

FILED
Court of Appeals
Division II
State of Washington
9/9/2020 1:51 PM

NO. 54101-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK STEVEN JOHNSON,

Appellant.

BRIEF OF RESPONDENT

RYAN P. JURVAKAINEN
Cowlitz County Prosecuting Attorney

SEAN M. BRITTAIN, WSBA #36804
Deputy Prosecuting Attorney
Attorneys for Respondent

Cowlitz County Prosecuting Attorney
Hall of Justice
312 SW First Avenue
Kelso, WA 98626
(360) 577-3080

TABLE OF CONTENTS

	PAGE
I. RESPONSE TO ASSIGNMENTS OF ERROR	1
II. STATEMENT OF FACTS.....	1
III. ARGUMENT.....	6
A. The Court Did Not Err In Denying The Appelleant's Motion For A Mistrial.	6
B. The State Concedes That The Trial Court Did Not Inquire Into The Appellant's Ability To Pay Legal Financial Obligations.....	12
IV. CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases

Federal

State v. Mach, 137 F.3d 630 (9th Cir. 1997)..... 3, 8, 9, 10, 11, 12

Washington State

State v. Benberg, 1 Wn. App 1060 (2018) (unreported)..... 11, 12

State v. Castellanos, 132 Wn.2d 94, 97
935 P.2d 1353 (1997)..... 6

State v. Greiff, 141 Wn.2d 910, 921
10 P.3d 390 (2000)..... 6

State v. Lewis, 130 Wn.2d 700, 707
927 P.2d 235 (1996)..... 7

State v. Ramirez, 191 Wn. 2d 732
426 P.3d 714 (2018)..... 13

State v. Russell, 125 Wn.2d 24, 85
882 P.2d 747 (1994)..... 7

State v. Strange, 188 Wn. App. 679 (2015), 11

Other Authorities

Appellant's Brief..... 10

Page

Rules

GR 14.1 10

I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in denying the Appellant's motion for a mistrial, as no statements made in the presence of the entire jury panel were sufficient to taint the jurors that sat on the case.
2. The State concedes that the court did not inquire into the Appellant's ability to pay legal financial obligations and imposed the LFOs.

II. STATEMENT OF FACTS

The State charged Mark Johnson, the Appellant, in Cowlitz County Superior Court with Assault in the Second Degree DV, Violation of the Uniform Controlled Substances Act – Possession, two counts of Tampering with a Witness DV, and thirteen counts of Violation of a Protection order DV. CP 31-38. The case proceeded to a jury trial on September 11 and 12, 2019. 1RP. During voir dire, the Appellant's trial counsel asked the entire jury panel:

So, I've -- you've been asked by the judge, you've been asked by Mr. Brittain. Now it's my turn: who thinks that's too hard of a burden to handle? Who feels like they want to give him a fair trial but, you know what, in all honesty I just might not be the right person to do it. No. 22?

1RP at 136. Juror 22 responded:

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.

1RP at 136-37. The Appellant's trial counsel followed this statement by asking the rest of the jury panel whether or not they felt the same way, "Okay, I appreciate that very much. Anybody else with that kind of same - same thing? Feel [indiscernible]?" 1RP at 137. Another juror stated, "Same thing. I'm current, and so that's -- I know -- I know all of it has to happen." 1RP at 137. Juror 13 then stated,

I also used to be a King County Sheriff's deputy, but that was 18 years ago, so I just work in the school system now; but, I do also know the extent that goes in to doing the reports on something, and the checks and balances. So, I see what he's saying, but I -- I don't think that would taint my opinion, just because I know you have to look at all of the evidence and you have to look at all that stuff and see if it fits, like you're seeing what the crime is. I don't think that that would taint my judgment, but I figured I better tell you that.

1RP at 137.

The Appellant's trial counsel did not stop or attempt to stop Juror 22 at any point during his statement. Instead, as noted above, the Appellant's trial counsel asked the entire panel to comment on Juror 22's statement. In total, he independently called up on eight jurors to discuss their feelings about impartiality in light of Juror 22's statement. 1RP at 137-142.

