able to get into the car through the rear hatch. RP 248. J.J. testified that Johnson grabbed her hair and used it as leverage to pull himself toward the front of the car. He then grabbed her by the throat and squeezed her neck until she couldn't breathe, and this lasted ten to 15 seconds. RP 250-52. After letting go of her neck, Johnson punched her in the shoulder, and J.J. thought he had

broken it. RP 252. J.J.'s daughter went to the neighbor's house to ask for help, and the neighbor called 911. RP 271, 293. J.J. was taken to the hospital and released when it was determined nothing was broken. RP 256-57. The investigating officer drove her home. RP 258.

Defense counsel established that J.J. had not mentioned choking when her neighbor was on the phone with 911 asking what happened. RP 463-69. She did not mention it when she spoke to the police at the scene. RP 273, 275, 326-27. She did not mention it to the EMTs who transported her to the hospital. She did not mention it to the medical professionals at the hospital. RP 275. She did not mention it when she spoke to the investigating officer again at the hospital or when he drove her home. RP 273, 276, 331, 348. The first time she mentioned being choked was the following day, when a domestic violence detective asked about marks on her neck. RP 262, 277, 279, 351, 423-24. At that point J.J. gave a description of symptoms the detective believed were consistent with strangulation. RP 424.

In closing argument defense counsel urged the jury not to be swayed by the fact that the State had made 17 accusations against Johnson but instead to decide each count on the evidence. RP 548. Counsel argued that the evidence showed fourth degree assault. RP 549. The real time

reporting in the 911 call established what happened, and J.J. did not disclose strangulation at that point because it did not happen. RP 550, 552.

The jury returned guilty verdicts on all counts, and the court imposed standard range sentences. CP 168-203, 209. It waived the criminal filing fee but imposed a jury demand fee. CP 213; RP 592. Johnson filed this timely appeal. CP 220.

C. ARGUMENT

1. THE COURT’S REFUSAL TO DECLARE A MISTRIAL DEPRIVED JOHNSON OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The Washington Constitution guarantees a criminal defendant the right to a fair trial by “unbiased jurors.” Wash. Const., art. I, § 22; *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). The Sixth Amendment to the United States Constitution also guarantees the right to a fair trial by impartial jurors. U.S. Const. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). “Even if ‘only one juror is unduly biased or prejudiced,’ the defendant is denied his constitutional right to an impartial jury.” *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979); *see also United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before

it. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 945-46, 71 L.Ed.2d 78 (1982).

The erroneous denial of a motion for mistrial violates the right to a fair trial. See *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity “prejudiced the jury, thereby denying the defendant his right to a fair trial.”). A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). A trial court’s denial of a motion for mistrial is reviewed for abuse of discretion. *Id.* Denial of a motion for mistrial must be overturned when there is a substantial likelihood the prejudice affected the verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

The appellate court determines the prejudicial effect of a trial irregularity by examining (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. *Babcock*, 145 Wn. App. at 163; *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In *Babcock*, the defendant was charged with child rape, harassment, and kidnapping as to one child and child molestation as to a

second child. Hearsay testimony as to the child molestation charge was admitted at trial, but when the child refused to testify, the charge was dismissed. The trial court denied Babcock's motion for a mistrial, however, and instead instructed the jury to disregard the child molestation allegations. The Court of Appeals held that the trial court abused its discretion by refusing to grant a mistrial. *Babcock*, 145 Wn. App. at 158.

First, the testimony regarding the child molestation charge amounted to evidence of other bad acts, which is an extremely serious trial irregularity. Because the verdict on the remaining charges depended solely on the credibility of the victim's testimony, which was at times inconsistent, the testimony regarding the dismissed charge had a high potential for prejudice. *Id.* at 163-64. Next, because evidence of the child molestation allegations was not cumulative of evidence concerning the remaining charges, that factor also weighed in favor of a mistrial. *Id.* at 164.

Finally, the Court of Appeals considered whether the trial court's instruction to disregard testimony regarding the molestation could have cured the irregularity. It noted that, despite the presumption that jurors will follow the court's instructions, "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.* at 164 (quoting *Escalona*, 49 Wn. App. at 255 (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968))). The court held that there was no guarantee the jury could effectively disregard the highly prejudicial evidence of other similar acts. *Babcock*, 145 Wn. App. at 165.

