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Court of Appeals
Division III
State of Washington
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No. 36016-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

ALBERT B. HICKMAN,

Appellant

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

NO. 16-1-00706-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The defense attorney was not ineffective for failing to move for a mistrial.
- B. The \$200 filing fee and the \$100 DNA fee should be stricken.

II. STATEMENT OF FACTS

A. Facts relating to the crime.

Richland Police Officer Todd Woodhouse saw the defendant riding a bicycle erratically, weaving in and out of traffic lanes, around 10:00 A.M. on April 1, 2016. RP at 94-95. Woodhouse decided to follow the defendant to observe if this erratic bicycle riding would continue. RP at 96. After the defendant failed to stop at a stop sign, Woodhouse turned on his overhead lights. RP at 96-97.

The defendant turned around and looked at Woodhouse. RP at 97. The defendant then went in another direction and started pedaling faster. *Id.* He reached into his left pocket, pulled out a glass pipe, which Woodhouse recognized as a pipe used to smoke methamphetamine, and threw it to the ground. RP at 98. The defendant eventually stopped 100-200 yards west of his original location. *Id.*

While being detained by Woodhouse, the defendant looked around as if he was trying to spot avenues to escape. *Id.* It looked to Woodhouse that he was going to run. *Id.* The defendant then again reached into his left

pocket, pulled out another glass pipe and threw it violently on the ground, disintegrating it. RP at 99. Woodhouse was not able to recover this pipe but was able to recover the first pipe thrown while the defendant was still riding the bicycle. RP at 101. That pipe did contain methamphetamine. RP at 117, 123.

The defendant admitted to Woodhouse that both pipes were his, that they were “meth” pipes, and that he used them to smoke methamphetamine. RP at 100.

The defendant was found guilty as charged of Unlawful Possession of a Controlled Substance, Methamphetamine. CP 45.

B. Facts relating to defendant’s claim that mistrial should have been sought.

Prior to the trial testimony, the defense attorney moved “to exclude evidence of prior bad acts. ER 401, ER 402, ER 403, ER 404 (b) and ER 609.” CP 19. Both parties agreed there was no evidence planned to be admitted under ER 404 (b) and ER 609. RP at 77.

The defense attorney also moved to “exclude Officer Woodhouse from testifying to having any prior contacts with Mr. Hickman.” CP 20. In writing the defense attorney explained this motion by stating,

During the 3.6 hearing, Officer Todd Woodhouse testified that he recognized Mr. Hickman from previous police contact. We are asking that the Court preclude him from testifying about any previous police contact. Allowing the

jury to hear that the Officer knows him would allow them to assume that he has been in trouble in the past. There are no issues of misidentification on this case so this evidence serves no purpose whatsoever.

Id.

Verbally, the defense attorney explained, “I’m asking that [Officer Woodhouse’s prior contacts with the defendant] be completely excluded from trial and that he not be allowed to testify because I think it leaves the jury wondering why has he had these prior contacts, and I don’t think that’s appropriate.” RP at 77-78. The State did not contest the motion. RP at 78.

The Court stated, “[S]ometimes . . . the officer’s prior knowledge of a defendant is relevant on one or more of the elements, but in this case I can’t see it, and so I’ll grant this motion.” *Id.*

At trial, the following question and answer with Officer Woodhouse occurred:

Q: And at that point did you put him under arrest?

A: Yes. At that point he was—it was pending arrest. There were multiple things that were pending there.

Q: Okay. At some point you put him under arrest?

A: Yes, at some point I did.

Q: And did he agree to speak with you?

A: Yes. After the return came back I found he had a warrant for his arrest as well, and I read him his Miranda rights and he agreed to speak to me waiving his rights.

Q: Did he—did you ask him about the pipes?

A: I did, and initially he indicated they weren’t his and he later admitted, “Yes, they were my meth pipes.” He said they were from

smoking methamphetamine and he had used them for doing just that activity.

RP at 100.