At the end of his voir dire, the Appellant's trial counsel requested a mistrial, claiming that the entire panel had been tainted by Juror 22's statement. 1RP at 149. The Appellant's trial counsel relied upon *State v. Mach*, 137 F.3d 630 (9th Cir. 1997), comparing Juror 22's statement to a self-professed expert in child sex investigations who repeated on four separate occasions that child victims never lie. 1RP at 151-53. The State objected to the motion to mistrial, noting that the present matter was factually distinct from *Mach* because Juror 22's single statement was general in nature, unlike the four specific statements made in *Mach*. 1RP at 154-56. The trial court, the Appellant's trial counsel, and the State all agreed that, as stated by *Mach*, additional voir dire of the jury was needed. The trial court determined that the best manner to handle this issue was to ask the entire panel the following:

I'm going to say there was a comment by a juror sitting in the front row down here about law enforcement and their time on law enforcement, what it takes for a charge to get to this point. Does any of that affect your ability to be fair and impartial and move forward, change anybody's opinion.

1RP at 169. The trial court would permit the State and defense to further inquire from there.

The jury panel was brought back into the courtroom and voir dire continued. The trial court asked the panel the above-stated question. Not a single member of the panel indicated that their ability to be impartial had

been tainted by Juror 22's statement. 1RP at 173. The trial court then allowed the State and the defense to reopen their voir dire to this particular issue. The State declined to ask further questions. The Appellant's trial counsel questioned the remaining jury panel. 1RP at 173-75. He individually called upon members of the panel and examined their ability to be impartial in light of Juror 22' statement. With Juror 26, the following dialogue took place:

MR. MAHER: ...we had a lot of people on the fence, kind of, and some of them are no longer here and that's why, people who couldn't say I will be impartial. I can be impartial. I will be presuming innocence going into this. I won't be inclined to believe because there's so many charges, that he did it. And the question the judge just asked and that I still have is: we've heard from some people who make these decisions who are involved with this process, and their statements could be convincing. They could be persuading. They could be persuasive, excuse me. And I'm curious about -- I'll start with No. 26, I've been picking on you a little bit. Did hearing from those other jurors, law enforcement folks, I mean one with a lot of experience --

JUROR: Right.

MR. MAHER: -- kind of, you know, their feeling --

JUROR: It's a little bit of extra information to know some people in law enforcement. I think I could try to be impartial, but I am -- I am presuming innocence, but I'm probably not as straight down the middle as I should be.

MR. MAHER: More inclined to the prosecution?

JUROR: Yeah.

1RP at 173-74. With Juror 46:

MR. MAHER: Okay. And is anybody else, based on this long conversation, day-long conversation now we've had today, that recently was broken up after law enforcement kind of weighed in -- people with law enforcement experiment (sic) -- experience, is anybody else kind of now, where before, were kind of like, oh, that's kind of an iffy bet, I'm going to try. Is anybody else moved by those statements to more inclined to prosecute? More inclined to believe somebody probably did something? 46?

JUROR: I was aware of that process --

MR. MAHER: Okay.

JUROR: -- and I'm pro law enforcement, but I also have a lot of personal friends that are officers and some of them are --

MR. MAHER: Okay.

JUROR: -- [indiscernible] know that, so I think I can be impartial. But I am pro law enforcement.

1RP at 174-75. The Appellant's trial counsel then followed up with Jurors 10, 11, and 12:

MR. MAHER: Okay. And in no way -- I hope I'm not coming across as anti-law enforcement, and I greatly support our -- I know them well, we work with them well, Mr. Brittain works with them very closely, as well. Just simply hearing from them and them kind of weighing in on the process, I mean, that's what was spoken about. That's -- that's the key issue that's kind of led to another pause for us to have to come back. Hearing about the process, was that something too far for anybody else? Then -- is it Juror No. 10, was that one step too far for you? Or are you right where you were before those statements?

JUROR: I'm not [indiscernible].

MR. MAHER: Fine? Okay. And 11?

JUROR: Yes.

MR. MAHER: Same for you? 12?

JUROR: (No audible response.)

1RP at 175.

The Appellant's trial counsel did not renew his motion for a mistrial. Instead, he conducted his preemptory challenges and agreed to the jury being seated as picked by both parties. 1RP at 176-77. The Appellant was convicted of each charged count as charged and sentenced. CP 168-203, 209. The Appellant then filed a timely appeal. CP 220.

