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Court of Appeals
Division III
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No. 36074-1-III

IN THE COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

HECTOR RAMOS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

THE HONORABLE JUDGE MICHAEL G. MCCARTHY

SUPPLEMENTAL BRIEF OF APPELLANT

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I. SUPPLEMENTAL ASSIGNMENT OF ERROR

The Trial Court Erred When It Did Not Declare A Mistrial When The Prosecutor Violated A Motion In Limine During Closing Arguments.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The trial court ruled the phrase “DOC warrant” was not to be used by the parties. During closing argument, the State deliberately used the prohibited phrase. Did the trial court err when it found the State’s comment was not inadvertent, and called it a “boneheaded” and “misguided” move, but denied the defense request for a mistrial?

II. STATEMENT OF FACTS

Mr. Ramos incorporates the facts presented in the appellant’s opening brief and adds the following.

Yakima County prosecutors charged Hector Ramos with possession of a controlled substance and assault in the third degree. CP 6. A jury found him guilty of possession of a controlled substance and the assault charge was dismissed with prejudice. CP 60, 62.

In a pretrial motion in limine ruling the parties agreed, and the trial court ruled that police officers could testify they had an arrest warrant for Mr. Ramos. 1/29/18 RP 54-55. The court instructed there was *not* to be testimony it was "a DOC warrant or anything else." 1/29/18 RP 55. The following day, the court again advised:

> The only thing of any import would be that the officers should reference that they were attempting to contact Mr. Ramos to arrest him on a warrant, a DOC warrant. There is an agreement there will be no mention of the nature of the warrant, just a warrant.

1/30/18 RP 59.

During opening statements, the prosecutor said:

> On September 25th, the defendant was arrested on a Department of Corrections warrant. He had an existing warrant out from the Department of Corrections.

1/30/18 RP 132.

The court stopped the proceedings and excused the jury. 1/30/18 RP 132. The court reiterated its ruling that the fact that it was a DOC warrant was not to be mentioned. 1/30/18 RP 133. The prosecutor stated he misunderstood the court's ruling. 1/30/18 RP 133. The court found that while it believed the mistake was

unintentional, it warranted a mistrial and granted the defense counsel's request. 1/30/18 RP 136, CP 17.

The second trial commenced March 13, 2018. RP 214. Prior to witness testimony the prosecutor advised the court "I went over with both officers not to mention DOC." The court responded, "It's just a generic arrest warrant" and the prosecutor said, "Just say arrest warrant." 3/12/18 RP 215.

Mr. Ramos testified that on the morning of September 25, 2017, he was walking down an alley with a cooler near a relative's home. 3/14/18 RP 312-13. He kept his belongings in the cooler, because he was homeless. 3/14/18 RP 311-12. Unaware there was anyone near him, he was startled when he felt someone grab his shoulder and throw him to the ground. 3/14/18 RP 314. He felt his backpack fall off and his face pushed into the gravel alleyway. He was hit and dragged across the gravel. 3/14/18 RP 316. He screamed for help. 3/14/18 RP 316.

He kept his chin to his neck because he felt someone grabbing his neck and he was choking. 3/14/18 RP 317-19. He testified he had no intention of hurting or fighting with the individuals holding him down. 3/14/18 RP 326. Mr. Ramos was

later examined by EMTs and taken to the hospital. 1/29/1 RP 44,46-47.

Yakima police officer Hipner testified she was aware there was a warrant for Mr. Ramos and recognized him as he walked down the alleyway. 3/13/18 RP 224. As she waited for back-up, she slowly followed him in her vehicle. 3/13/18 RP 226. Mr. Ramos never turned around to see her patrol car. 3/13/18 RP 227.

When Officer Agledal arrived, she got out of her car and made verbal contact with Mr. Ramos but did not identify herself as a police officer. He did not turn around or run. 3/13/18 RP 228.

She told him to put his hands in the air, made physical contact, and pulled his backpack off his shoulders. 3/13/18 RP 229. She said she took him to the ground and they dragged him into an open area. 3/13/18 RP 230-31. She said Officer Agledal "was more in charge of the takedown because he's bigger and stronger." 3/13/18 RP 232.

In contrast, Officer Agledal testified "It seemed like he went to the ground on his own. Nobody used any takedown moves or anything." 3/13/18 RP 265.