III. ISSUES

- A. Did the defense attorney render ineffective assistance by not requesting a mistrial after Officer Woodhouse stated that he found the defendant had an outstanding warrant?
1. What is the standard on review?
 2. Was the defense attorney's performance deficient?
 - a) Was Officer Woodhouse's answer a violation of pre-trial motion or merely objectionable?
 - b) Was there a tactical reason for the defense attorney not to object?
 3. Would the motion for mistrial have been granted?
- B. Should the DNA fee and filing fee be stricken?

IV. ARGUMENT

A. Summary of Argument

There was a brief comment by Officer Woodhouse explaining that he arrested the defendant because of an outstanding warrant. The defense attorney could have objected to relevance but may have chosen not to because she felt it would highlight the statement, which was fleeting. The defense attorney may have not requested a mistrial because she noted an

error in Woodhouse's report that probably would have been corrected in a retrial. Either way, this Court should assume the defense attorney knew what she was doing. Further, there is no way that a mistrial would have actually been granted. Compared with other cases, the comment was not so serious that a mistrial was necessary. There was also a jury instruction that the fact of the arrest should not prejudice the defendant.

The State agrees that the \$200 filing fee and \$100 DNA fee can be stricken.

B. The defense attorney did not provide ineffective assistance.

1. Standard on review.

To prevail on a claim of ineffective assistance, the defendant must show both that his counsel's performance was deficient and that he was prejudiced. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *Thomas*, 109 Wn.2d at 226. "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Reviewing courts will not second guess a trial attorney's tactics where

they are not manifestly unreasonable. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1 (2001).

In order to prevail on a claim that counsel's failure to request a mistrial constituted ineffective assistance, the defendant must establish that the counsel's request for a mistrial would have been granted. A mistrial is appropriate only where nothing the trial court could have said or done would have remedied the harm done to the defendant, and the trial court has broad discretion to cure any trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Whether an inadvertent remark justifies a mistrial depends on 1) the seriousness of the irregularity; 2) whether the statement in question was cumulative of other evidence; and 3) whether the irregularity could effectively be cured by an instruction to disregard the remark. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

2. The defense attorney's performance at trial was not below professional standards.

a) The offending comment was objectionable but was short and fleeting and was not a violation of a pre-trial ruling.

The defense attorney could have objected to the comment "I found he had a warrant for his arrest as well" RP at 100. It was not relevant and was also not responsive to the question, "And did he agree to speak with you?" *Id.* However, it was not a violation of the Motion in Limine.

The Motions in Limine prohibited Officer Woodhouse from speaking about his own knowledge of the defendant. Officer Woodhouse stated that the defendant had an outstanding warrant but did not testify about his own police contacts with the defendant and did not testify about any prior criminal act. The comment from Officer Woodhouse is nothing more than an inadvertent remark.

b) There were tactical reasons the defense attorney may have chosen to not object to the comment.

First, the comment was short and was not repeated again in the trial. The defense attorney could have thought that an objection or a motion for mistrial would highlight the comment for the jury.

Second, the defense attorney scored some points by noticing an error in Officer Woodhouse's police report. Just before making the objectionable comment, Officer Woodhouse testified that the defendant had thrown the second pipe down violently, disintegrating it. RP at 99. The defense attorney pointed out that Woodhouse's report actually stated that the first pipe was thrown down violently. RP at 112-114. Woodhouse admitted he switched around the description of the way the defendant threw the two pipes. RP at 114. The defense attorney also emphasized this in her closing argument. RP at 150. If a mistrial had been granted, Officer Woodhouse and the prosecution would have anticipated the problem, and

the defense could have been deprived of this point. The defense attorney could have calculated that it would be better to go forward with the objectionable comment in the record than to allow the prosecution to clarify the remark.

3. A mistrial would not have been ordered if requested.

To consider the factors listed in *Weber* regarding whether a remark justifies a mistrial:

a) Seriousness of the comment

The comment, “I found he had a warrant for his arrest as well”, is not so serious that it requires a mistrial. At least two cases have dealt with more prejudicial statements about a defendant’s criminal history.