The jury in this case was similarly tainted by exposure to prejudicial information. When a prospective juror shared his knowledge about how carefully evidence is evaluated by the police before it’s even presented to the prosecutor, whose evaluation serves as checks and balances before a charging decision is made, it was clear to the court that his bias made him unsuitable to serve as a juror. RP 136-37, 159-60. The remaining venire heard this opinion, as well as that the juror had spent his life doing police work, giving him a certain expertise in this area. RP 62. Two other prospective jurors, each with law enforcement expertise, joined in to confirm the truth of the juror’s statements. RP 64, 137. Exposure to this expert opinion wears away the presumption of innocence, leaving the impression that the State is well on its way to meeting the burden of proof before any evidence is presented at trial. This constitutes a serious irregularity. Because no evidence had yet been presented, the juror’s statements cannot be considered cumulative evidence. These factors support Johnson’s motion for mistrial.

The Ninth Circuit held that denial of a mistrial was prejudicial under similar circumstances in *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997). In *Mach*, the defendant was charged with sexual conduct with a minor. During voir dire, a prospective juror stated that she was a social worker with Child Protective Services. She said she would have difficulty being impartial given her line of work and that she had never, in her three years in that position, heard of any case in which a child had lied about being sexually assaulted. She repeated this information at least three times. Finally, the judge reminded the juror and the venire that the reason for trial is to determine what happened based on the evidence presented and the arguments of counsel. *Mach*, 137 F.3d at 632.

Mach moved for a mistrial, arguing that the entire panel had been tainted by the prospective juror's statements. The court denied the motion but struck the juror for cause. *Mach* again moved for a mistrial, arguing the problem was the effect the juror's statements had on the other panel members, but the court again denied the motion. *Id.*

On review the Ninth Circuit noted that the juror presented as an expert and had stated four times that she had never known of a case where a child lied about being sexually assaulted. At a minimum, when *Mach* moved for a mistrial, the court should have conducted further voir dire to

determine whether the venire had been tainted by her expert-like statements.

Given the nature of Bodkin's [the prospective juror] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury.

Id. at 633. The Court concluded that the jury's exposure during voir dire to repeated statements from an expert in the relevant field resulted in the swearing in of a tainted jury, such that all the evidence presented at trial was received by a jury biased from the outset. *Id.* Reversal was required under the harmless error standard, given the nature of the information presented by the prospective juror and its connection to the case. *Id.* at 634. Because the verdict turned on whether the jury believed the child or the defendant, there could be no doubt that the prospective juror's statements had a tremendous impact. *Id.*

This Court distinguished *Mach* in *State v. Strange*, 188 Wn. App. 679, 354 P.3d 917, *review denied*, 184 Wn.2d 1016 (2015). In *Strange*, the defendant was charged with child molestation and voyeurism. During voir dire a prospective juror stated the belief that if an accusation of child molestation is made something must have happened. *Strange*, 188 Wn. App. at 682. The juror denied having much experience with the subject

however. *Id.* This Court noted that the Ninth Circuit in *Mach* had relied on the fact that the prospective juror there had a certain amount of expertise and had made multiple statements that she had never known a child to make false accusations of molestation. *Id.* at 685-86 (citing *Mach*, 137 F.3d at 632-33). Neither of those circumstances was present in *Strange*. None of the jurors claimed any expertise or claimed to speak authoritatively, and the venire did not hear multiple statements during voir dire which could potentially bias them regarding the central issue at trial. *Id.* at 686-87.

The situation here is far more similar to *Mach* than *Strange*. Juror No. 22 presented himself as an expert in police investigations, having stated that he spent his life doing police work and he knows from years of experience what has to happen before charges are filed. RP 62, 136-37. He gave his assurance that police officers are hard-working and honest in preparing a case and that prosecutors serve to provide checks and balances, so that charges are not filed unless they are supported by the necessary evidence. RP 136-37. Two other prospective jurors with similar expertise agreed with the accuracy of these statements. RP 137. With this “expert opinion” the jury would be far more likely to presume Johnson guilty from the fact that charges were filed or to overlook any shortfall in the State’s evidence.

