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DEC 20, 2013

Court of Appeals
Division III
State of Washington

NO. 316831-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

SIMEON GEORGE OWENS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-01273-7

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

The trial court acted properly when it denied the defendant's motion for a mistrial. The statement at issue did not compromise the defendant's argument at trial, that while intentionally fleeing a courtroom and actively resisting arrest, he unintentionally struck Officer Wright two to four times in the face. The evidence at trial was sufficient so as to allow the jury to reach a guilty verdict absent admission of the statement. The trial court acted properly by immediately issuing a curative instruction that remedied any prejudice to the defendant.

II. STATEMENT OF FACTS

On October 23, 2012, the defendant was attending a dependency hearing at the Benton County Juvenile Justice Center regarding the custody of his daughter. (CP 4). During this hearing the defendant became verbally aggressive toward the presiding judge, Commissioner Jerri Potts, and yelled expletives at the Commissioner. (CP 4).

Due to his aggressive behavior and statements, Commissioner Potts advised the defendant that he was in contempt of court, and instructed the court security guard to place the defendant under arrest. (CP 4; RP 73). At that point the defendant started cursing, shoved his chair in, and began to exit the courtroom. (RP 73). At the request of

Commissioner Potts, Court Security Officer Scott Wright pursued the defendant as he ran out of the courtroom into the lobby. (CP 4; RP 50, 74).

Officer Wright used his radio to call Court Security Officer Roggenkamp at the main entrance, and advised her to stop the defendant. (RP 31, 50). With the help of Officer Roggenkamp, Officer Wright was able to bring the defendant to the ground before the defendant made it out the front entrance. (RP 31, 51). Both officers were injured, and Officer Wright was struck in the face at least twice by the defendant. (RP 32-33, 51). Both Officer Roggenkamp and Officer Wright testified that Officer Wright was struck on the cheek by the defendant's elbow. (RP 32-33, 51). Officer Roggenkamp testified that she saw two strikes to the face, while Officer Wright testified that he was struck between two and four times on the right cheek with the defendant's elbow. (RP 32-33, 51). During the altercation, the defendant was screaming, cursing, and non-compliant with the verbal commands given by Officer Wright. (RP 32, 52). Officers Wright and Roggenkamp were able to gain control of the defendant, and used two pairs of handcuffs to restrain him until officers from the City of Kennewick Police Department arrived. (RP 34, 53-54).

Kennewick Police Officers Rebecca Jones and Paul Reynolds arrived in roughly five to six minutes following the altercation. (RP 9,

54). Officer Reynolds contacted the defendant, informed him he was under arrest, and advised him of his *Miranda*¹ rights. (RP 23). The defendant told Officer Reynolds that he had been in court for custody of his children, and he lost his temper and made comments that he should not have. (RP 23). The defendant said he left the court room, because he heard the Commissioner order his arrest and he did not want to be arrested. (RP 23-24). He further indicated to Officer Reynolds that he was keeping his hands underneath himself during the altercation in order to prevent being arrested by Officer Wright. (RP 24).

The defendant was charged with one count of Assault in the Third Degree under RCW 9A.36.031(1)(j). (CP 1-3). The defendant was found guilty, and sentenced to fourteen months confinement. (CP 28-33). The defendant now appeals, arguing that the trial court erred when it did not grant his motion for a mistrial. (App. Brief at 1; CP 40-41).

The basis of this appeal is an irregularity in the form of an unsolicited statement during direct examination from the State's fourth witness, Officer Scott Wright. (RP 43-44). Prior to Officer Wright's testimony, the jury heard from Officers Jones, Reynolds, and

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 1609, 16 L. Ed. 2d 694 (1966).

Roggenkamp. (RP 6, 20, 29). In response to the question on direct examination, “How did this incident begin?” Officer Wright answered:

There was a discussion about steps Mr. Owens needed to take to get his child back. It was a dependency docket. There was [sic] 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 timely objected on the basis that the statement was irrelevant and unfairly prejudicial. (RP 48). Defense counsel moved the court for a mistrial, or in the alternative, a curative instruction. (RP 48). The State told the court that the statement had not been elicited intentionally, and likewise asked the court for a curative instruction. (RP 48). The court denied the motion for mistrial, but did issue the curative instruction. (RP 49). The jury was instructed that the witness's answer was nonresponsive, and should be disregarded. (RP 49). Following the instruction, the examination of Officer Wright resumed, and then the jury heard from Juvenile Court Clerk Nicole Cruz before the State rested. (RP 71). The jury was again instructed by the court to ignore evidence that was not admitted or was stricken from the record as part of Jury Instruction Number 1. (CP 10).