In *State v. Condon*, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993), a witness made a reference to the defendant having been in jail. The court held “although the remarks may have had the potential for prejudice, there were not so serious as to warrant a mistrial . . .” *Id.* The comment here about an arrest warrant was certainly less serious than a reference to the defendant having been in jail.

State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010), held that an incarceration reference was not the type of irregularity that would require the trial court to declare a mistrial because the defendant was not

so prejudiced that nothing short of a new trial could ensure the fairness of the trial.

The comment was also inadvertent. Officer Woodhouse was explaining the chaotic situation: The defendant had tried to flee on his bicycle, had thrown away a drug pipe while fleeing, was looking to run again, and had just shattered a second drug pipe right in front of the officer. Woodhouse was dealing with all this while also trying to contact his dispatch. *Gamble*, 168 Wn.2d at 178, held in such circumstances that an unintentional interjection of inadmissible testimony was less serious than an intentional introduction of evidence relating to criminal history.

Further, the comment should be in context of the entire trial. The defendant threw away a meth pipe in front of a police officer. He admitted it was a meth pipe. A forensic scientist found it contained methamphetamine. No matter how skilled, no attorney could have changed the outcome.

b) Cumulative

Here is the challenged comment:

Q: Okay. At some point you put him under arrest?

A: Yes, at some point I did.

Q: And did he agree to speak with you?

A: Yes. After the return came back *I found he had a warrant for his arrest as well*, and I read him his Miranda rights and he agreed to speak to me waiving his rights.

RP at 100. (Emphasis added).

Officer Woodhouse detained him for throwing the meth pipes but arrested him on the outstanding warrant. RP at 26, 100. The jury knew the defendant was not going anywhere after throwing the meth pipes. The information about the warrant was cumulative information: he also was not going anywhere because he had an outstanding warrant.

c) Curative instruction

Before this issue came up, the defense proposed an instruction stating, “The fact that the defendant was arrested cannot be used to infer guilt or prejudice him in any way.” CP 25. This instruction was given as Instruction Number 6. CP 35. As the defense attorney explained, “there was definitely testimony about him being arrested, and I don’t want the jury to make any negative conclusions towards my client due to that.” RP at 130.

To repeat, the arrest was based on the outstanding warrant. RP at 100. Officer Woodhouse only detained the defendant for throwing the meth pipes. *Id.* The jury is presumed to follow this Instruction. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). This should cure any possible prejudice to the defendant.

The defense attorney acted tactically not to object and proposed a curative instruction. The defendant has not shown that his attorney fell

below reasonable standards or that a mistrial would have been granted if requested.

C. The \$100 DNA fee and the \$200 filing fee can be stricken.

Based on new legislation, which in fairness would apply to pending cases, the filing fee is discretionary, and the DNA fee should not be imposed if a DNA sample has been taken. This is not a criticism of the trial court. At the time of sentencing the fees were required. However, these fees should be stricken. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014).

V. CONCLUSION

The conviction should be affirmed. The fleeting comment from Officer Woodhouse that he arrested the defendant based on an outstanding warrant was not so serious to conclude that a mistrial was necessary. The trial court instructed the jury not to infer any prejudice against the defendant because he was arrested.

The defense attorney was dealt a terrible hand. The defendant in the presence of a police officer tossed away a methamphetamine pipe. He admitted it was his pipe and that he smokes methamphetamine from it. A scientist found methamphetamine was in the pipe. The defense attorney did the best she could with these facts. She noted one mistake by the

officer which would have been corrected if there had been a mistrial. It appears she wanted to present the case to the jury, with that mistake noted, and not highlight the comment further. The defense attorney's performance did not fall below professional standards and was not the reason the defendant was convicted.

The DNA fee and filing fee should be stricken.

RESPECTFULLY SUBMITTED on December 10, 2018.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over a horizontal line.

Terry J. Bloor, Deputy
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Bar No. 9044
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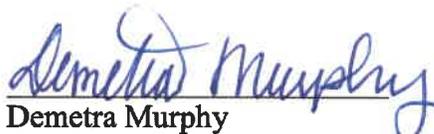
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 10, 2018.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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