Officer Hipner said during the take down and attempt to handcuff Mr. Ramos, Officer Agledal kneed Mr. Ramos in the side,

hit Mr. Ramos, and climbed on top of him to apply a carotid neck hold. 3/13/18 RP 232-234. The officers testified that Mr. Ramos flailed, and Officer Hipner had a grazing blow to her leg, not a direct kick. 3/13/18 RP 233.

Officers handcuffed Mr. Ramos but did not recite Miranda warnings to him. 1/29/18 RP 12. They conducted a search and testified they found a small baggy, which they believed to contain a controlled substance. 3/13/18 RP 270. The substance was later found to be methamphetamine. 3/14/18 RP 302.

During closing argument, the prosecutor said:

> Let's talk about what happened with Officer Hipner. She goes to approach him. She tells him he has a DOC warrant.

3/13/18 RP 360.

Defense counsel immediately objected, motioning to strike based on the court's pretrial ruling. The court sustained the objection. 3/13/18 RP 361. After closing arguments, defense counsel made a motion for a mistrial, noting there had been one mistrial, and after all the discussion about not calling it a DOC warrant, the prosecutor's statement was intentional or a reckless disregard of the court's rulings. 3/14/18 RP 378-79.

The prosecutor said she thought it was “harmless error” and apologized, saying it was not intentional or reckless, but rather referencing COBAN. 3/14/18 RP 379. The court said:

> Well, I’m concerned about it. I don’t know why you went there, to tell you the truth. It was a boneheaded move, to say the least. Well, I’m going to wait and see what the jury does. We’ll see what happens with the jury. Whether I decide to grant a new trial or dismiss the prosecution we’ll see where we are.

3/14/18 RP 379.

The jury returned a guilty verdict on the possession of a controlled substance and could not reach a unanimous verdict on the assault charge. 3/14/18 RP 384. The court declared a mistrial on the assault charge and later dismissed it with prejudice. 3/14/18 RP 384-85; CP 62.

Regarding the defense motion for a mistrial, the court said:

> In any event, I would also indicate that I think your motion at this point probably is moot about the mention of the DOC warrant. It doesn't appear to me that there was any serious contest as to Count 2, the charge of possession of methamphetamine. I don't think the mention of the DOC warrant affected in any fashion the jury's verdict as to Count 2. For the record, I will deny your request.

3/14/18 RP 386.

Addressing the prosecutor, the court said:

> I don't think it was inadvertent. I think it was misguided. I think, given all the hullabaloo about the pretrial rulings, that it was an area that the state should never have gone into. It was misguided to do so.

3/14/18 RP 388.

Mr. Ramos filed a timely notice of appeal. CP 59-67.

III. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION FOR A NEW TRIAL.

In this case, the State's attorneys twice violated the same order in limine. After the first violation the court granted a mistrial. The second time the court expressed frustration but waited to hear the jury verdict before deciding whether to grant a mistrial or dismiss the charges with prejudice. The second violation was intentional. The trial court abused its discretion in not granting a mistrial.

The purpose of a motion in limine is to dispose of legal issues so counsel will not be forced to comment in front of the jury which may prejudice his presentation. *State v. Evans,* 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981). Violating an order in limine is considered a trial irregularity, and may constitute misconduct, warranting a mistrial. *State v. Thompson,* 90 Wn. App. 41, 46-47,

950 P.2d 977 (1998). *State v. Clemons,* 56 Wn. App. 57, 62, 782 P.2d 219 (1989).

It is within the sound discretion of the trial court to grant or deny a request for a mistrial based on misconduct. *State v. Copeland,* 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). An abuse of discretion occurs when the court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the first time the prosecutor violated the court order the court excused the jury. It found the violation was based on a misunderstanding, despite the court having been clear in its original order prohibiting the State from disclosing the officers were acting on a DOC warrant. 1/30/18 RP 133. The court recognized the evidence was overly prejudicial to Mr. Ramos and granted the remedy of a mistrial.

The second violation, during closing argument, was deliberate and intentional. The court had already declared a mistrial for violation of the order and had again, instructed the prosecutor to adhere to the prohibition about mentioning a DOC warrant.

