

FILED

SEP 17 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 302580

STATE OF WASHINGTON,
Respondent,

vs.

TONY ORLANDO CANTU,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00064-0

BRIEF OF RESPONDENT



Kimberly S. Horner, WSBA #42534
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

FILED

SEP 17 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 302580

STATE OF WASHINGTON,
Respondent,

vs.

TONY ORLANDO CANTU,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00064-0

BRIEF OF RESPONDENT



Kimberly S. Horner, WSBA #42534
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
RESPONSE TO ASSIGNMENTS OF ERROR.....	1
STATEMENT OF THE CASE.....	1
ARGUMENT	7
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

1.	<u>Dickson v. Sullivan</u> , 849 F.2d 103 (9 th Cir. 1988)	10
2.	<u>Gibson v. Clanon</u> , 633 F.2d 851 (9 th Cir. 1980)	10
3.	<u>Mach v. Stewart</u> , 137 F.3d 630 (9 th Cir. 1997)	10, 11, 12
4.	<u>State v. Bankston</u> , 99 Wn.App. 266, 268, 992 P.2d 1041 (Div. III, 2000)	8
5.	<u>State v. Burleson</u> , 18 Wn.App. 233, 237-238, 566 P.2d 1277 (1977)	9
6.	<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 578, 79 P.3d 432 (2003)	17
7.	<u>State v. Dunaway</u> , 109 Wn.2d 207, 221, 743 P.2d 1237 (1987)	16
8.	<u>State v. Eggers</u> , 55 Wn.2d 711, 349 P.2d 734 (1960)	12, 13
9.	<u>State v. Greiff</u> , 141 Wn.2d 910, 921, 10 P.3d 390 (2000)	7, 8, 9
10.	<u>State v. Johnson</u> , 124 Wn.2d 57, 76, 873 P.2d 514 (1994)	9
11.	<u>State v. Kerr</u> , 14 Wn.App. 584, 591, 544 P.2d 38 (Div. II, 1975)	14
12.	<u>State v. Lewis</u> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996)	7, 9
13.	<u>State v. Moe</u> , 56 Wn.2d 111, 115, 351 P.2d 120 (1960)	15
14.	<u>State v. Noltie</u> , 116 Wn.2d 831, 839, 809 P.2d 190 (1991)	8
15.	<u>State v. Pepoon</u> , 1911, 62 Wn. 635, 114 P. 449, 453	13
16.	<u>State v. Russell</u> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994)	16

17.	<u>State v. Stenson</u> , 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)	17
18.	<u>State v. Turner</u> , 167 Wn.App. 871, 882, 275 P.3d 356 (Div. III, 2012)	16, 17
19.	<u>State v. Weber</u> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)	7,15
20.	<u>State v. Willis</u> , 67 Wn.2d 681, 686, 409 P.2d 669 (1966)	15
21.	<u>U.S. v. Saya</u> , 247 F.3d 929 (9 th Cir. 1988)	10
22.	<u>U.S. v. Vasquez</u> , 597 F.2d 192 (9 th Cir. 1979)	10

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution	8
---	---

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err when it denied Appellant's motion for a mistrial.
- B. The prosecutor did not commit prosecutorial misconduct by referring to the vehicle in which the firearm was found as Appellant's vehicle.

II. STATEMENT OF THE CASE

On April 27, 2010, Appellant Tony O. Cantu was charged with Possession of a Stolen Motor Vehicle, Criminal Trespass in the First Degree, and Unlawful Possession of a Firearm in the First Degree. (CP 4)

On June 14, 2011, Appellant's case proceeded to trial. (Voir Dire RP 1) During jury selection, the trial judge asked the veniremembers whether any of them was acquainted with Appellant. (Voir Dire RP 18) Only veniremember 19 disclosed an acquaintance with Appellant at that time. (Voir Dire RP 18) However, later on during the voir dire process, when the trial judge asked generally whether any of the remaining veniremembers were concerned about their ability to be fair during the trial, veniremember 30 responded by stating that Appellant was "a rival gang member of friends of mine." (Voir Dire RP 52-53) The trial

judge then asked two more general questions of the jury venire, concluding with the question of whether any veniremember “just flat out does not want to be here today?” (Voir Dire RP 54) In response to this question, veniremember 30 was the only one who responded in the affirmative. (Voir Dire RP 54) A 15-minute recess was then taken, after which Appellant moved for a mistrial, out of the presence of the jury venire, based on veniremember 30’s comment to the effect that Appellant had a gang affiliation. (Voir Dire RP 54-55)

