

FILED

SEP 30, 2013

Court of Appeals
Division III
State of Washington

NO. 31683-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

SIMEON OWENS,

Appellant.

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

The Honorable Vic L. Vanderschoor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motion for a mistrial based on the improper admission of evidence portraying appellant in an extremely poor light, including evidence he had a history of failed anger management.

Issue Pertaining to Assignment of Error

Appellant was accused of assaulting a court security guard. The defense contended that appellant did not intentionally strike the guard. Rather, the guard was accidently struck. During the State's case, jurors learned that appellant's child had previously been taken away from him in a dependency proceeding and he had been ordered to undergo anger management classes, which he had failed to complete. Did the trial court err when it denied the defense motion for mistrial?

B. STATEMENT OF THE CASE

The charge in this case stemmed from events at the Benton County Juvenile Justice Center on October 23, 2012. CP 4. According to the probable cause statement, Owens was in court for a dependency hearing involving his parental rights to his son. He became verbally aggressive toward Court Commissioner Jerri Potts, who found Owens in contempt. CP 4. When Owens walked

out of the courtroom, two security guards physically stopped him, leading to a struggle in the lobby, during which one of the officers was struck in the face. CP 4-5. Owens was charged with Assault in the Third Degree.¹ CP 1-3.

At trial, defense counsel stated that what happened inside the Juvenile Justice Center courtroom prior to events in the lobby was irrelevant. RP 4. The prosecutor countered that jurors would have to hear some evidence of what occurred to provide context for what happened immediately thereafter. RP 4-5. Defense counsel agreed and indicated he had no problem with jurors hearing that Owens “mouthed off” to the commissioner, was found in contempt of court, and left the courtroom. RP 5. The trial judge agreed that would be fine. RP 5.

Commissioner Potts’ court clerk testified that on October 23, 2012, at the Benton County Juvenile Court, the commissioner found Owens in contempt of court. Owens started cursing, shoved his chair in, and started to exit the courtroom. RP 73. Commissioner Potts told Owens to stay, but he ran out the door.

¹ Initially, the State also charged Owens with resisting arrest, but voluntarily dismissed that charge prior to trial. CP 2, 7-8; RP 2.

Potts ordered a security officer to place Owens under arrest, and the officer ran after him. RP 74.

That security officer was Scott Wright, who served as court bailiff. RP 45, 49-50. Wright used his radio to notify another officer, Patricia Roggenkamp, that Owens was heading in her direction and she should stop him. RP 50. Roggenkamp, who was positioned in the lobby near the metal detector, grabbed Owens in an attempt to throw him to the ground. RP 31, 50. Officer Wright grabbed Owens at the same time, and all three fell to the ground. RP 31-32, 51. Both officers struggled to gain control of Owens, who resisted their physical efforts and failed to comply with their verbal commands. RP 32-33, 52-53.

Roggenkamp and Wright gave differing accounts of the alleged assault. According to Roggenkamp, she was on the left side of Owen's body, Wright was on the right side of his body, and "there was a lot of moving around" on the floor. RP 32. Roggenkamp testified that Owens had his arms tucked underneath him. RP 39. While she pulled on Owens' left arm, Officer Wright attempted to secure Owens' right arm. RP 33, 40, 42-43. During this attempt, Owens looked at Wright and struck him two times on the right side of his face with his elbow. RP 32-33. Eventually,

they gained control of Owens and restrained him with handcuffs. RP 33-34, 41. Owens conceded that everything happened very quickly. RP 38-39, 41.

According to Officer Wright, however, when the three landed on the ground, Owens was on top of him and the two men were face-to-face. RP 51, 59. Moreover, Wright testified that he had a hold on both of Owens' wrists. RP 51, 61-62. Owens then struck him in the face two to four times using his elbow. RP 51, 55-56, 60-61, 64. According to Wright, Owens also attempted to bite him. RP 53, 68-71. Wright was able to get on top of Owens, gain control using compliance techniques, and place him in handcuffs. RP 52-54, 59-60. Wright agreed that everything happened very quickly, he had been in an excited state, and this may have impacted his memory of events. RP 56, 66-67.

Both officers were injured. Wright suffered a scratch on his nose and some facial bruising. RP 55, 61. Roggenkamp tore a ligament in her shoulder and bruised a knee. RP 35.

Police officers arrived on scene, arrested Owens, took statements from Wright and Roggenkamp, and documented their injuries. RP 7-13, 21-23. Owens was cooperative with the officers. RP 26-27. He admitted he had lost his temper in court, made

comments he should not have made, and that his attitude and mouth had gotten him into trouble. RP 23-24, 27. He also indicated that he had resisted the guards' efforts to grab his arms in an attempt to resist and avoid arrest. RP 24, 28.