In *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937), the Supreme Court considered whether a new trial should have been granted where the prosecutor clearly violated the ruling of the court. There, the defendant had left the armed services under circumstances which were “discreditable to him”, as he had deserted. The court held the matter should not be inquired into during cross-examination. *Id.* at 428. The prosecutor delved into the circumstances. The defendant did not object. The trial court denied a motion for a new trial, finding the action was erroneous, but did not warrant a mistrial. On review, the Court found the ruling to be error.

The Supreme Court held the prosecutor clearly violated the court’s ruling, the question was highly prejudicial, and the prejudice consisted in the mere asking of the question. The Court further held that a motion to strike and an instruction to the jury to disregard was unnecessary. Rather, the Court ruled “In any event, in view of the *deliberate disregard* by counsel of the court’s ruling, *prejudice must be presumed*, and appellant’s motion for a new trial should have been granted.” *Id.* at 429.

The Court noted another of its opinions, *State v. Tweedy,* 165 Wash. 281, 5 P.2d 335, 338 (1931), in which the prosecutor

had “finally succeeded in introducing testimony which the court on three prior occasions ruled was incompetent and inadmissible.” *Smith,* 189 Wash. at 429. The Court held the “error was prejudicial, even though the objectionable testimony was on motion stricken by the court and the jury instructed to disregard it.” *Id.* at 429.

Here, the improper remark was made after testimony had concluded, and all the witnesses had obeyed the court’s ruling. By referencing the DOC warrant, the prosecutor left the jury knowing that the Department of Corrections had issued a warrant for Mr. Ramos’s arrest. The reasonable inference for the jury was that Mr. Ramos had previously been convicted of a crime. This was the very prejudice the defense and court sought to avoid through the motion in limine order.

A trial must be fair, and if the defendant is to be convicted, it must be based on his behavior that gave rise to the crime, not on his character. This is so because:

> The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court. There are also indirect and more subtle disadvantages. Our rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character.

1 Wigmore on Evidence (2d Ed.) § 57, p. 272. *State v. O'Donnell*, 191 Wash. 511, 515, 71 P.2d 571, 573 (1937)

In *O'Donnell* the Court found the defendants received an unfair trial after the prosecutor committed gross misconduct during his opening statement. There, the prosecutor referenced the criminal records of the defendants. *Id.* at 512-13. On review, the Court reasoned:

> It is true that counsel for the defense might have then asked the court to instruct the jury to disregard the statements made, but had that been done, it seems to us the virus could not have thus been removed. This question of character bears with peculiar force upon the issue of intent and the character of appellants having been destroyed with a single blow, the jury, as ordinary men and women, must necessarily have been greatly influenced thereby in determining the issue of intent. The ordinary direction to disregard could not restore the minds of the jurors to that fair and impartial state which the law requires.

Id. at 513.

The Court added, "the rule which excludes evidence of bad character of the accused is grounded on the policy of avoiding the uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce." *Id.* at 515.

The fact that the defendants were proven to be guilty by evidence properly before a jury was of little comfort to the Court. *Id.* at 518-519. The Court wisely reasoned: "The appellants are not alone involved here. The integrity of our system of administering criminal justice is involved." *Id.* at 518. The Court found the expense of a new trial was "a small price to pay for maintenance of the standard of judicial fairness which is our boast. If, on the other hand, we condone the admittedly irregular procedure occurring in the trial, twill be recorded for a precedent, and many an error, by the same example will rush into the state.'" *Id.* at 518-19.

The prosecutor's comment here was improper and a violation of a court order. Mr. Ramos timely objected. The trial court considered whether to grant a new trial or dismiss the charges, but reasoned the admissible evidence had secured a conviction. Such reasoning is in contrast to the Court's interest in maintaining the integrity of the criminal justice system and constitutes an abuse of discretion.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ramos respectfully asks this Court to remand to the trial court with

instruction to either vacate the conviction with prejudice or to set a new trial for Mr. Ramos.

Respectfully submitted this 24th day of January 2019.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on January 24, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Supplemental Brief to the following: Yakima County Prosecuting Attorney at appeals@co.yakima.wa.us and to Hector Ramos, 12664 Summit View Road, Yakima, WA 98908.

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January 24, 2019 - 3:01 PM

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