In support of his motion for a mistrial, Appellant argued that veniremember 30’s comment would prevent Appellant from having a fair trial, that the veniremembers were shocked by the comment, and that there was no way to cure “that type of defect.” (Voir Dire RP 55) In response, the prosecutor stated that he disagreed that the veniremembers were shocked by the comment. (Voir Dire RP 56) He further argued that a mistrial was not necessary because the comment had nothing to do with the charges in Appellant’s case, the court could give a curative instruction if Appellant so desired, and the jurors would be instructed to consider only evidence formally presented during the trial as they deliberate on the case. (Voir Dire RP 56)

Appellant advised the court that he did not wish a curative instruction to be given to the jury, so as to avoid emphasizing the comment at issue. (Voir Dire RP 57) The trial judge denied the motion for a mistrial, stating:

I'm always very cautious in explaining to the jury more than once, over and over again what their role is and what they can properly consider in determining in a case (sic), only to consider the testimony of witnesses and exhibits admitted into evidence and they're not to consider any evidence that's not admitted or may be excluded by the Court, and I, I don't feel at this point that the comment that this juror gave is so prejudicial that it would require a mistrial. (Voir Dire RP 58)

Veniremember 30 was then immediately excused from further duty, outside of the presence of the rest of the venire, and was twice admonished not to have any contact with the remaining veniremembers until the trial had concluded. (Voir Dire RP 60)

At a later point in the voir dire proceedings, Appellant's trial counsel revisited the issue of veniremember 30's comment. (Voir Dire RP 173-174) He asked the venire whether the comment "would have an impact on you in terms of believing Mr. Cantu or how you would weigh the evidence?" (Voir Dire RP 174) The first response was from a veniremember who indicated that whether

Appellant was a gang member would have to be proven to him by evidence presented at trial for him to "make a judgment on that." (Voir Dire RP 174) Another veniremember then agreed that gang membership would first have to be proven, but that if it was proven, such would "weigh on you a little bit." (Voir Dire RP 174-175) The prevailing view among the veniremembers appeared, however, to be that gang membership was irrelevant to the issues of the case. (Voir Dire RP 176-177) Veniremember 26 stated: "I don't think it impacts whatsoever because he's not being tried for being on a gang." (Voir Dire RP 176) Several other veniremembers agreed, and the voir dire discussion then moved on to other topics; the issue of veniremember 30's comment was not raised again. (Voir Dire RP 176-177)

In its case in chief, the State presented evidence that, in the early morning of April 22, 2010, witness/victim Chris Olsen was out on his farm in Othello, WA, when he observed suspicious activity. (RP 60-61) Mr. Olsen testified that he observed a man and a woman with a white, late-model, four-door vehicle parked in a driveway which led to Mr. Olsen's garage. (RP 61) Mr. Olsen observed the male subject unload four tires from the garage into the white vehicle while the female subject waited outside. (RP 61)

The two subjects then got into the white vehicle and drove away. (RP 64-65) Mr. Olsen testified that he had never seen either individual before, that it is unusual for people to be out on that part of his property, and that he had not given anybody permission to be in his garage or on that part of his property. (RP 65) After the two subjects left, Mr. Olsen entered the garage, and in the garage he found a vehicle he had never seen before: a late model, dark green or grey Honda that was missing all four tires.¹ (RP 65-67)

Detective Dale Wagner, of the Adams County Sheriff's Office, testified that later that morning, he stopped a vehicle matching the description and license plate number reported by Mr. Olsen. (RP 74-76) It was a white 2001 Hyundai four-door sedan, and in the vehicle were two people: Appellant, and a female who was identified as Myra Valencia. (RP 76-77) Both Appellant and Ms. Valencia were eventually placed under arrest. (RP 145-146, 176-178) Ms. Valencia led law enforcement to a site 10 to 15 miles away, where the wheels and tires from the green Honda in Mr. Olsen's garage were located. (RP 79-80) Detective Wagner applied for and received a warrant allowing the search of the white