III. ARGUMENT

A. The Court Did Not Err In Denying The Appelleant's Motion For A Mistrial.

A grant or denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The trial court abuses its discretion when no reasonable person would take the position of the court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A denial of a motion for mistrial will only be overturned "when there is a substantial likelihood the prejudice affected jury's verdict." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Additionally, a motion for mistrial should only be granted when the defendant has been so

prejudiced that nothing short of a new trial will ensure that the defendant will be tried fairly. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

The Appellant's argument fails for three reasons. First, the Appellant's trial counsel clearly abandoned his motion for a mistrial after the additional voir dire was completed. The Appellant's trial counsel had an opportunity to further question the jury panel about their ability to remain impartial throughout the jury trial in spite of Juror 22's statement. After asking a generalized question to the panel as a whole and then speaking directly with five separate individuals, the Appellant's trial counsel did not renew his motion for a mistrial. Instead, he utilized his preemptory challenges and agreed to sit a jury as selected by both parties. Thus, his motion was abandoned because he realized there was no merit in making such an argument.

Second, the Appellant's reliance upon the results of *Mach* is misplaced. In *Mach v. Stewart*, a child sexual assault case, a prospective juror was a social worker who stated she would have a difficult time being impartial because of her line of work. *Mach*, 137 F.3d at 632. She told the entire panel that she had a background in psychology, took psychology courses, and worked extensively with psychologists and psychiatrists. *Id.* She stated that, in her experience, sexual assault was confirmed in every

case where it was reported and in her three years no child had lied about being sexually assaulted. *Id.* She repeated these statements three additional times. Mach moved for a mistrial, arguing the entire panel was tainted. *Id.*

At a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by Bodkin's expert-like statements. Given the nature of Bodkin's 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.

Id.

Juror 22's statements were not the same as those made by the juror in *Mach*. Juror 22 made a generalized statement about police investigations and how cases end up in trial. There were no specific statements about the domestic violence investigations or trials, nor were there any statements about the veracity or honesty of a domestic violence victims. Juror 22 was not vouching for domestic violence victims or stating that the State's case had already been proven. Instead, Juror 22 indicated that based upon his experience, he was generally aware of the behind the scenes actions that have likely already taken place and what was required to get a case to trial. As seen by the additional voir dire, the jury panel as a whole was not tainted by these statements.

Additionally, the Appellant would have this Court take a generalized statement about law enforcement investigations and conclude that it was the same specific type of expert opinion given in *Mach*. Again, the comments at issue in this case never specifically referenced domestic violence assaults or victims. The statements were limited to police investigations and the prosecutor's role in general. The repeated statements in *Mach* are a whole separate beast since they were made directly towards the actual allegations in the case itself. What the Appellant would have this Court ultimately conclude is that a layperson would not understand independently that a case proceeds to trial because the State believes it has evidence to prove its case. Somehow, this would be a shock to the average person and hearing such a comment would completely taint their perspective of our criminal trial process. That did not occur here. The jury panel was repeatedly asked if they could remain fair and impartial and abide by the court's instructions that the Appellant was innocent until proven guilty. The jury that was seated abided by those instructions.

Third, the Appellant significantly downplays the fact that the trial court did exactly what *Mach* concluded was required in these type of situations – further voir dire of the jury. The trial court inquired to the whole panel whether Juror 22's statement “about law enforcement and their time on law enforcement, what it takes for a charge to get to this point. Does any

of that affect your ability to be fair and impartial and move forward, change anybody's opinion?" Not a single juror indicated their ability to be impartial was affected. The Appellant dismisses this fact by stating "[u]nsurprisingly, there was no response to the court's vague inquiry." *Appellant's Brief* at 13. This inquiry was done in a manner suggested by the Appellant's trial counsel. The lack of response was due to the fact that no one was actually affected by the statement at issue.

The Appellant's argument also completely ignores the additional voir dire that was done by the Appellant's trial counsel. He went into detail about the statement's implication and questioned individual jurors about whether they were affected by it. Unsurprisingly, the jurors that were seated were not affected by a generalized statement that had no actual bearing on the present case.