III. ARGUMENT

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). A mistrial should only be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *Id.* The denial of a motion for mistrial should only be overturned upon a showing that there was a substantial likelihood that the prejudice affected the verdict. *Id.* at 176; See, *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

1. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A MISTRIAL BECAUSE THE DEFENDANT FAILED TO SHOW A SUBSTANTIAL LIKELIHOOD THAT THE PREJUDICE AFFECTED THE VERDICT.

In evaluating the prejudicial effect of a trial irregularity, the court scrutinizes the irregularity in light of (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *Gamble*, 168 Wn.2d at 177. The inquiry should not be a rigid analysis of whether a single irregularity was prejudicial to the defendant. *Id.* Rather the question is ““whether..., [when] viewed against the background of all the evidence, the improper statement was so prejudicial that the defendant did not get a fair trial.” *Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citing *State v.*

Thompson, 90 Wn. App. 41, 47, 950 P.2d 977 (1998)). These factors should be viewed holistically within the context of the trial as a whole, and the entirety of the evidence. *Gamble*, 168 Wn.2d at 176-77.

The defendant does not deny he intentionally fled the courtroom in order to avoid arrest. (App. Brief at 2-3, 8; RP 23-24). Nor does he deny that he actively attempted to “resist arrest”. (App. Brief at 6). The only issue at trial was whether he intentionally or unintentionally struck Officer Wright two to four times in the face while actively trying to avoid arrest. (App. Brief at 2, 8). The defendant now argues that Officer Wright’s statement was so prejudicial that a new trial is the only remedy. (App. Brief at 1, 8). However, given the context of the trial, the statement was not so serious or cumulative as to prevent the defendant from receiving a fair trial. See, *Gamble*, 168 Wn.2d at 176-77.

A. The statement was not prejudicial given the context of the trial.

In *Gamble*, a detective who was a witness for the prosecution violated a pre-trial ruling on two different occasions when he referenced excluded evidence regarding a defendant’s prior conviction and post arrest-behavior. *Id.* at 176-77. Despite the seriousness of this violation, the court concluded “given the curative instructions, and in the context of the trial as a whole and all the evidence,” the defendant was not deprived

of a fair trial. *Id.* at 179. This was in spite of the fact that the witness may have intentionally violated the pretrial order. *Id.* at 176-77.

Despite the defendant's assertion, there was not a pretrial order or agreement in place as to exactly what would be said regarding the events that led to the charged assault. (App. Brief at 6, 9; RP 4-5). The only pre-trial discussion regarding this information between counsel and the court was to the extent that the cause of the altercation would be explored in so far as it was relevant to give context to the jurors. Defense counsel expressed that he did not want to go too far in depth as to what occurred inside the courtroom, because he did not want to put his "client's character in a bad light." (RP 5). The State did not intentionally elicit the statement, and on balance the statement was not so prejudicial as to warrant a mistrial.

In contrast, the defendant references *State v. Escalona*, 49 Wn. App 251, 742 P.2d 190 (1987) to support his contention that a mistrial is appropriate. (App. Brief at 7). The facts there are inapposite due to the severity of the irregularity in that case. There, a defendant was on trial for assault in the second degree with a deadly weapon for threatening to kill the victim while armed with a knife. *Id.* During the trial, a prosecution witness violated a pretrial order and divulged to the jury that the defendant had a criminal record and had stabbed someone else in the past. *Id.* at 253.

The court reasoned that the revelation of a prior conviction for “having stabbed someone” was especially serious, given the relevance of the conviction to the charged offense when compared to the weak evidence presented by the State; thus, a new trial was granted. *Id* at 256.

That is not the case here. Officer Wright was not the State’s only witness, nor was he the sole witness to describe the altercation, or the reason the defendant was fleeing the courtroom. By the time the statement was made, Officers Jones and Reynolds had already testified about their interaction with the defendant. (RP 8, 23). Officer Reynolds testified the defendant told him he was at court for a custody issue and that he lost his temper and made comments he should not have made. (RP 23). The defendant also told him he did not want to be arrested by Officer Wright, and was purposely placing his hands underneath himself during the altercation in an attempt to avoid arrest. (RP 23). That conversation concluded with the defendant saying that his “attitude and mouth had gotten him in trouble.” (RP 24). In addition, the jury had already heard from Officer Roggenkamp who testified that she saw the defendant strike Officer Wright twice with his elbow. (RP 32-33, 40). Consequently, any prejudice that Officer Wright’s statement may have had was tempered by the facts already before the jury. However, even if the statement was prejudicial under ER 403 or 404(b), that prejudice was mitigated by the

curative instruction. *See, Gamble*, 168 Wn.2d at 177. The irregularity here clearly falls within the *Gamble* court's reasoning and even *Escalona's* in light of the trial as a whole. (RP 4-5).