¹ Witness/victim Maciel Cruz testified at trial that on the evening of April 21, 2010, she reported to law enforcement that somebody had stolen her green Honda. (RP 138) She later identified the vehicle found in Mr. Olsen's garage as the vehicle she had reported as being stolen. (RP 67-68, 139-140)

Hyundai, which had been impounded. (RP 81-82) Several lug nuts and tools for removing wheels from a vehicle were found in the white Hyundai, along with a loaded handgun that was located under the steering column dashboard.² (RP 85-87)

One of the defense witnesses called to testify at trial was Rick Rodgers. (RP 65) Mr. Rodgers testified that he saw Appellant get arrested, and that the white car Appellant was in when stopped by law enforcement immediately prior to his arrest was Appellant's vehicle. (RP 256, 260-266) Mr. Rodgers repeatedly referred to the vehicle Appellant was in at the time of his arrest as Appellant's car, and when directly asked if that vehicle belonged to Appellant, he replied that it did. (RP 260-261, 264-265) Later on in the trial, during the State's closing argument, the prosecutor referenced Mr. Rodgers' testimony that the white vehicle at issue belonged to Appellant. (RP 307)

After both sides had rested, the court read the jury instructions to the jurors. (RP 271-291) One of the instructions was: ". . .The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the Exhibits that I have admitted during

² Appellant was prohibited from possessing the handgun, as he had previously been convicted of a serious offense. (RP 306; CP 5)

the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.” (RP 278)

The jury returned a verdict of guilty on all three counts. (CP 81-83) This appeal followed.

III. ARGUMENT

A. The trial court did not err when it denied Appellant’s motion for a mistrial.

1. The appropriate standard of review is abuse of discretion.

Washington case law makes it clear that “[a] trial court’s denial of a motion for a mistrial is reviewed under an abuse of discretion standard.” State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). See also State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). This standard of review has been adopted for situations such as the one at hand, where veniremember 30 made his unsolicited statement regarding gang affiliation, because “... the trial judge is best suited to judge the prejudice of a statement ...” State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). See also Greiff, 141 Wn.2d at 921. In other words, “the trial court is in the best position to determine a juror’s ability to be fair and impartial. [footnote omitted] It is the trial court that can observe the

demeanor of the juror and evaluate and interpret the responses.”
State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

An abuse of discretion occurs when “no reasonable person would take the view adopted by the trial court,” Greiff, 141 Wn.2d at 921, or when “the ruling of the trial court is manifestly unreasonable or discretion is exercised on untenable or unreasonable grounds.”
State v. Bankston, 99 Wn.App. 266, 268, 992 P.2d 1041 (Div. III, 2000). The burden of proving abuse of discretion is on the appellant. Id.

Appellant attempts to portray the issue of veniremember 30’s comment and the denial of the motion for mistrial in terms of a violation of his right to confront and cross examine the witnesses testifying against him, a right guaranteed under the Sixth Amendment to the United States Constitution. By couching his argument in these terms, Appellant attempts to convince this Court to adopt a stricter standard of review. However, presenting the issue as a Sixth Amendment violation is a mischaracterization. The Washington Supreme Court has stated:

“The sixth amendment to the U.S. Constitution provides that: ‘(i)n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .’ The “witnesses” that an accused is entitled

to confront are those who give testimony against him or her at a trial on the issue of guilt or innocence.”

State v. Burlison, 18 Wn.App. 233, 237-238, 566 P.2d 1277 (1977).

Clearly, Appellant was not denied his Sixth Amendment right to confront witnesses by virtue of veniremember 30's comment during voir dire, as such comment was made during voir dire and therefore was not actual testimony, and as it did not speak to any of the issues of the case. Therefore, as explained above, the appropriate standard of review for this Court to utilize when examining the mistrial issue is abuse of discretion.

2. The trial court did not abuse its discretion by denying the motion for a mistrial.

When an irregularity occurs at trial, and forms the basis of a motion for a mistrial, the 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. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). See also Greiff, 141 Wn.2d at 920-921, citing to State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

In support of his argument that the trial court should have granted him a mistrial, Appellant appears to rely heavily on Mach v.

Stewart, 137 F.3d 630 (9th Cir. 1997), a case which, more than any other case cited by Appellant, appears to be factually similar to the one at hand.³ Even Mach, however, can clearly and easily be distinguished from Appellant's case.