This case is clearly distinguishable from *Mach*. Instead, it more closely relates to *State v. Strange*, 188 Wn. App. 679 (2015), and *State v. Benberg*, 1 Wn. App 1060 (2018) (unreported)¹. In *Strange*, this Court held that a comment about a potential juror's prior personal experience with child molestation did not taint the entire jury panel. This Court found two distinct

¹ "...unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate".
GR 14.1

factors: no prospective jurors professed an expertise about these type of case, and none of the jurors stated multiple times that sexually abused children never lie. *Strange*, 188 Wn. App at 686. Here, Juror 22 did not claim an expertise in domestic violence cases or investigations. His statement was a generalized statement about law enforcement investigations work and how cases get to the point of a jury trial. Additionally, this statement was made one time, not multiple times.

Benberg is also instructive. This Court held in *Benberg* that the defendant did not received a tainted jury because

the trial court and attorneys extensively questioned the jurors, and defense counsel was able to identify jurors who expressed an inability to keep an open mind about the issues in the case. The trial court's ruling reflects that it believed the jury was comprised of fair and impartial jurors such that a mistrial was not necessary. Thus, the “further voir dire” absent in *Mach* occurred in *Benberg's* case.

Benberg, 1 Wn. App. at 6.

The facts in the present case are much different from a social worker, who has the experience and expertise of someone in a position to have knowledge, vouching for a victim’s credibility on four separate occasions. One juror made a general statement about prior law enforcement experience and expressed knowledge of how cases ended up in a trial. One fellow juror agreed with that statement. There was not a specific statement that all domestic violence victims must be believed and that the Appellant must be

guilty because the State has decided to pursue a jury trial. Juror 22's statement simply did not rise to the level of those made in *Mach*. The entire panel was questioned by the trial court and the Appellant's trial counsel about Juror 22's statement. The Appellant's trial counsel abandoned the motion and instead picked a jury. Therefore, the jury was not tainted by these comments.

B. The State Concedes That The Trial Court Did Not Inquire Into The Appellant's Ability To Pay Legal Financial Obligations.

The Appellant is indigent. At sentencing, the trial court did not conduct an inquiry into the Appellant's ability to pay his legal financial obligations. In light of *State v. Ramirez*, 191 Wn. 2d 732, 426 P.3d 714 (2018), the State agrees that the trial court's imposition of the \$200 criminal filing fee and \$100 domestic violence assessment should be vacated.

IV. CONCLUSION

The Appellant's conviction should be affirmed as the trial court's denial of the motion for a mistrial was not an abuse of discretion. The trial court properly conducted an additional voir dire of the jury panel, and allowed the Appellant's trial counsel to inquire further about any potential tainting of the panel as a whole. The Appellant's trial counsel did not renew

the motion for a mistrial and instead participated in the selection and seating of the jury.

The State agrees that the jury demand fee should be vacated. Thus, the Appellant's convictions should be affirmed and the State will enter an order vacating the contested LFO.

Respectfully submitted this 9th day of September, 2020.

RYAN P. JURVAKAINEN
Prosecuting Attorney

By 
SEAN M. BRITAIN
WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent

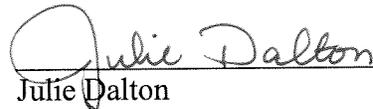
CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served BRIEF OF RESPONDENT electronically via the Division II portal:

Catherine E. Glinski
Glinski Law Firm PLLC
PO Box 761
Manchester, WA 98353-0761
glinskilaw@wavecable.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 9, 2020.


Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

September 09, 2020 - 1:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54101-7
Appellate Court Case Title: State of Washington, Respondent v. Mark Steven Johnson, Appellant
Superior Court Case Number: 19-1-00671-1

The following documents have been uploaded:

- 541017_Briefs_20200909135004D2983776_7544.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Johnson 541017 Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- glinskilaw@wavecable.com

Comments:

Sender Name: Julie Dalton - Email: dalton.julie@co.cowlitz.wa.us

Filing on Behalf of: Sean M Brittain - Email: brittains@co.cowlitz.wa.us (Alternate Email: appeals@co.cowlitz.wa.us)

Note: The Filing Id is 20200909135004D2983776