In *Mach*, the Ninth Circuit suggested that at the very least the court should have conducted further voir dire before ruling on the motion for mistrial. *Mach*, 137 F.3d at 633. With that in mind, the court below attempted to contain the damage done by the prospective juror's expert-like statements, while taking into account the defense concern about over-emphasizing the importance of those statements. The court asked the remaining venire whether the officer's comments "changed anyone's perspective about this case or affected your ability to feel that you can move forward fairly and impartially to hear the facts of this case." RP 173. Unsurprisingly, there was no response to the court's vague query.

The lack of response does not serve as assurance that there was no prejudicial impact. It is not clear that the jurors would have understood how to answer the court's question, as vague as it was. As defense counsel argued, however, any attempt to be more direct regarding the impact of the expert-like statements on the presumption of innocence would have served only to further emphasize the problematic comments, ringing the bell louder rather than removing the prejudice. RP 153; *see Babcock*, 145 Wn. App. at 164-65 (court's instruction ineffective in removing prejudicial impression of inherently prejudicial evidence).

As in *Mach*, the jury's exposure during voir dire to the prospective jurors' assurances regarding the state's case resulted in the swearing in of

a tainted jury. Defense counsel's argument that the jury should not be swayed by the sheer number of charges but should instead decide each count based on the evidence could not overcome the fact that all the evidence presented at trial was received by a jury biased from the outset. RP 548; *see Mach*, 137 F.3d at 633.

Moreover, the comments by the law enforcement officer during voir dire were particularly harmful in light of the evidence presented at trial. There was significant dispute regarding the sufficiency of the State's evidence as to the assault charge. The defense established that J.J. had not reported being strangled on the day of the incident, despite several opportunities to do so. RP 273, 275-76, 326-27, 331, 348, 463-69. Instead, she first claimed she was choked only after a domestic violence detective, admittedly acting as an advocate rather than objectively evaluating the facts, asked her about some marks on her neck the following day. RP 277, 351, 418, 424, 454. Given the expert-like assurances during voir dire that law enforcement officers and prosecutors carefully evaluate the facts before charging a defendant, it is likely that at least one juror entered deliberations with the conviction that the weight of the evidence had been settled before trial even began. *See Mach*, 137 F.3d at 633. Such bias violated Johnson's right to an impartial jury. *See Momah*, 167 Wn.2d at 152 (An essential element of a fair trial is a jury capable of deciding the

case solely on the evidence before it). Nothing short of a new trial can ensure that Johnson is tried fairly.

2. REMAND IS REQUIRED SO THAT THE COURT CAN ENTER A FINDING OF INDIGENCY AND STRIKE THE JURY DEMAND FEE.

A convicted defendant may be required to pay costs incurred by the state in the prosecution. RCW 10.01.160(1). A sentencing court is permitted, but not required, to impose a jury demand fee of \$250. RCW 36.18.016(3)(b); RCW 10.46.190; *State v. Lundy*, 176 Wn. App. 96, 107, 308 P.3d 755 (2013) (describing jury demand fee as discretionary); *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253, review denied, 172 Wn.2d 1021 (2011). The court may not order the defendant to pay costs, however, if the defendant is indigent at the time of sentencing. RCW 10.01.160(3). Even the mandatory criminal filing fee must be waived if, at the time of sentencing, the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h).

Although there was no discussion regarding Johnson's indigency at sentencing, the court struck the criminal filing fee and the drug enforcement fund fee from the Judgment and Sentence. CP 213; RP 592. It did not strike the jury demand fee, however. *Id.* Since the court waived the criminal filing fee, it apparently found Johnson indigent as defined in RCW 10.101.010(3)(a) through (c), despite its failure to check the box on

the Judgment and Sentence indicating that finding. *See* CP 208. This court should remand for entry of the indigency finding and to remove the jury demand fee.

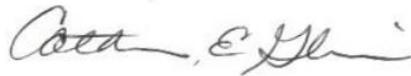
D. CONCLUSION

For the reasons addressed above, this Court should reverse Johnson's convictions and remand for a new trial. In addition, the sentencing court should enter a finding of indigency and strike the jury demand fee.

DATED July 14, 2020.

Respectfully submitted,

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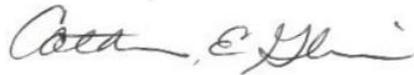
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Catherine E. Glinski
Done in Manchester, WA
July 14, 2020

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