Unfortunately for Owens, during the prosecution's case, Officer Wright revealed information jurors should never have heard. When asked how the whole incident began in juvenile court, Wright replied:

There was a discussion about steps that Mr. Owens needed to take to get his child back. It was a dependency docket. There was some steps he had to take to get his child back. He got upset with basically he was being told he hasn't been doing his anger management, got upset. Do you want me to use the actual terms that he – the words that he used?

RP 47.

Defense counsel asked for and received a sidebar conference. He indicated these were the details he had worried about at the beginning of trial when he stated that what happened in juvenile court was irrelevant at this trial. RP 47-48. Counsel moved for a mistrial and, in the event that motion was denied, a curative instruction. RP 48. The prosecutor responded that she had not intentionally elicited the information, opposed a mistrial, but

joined in the request for a curative instruction. RP 48. The court declined to declare a mistrial and instructed jurors to disregard Wright's last answer. RP 49.

At the close of evidence, defense counsel asked jurors to find Owens not guilty because he had not intentionally assaulted Officer Wright. Rather, his only intent was to resist arrest and, during that struggle, he accidentally struck Wright in the face with his elbow. Counsel pointed out that events in the lobby happened very fast – so fast that Wright and Roggenkamp had given very different versions of the same event. It was therefore possible they had also misinterpreted Owens' intent. RP 80-88.

Jurors convicted Owens anyway, and the court imposed a standard range 14-month sentence. CP 27, 33. Owens timely filed his Notice of Appeal. CP 40-41.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL.

There was agreement among the parties and the trial judge that jurors needed only minimal details of the juvenile court hearing to provide context for what happened immediately thereafter. This

meant evidence that Owens was disrespectful to the commissioner, found in contempt, and left the courtroom. RP 5.

Yet, jurors ultimately heard additional evidence from Officer Wright that reflected extremely poorly on Owens' character. They learned that his child had been taken away from him, the court was monitoring him, he had been ordered to obtain anger management training, and he had failed to comply with that requirement. See RP 47. The prosecutor did not intentionally elicit this evidence. But jurors heard it nonetheless.

When examining a trial irregularity such as this, the question is whether the evidence so prejudiced the jury that the defendant was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P. 2d 190 (1987). In determining whether a trial irregularity may have had this impact, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, informing jurors that Owens had lost his child, had anger issues, and failed to comply with anger management training was very serious indeed. This was inadmissible character evidence. ER 404(b) (“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.”).

Owens could be convicted of assault only if he acted intentionally. See CP 19 (“an assault is an intentional touching or striking of another”). The entire defense case turned on the ability to convince jurors that, while Owens clearly struggled with officers and resisted arrest, he never intentionally struck Officer Wright in the face. Once jurors heard that Owens’ had lost custody of his child, has anger issues (why else would he be required to do anger management?), and had failed to satisfy his anger counseling requirement, it was far more likely they would conclude the contact with Officer Wright’s face was the intended result of an angry defendant as opposed to an unintended consequence of his efforts to avoid arrest.

An examination of the second factor, whether the evidence was cumulative, also supports the conclusion a mistrial was necessary. Evidence that Owens had lost his child, struggled with his temper, and failed to comply with anger management training was not cumulative of any other properly admitted evidence. In fact, it was contrary to defense counsel's earlier efforts, and everyone's agreement, to keep this information from jurors.

The third factor is whether the court instructed the jury to disregard the evidence. The court did, but some errors simply cannot be fixed with a curative instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56; see also Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.). Officer Wright's testimony falls into this category. The information he revealed undermined Owens' trial defense. Not only did it portray Owens in a negative light generally, it improperly and unfairly cast him as historically angry and, therefore, more prone to intentional assaultive behavior.

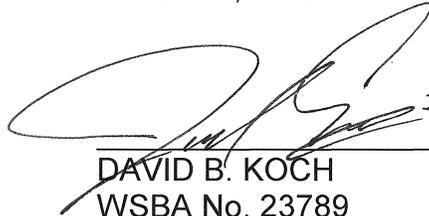
D. CONCLUSION

The trial court abused its discretion when it denied the defense motion for mistrial. This court should reverse Owens' conviction and order a new trial.

DATED this 30th day of September, 2013.

Respectfully submitted,

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State v. Simeon Owens

No. 31683-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30th day of September, 2013, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 30th day of September, 2013.

X  _____