In Mach, the defendant had been charged with sexual conduct with a minor under 14 years of age. Id. The first veniremember to be questioned during voir dire was a social worker by the name of Ms. Bodkin, who stated that "she would have a difficult time being impartial given her line of work, and that sexual assault had been confirmed in every case in which one of her clients reported such an assault." Id. at 632. Ms. Bodkin was further questioned on the topic by the court in front of the entire venire panel, and the judge's questioning "elicited at least three more statements from Bodkin that she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted. Id. The court later inquired as to whether any of the veniremembers had a background in

³ Appellant cites to a number of cases in support of his argument that a mistrial should have been granted, including U.S. v. Saya, 247 F.3d 929 (9th Cir. 2001), U.S. v. Vasquez, 597 F.2d 192 (9th Cir. 1979), Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988), and Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980). An important distinction between these cases cited by Appellant and the case at hand is that the irregularity complained of in this case, the comment by veniremember 30, occurred during voir dire, as opposed to during the evidentiary or jury deliberation phases of trial, and there is no evidence in this case that the jury actually considered veniremember 30's comment in reaching a verdict.

psychology, and Ms. Bodkin responded that she had taken courses in child psychology and had worked extensively with psychologists and psychiatrists. Id.

The defendant in Mach moved for a mistrial based on Ms. Bodkin's statements, but the trial court denied the motion. Id. The trial court's ruling was ultimately overturned, however, because of "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 . . ." Id. at 633. The appellate court further stated:

The result of the trial in this case was principally dependant on whether the jury chose to believe the child or the defendant. . . . The extrinsic evidence was highly inflammatory and directly connected to Mach's guilt. Bodkin repeatedly stated that in her experience as a social worker, children never lied about sexual assault. The bulk of the prosecution's case consisted of a child's testimony that Mach had sexually assaulted her. . . .

Id. at 634.

Here, the basis of Appellant's motion for a mistrial was an isolated comment by veniremember 30 to the effect that Appellant was a gang member. Veniremember 30 did not provide any information about his background or explain why he believed

Appellant to have a gang affiliation. More importantly, he did not say anything regarding any of the issues to be decided at trial. In contrast, in Mach, the conduct which formed the basis of the mistrial motion was an extended, expert-like commentary by a veniremember who spoke at length about core issues in the case.

The facts of Appellant's case appear to be more analogous to those in State v. Eggers, 55 Wn.2d 711, 349 P.2d 734 (1960) than those in Mach. In Eggers, a veniremember "rose and, without warning, expressed a highly offensive and vilifying opinion of the defendant's counsel, before he could be silenced by the court. He was immediately excused . . ." Id. at 711. At the defense attorney's request, the court instructed the jury venire to disregard the offensive remark, and the voir dire continued. Id. at 711-712. During the next recess, the defendant moved for a mistrial based upon the offensive remark. Id. at 712-713. The court denied the motion for a mistrial. Id. at 713. The defendant appealed the ruling, arguing the following:

[the defendant] contends he was denied a fair and impartial trial by jury; that the statement made by the prospective juror was such that no amount of caution or instruction could remove the cloud placed upon appellant's counsel, and the prejudice by association that was directed to the appellant himself; that

the effect of the statement was to place in the minds of every prospective juror, a strong doubt as to the ethics of appellant's counsel and, therefore, the thought that unless the appellant was guilty of the crime charged, he would not have employed him.

Id.

The appellate court in Eggers held that the trial court properly denied the motion for a mistrial, stating:

We are dealing with a comment by a stranger, which could not be taken as anyone's opinion but his own. . . . Jurors are assumed to be fair and reasonable and there is a total absence of evidence that the jurors selected in this case were otherwise.

In State v. Pepon, 1911, 62 Wn. 635, 114 P. 449, 453, we made an observation which is appropriate here:

' . . . if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure. . . . '

Id. at 713-714.