Given the previous testimony of the State's other witnesses, the defendant has failed to show a substantial likelihood that Officer Wright's statement affected the verdict.

B. Even if the defendant was unfairly prejudiced by Officer Wright's statement, the proper remedy was a curative instruction and not a mistrial.

A jury is presumed to follow the instructions of the court. *Gamble*, 168 Wn.2d at 177-78; *Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990) (“*A jury is presumed to follow jury instructions and that presumption will prevail until it is overcome by a showing otherwise.*”) It is not enough to point toward a conviction as evidence that the jury did not follow a court instruction. *See, Gamble*, 168 Wn.2d at 176.

The defendant argues that the statement here could not be cured, and instead it was: “far more likely they [the jury] would conclude the contact with Officer Wright's face was the intended result of an angry defendant as opposed to the unintended consequences of his efforts to avoid arrest.” (App. Brief at 8). This conclusion is inapt given the facts already before the jury, and the defendant's purported rationale for the

contact. The defendant's own peculiar position, that his purposeful resistance resulted in an accidental assault, could easily have led a jury to conclude that the contact was intentional given his intent to flee. In light of the facts of this case, the curative instruction was appropriate.

In addition to *Escalona*, the defendant relies on two cases, *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996), and *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) for the proposition that some errors cannot be fixed through a curative instruction. (App. Brief at 9). However, like *Escalona*, these cases do not support the defendant's position. First, the defendant's reliance on *Copeland* is misplaced. There, the prosecutor deliberately asked a prejudicial question that blatantly exceeded the bounds of ER 609 and "constituted prosecutorial misconduct." *Copeland*, 130 Wn.2d at 285. However, despite the prosecutorial misconduct, the *Copeland* Court still did not grant a mistrial, and instead, upheld the defendant's conviction. *Id.* The Court reasoned that given what the jury had already learned about the witness and the fact that the question was quickly cured by a trial court instruction, the misconduct was not prejudicial enough to warrant mistrial. *Id.* Officer Wright's statement in this case clearly falls within the *Copeland* holding.

Belgarde is similarly distinguishable. There, during closing argument, a prosecutor made "flagrant, highly prejudicial [remarks] and

introduced “facts” not in evidence.” *Belgarde*, 110 Wn.2d at 508. In that case, the prosecutor deliberately associated the defendant with an organization described as “a deadly group of madmen” and “butchers that kill indiscriminately.” *Id.* Defense counsel did not object, nor was a curative instruction issued there. *Id.* Consequently, the Court held the statements were so flagrant and ill-intentioned, that a new trial was the only remedy. *Id.* at 512, 755 P.2d 174.

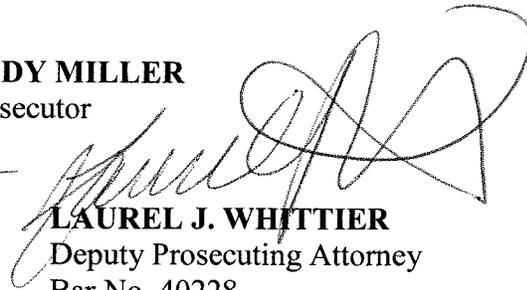
Again, that is not the situation here. Officer Wright’s statement was not ill-intentioned, inflammatory, nor was it unduly prejudicial given the testimony of the other witnesses and the defendant’s own statements to Officer Reynolds. (RP 23-24). The trial court’s curative instruction properly remedied any prejudice that may have resulted from that statement. As a result, the defendant fails to show a substantial likelihood that any prejudice affected the verdict. Furthermore, given the evidence presented and the testimony of the other witnesses, it is clear the jury had enough facts to establish the defendant’s guilt. The defendant was not deprived of his right to receive a fair trial.

IV. CONCLUSION

The trial court did not abuse its discretion when it refused to grant the defendant’s motion for a mistrial. Officer Wright’s statement was not unfairly prejudicial, and any prejudice was timely cured by the court

instruction. Based upon the arguments above, the conviction should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

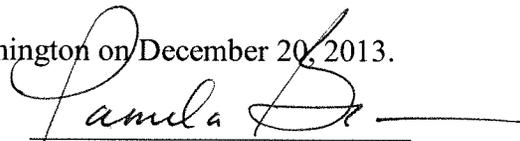
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