Here, as in Eggers, the comment at issue is an isolated, unsolicited remark made by a veniremember, and although each remark may have momentarily cast a negative light on the

defendant in the case, neither remark had any direct bearing on any of the issues in the case and was not so irreversibly prejudicial as to require a mistrial.⁴

As stated above, a trial court's decision to deny a motion for a mistrial is reviewed under an abuse of discretion standard. Here, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial. In fact, the trial court acted very appropriately under the circumstances, as a new trial was not necessary in order to guarantee that Appellant would be tried fairly. Veniremember 30's comment to the effect that Appellant was a gang member had no direct connection to any of the issues in the case. Appellant was not on trial for being in a gang, and the jury venire as a whole seemed to recognize that. When questioned about the comment at issue, no veniremember indicated that the comment, in and of itself, would cause him to be more inclined to find Appellant guilty. (Voir Dire RP 173-177) Furthermore, veniremember 30 was excused for cause, and those who were eventually selected to serve as jurors were instructed to consider only the evidence that was formally presented in the case. (Voir Dire RP 60; RP 278) "It is presumed

⁴ See also State v. Kerr, 14 Wn.App. 584, 591, 544 P.2d 38 (Div. II, 1975), wherein a veniremember referred to the defense attorney as "the enemy," and the trial court was deemed to have not abused its discretion by denying a motion for mistrial based upon the remark.

that juries follow the instructions of the court,” State v. Moe, 56 Wn.2d 111, 115, 351 P.2d 120 (1960), and “the juror’s oath and the instructions of the court are the defendant’s safeguard against possible bias or prejudice resulting from the juror’s consideration of a collateral matter as evidence in the case.” State v. Moe, 56 Wn.2d 111, 116, 351 P.2d 120 (1960). See also State v. Willis, 67 Wn.2d 681, 686, 409 P.2d 669 (1966) and State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

There were no grounds for a mistrial in this case. There is nothing in the record that would have indicated to the trial court that Appellant would not be given a fair trial in front of a jury chosen from amongst the original veniremembers who were not stricken for cause. Therefore, the trial court did not abuse its discretion in denying Appellant’s motion for a mistrial.

B. The prosecutor did not commit prosecutorial misconduct by referring to the white Hyundai as Appellant’s vehicle.

Appellant argues that the prosecutor committed misconduct by referring to the vehicle which Appellant was driving, and in which the firearm was found, as Appellant’s vehicle, as “no facts in the

record” show that Appellant owned the vehicle. Brief of Appellant, p.18.⁵ This is a frivolous argument.

Appellant correctly states that in order to prove prosecutorial misconduct, he must show that conduct by the prosecuting attorney was both improper and prejudicial, and that there is a substantial likelihood that the misconduct affected the jury’s verdict. Brief of Appellant, p. 17, 19; State v. Turner, 167 Wn.App. 871, 882, 275 P.3d 356 (Div. III, 2012). However, Appellant neglects to mention that “[f]ailure to object to improper argument waives any claim of error on appeal ‘unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’” Id. at 883, quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987).

Interestingly, Appellant also fails to mention that his own alibi witness, Mr. Rodgers, testified that the white car Appellant was driving immediately prior to his arrest was Appellant’s car. The fact

⁵ What Appellant actually states in his brief is that “the prosecutor repeatedly stated that the white Honda belonged to Mr. Cantu when no facts in the record establish that Mr. Cantu owned the white Honda.” Brief of Appellant, p. 18. A thorough review of the record reveals that the prosecutor never mentioned a white Honda, and neither did anybody else during any of the transcribed proceedings. There was testimony concerning the green Honda which was stolen from Ms. Cruz, and abundant discussion of the white Hyundai driven by Appellant, but no mention whatsoever of a white Honda. The State assumes that Appellant meant to argue that there was no evidence showing that Appellant owned the white Hyundai.

that the prosecutor later repeated what Mr. Rodgers had testified to could not possibly be deemed misconduct, particularly since, as this Court has previously stated:

[a] prosecutor's closing argument is considered in the context of the total argument, the evidence addressed in the argument, the jury instructions, and the issues in the case. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). 'The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.' State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) . . .

Turner, 167 Wn.App. at 882.

Again, since the prosecutor's statements regarding who owned the white Hyundai were merely drawing the jury's attention to testimony that had been properly presented during the trial, such did not constitute misconduct at all, much less "flagrant and ill intentioned" misconduct that irreparably prejudiced Appellant. Therefore, the prosecutorial misconduct argument advanced by the Appellant is without merit.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Mr. Cantu's conviction.

DATED this 13th day of SEPTEMBER, 2012.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: 
KIMBERLY S. HORNER, WSBA #42534
Deputy Prosecuting Attorney