

67506-1

67506-1

NO. 67506-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROGELLE HARRIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS AND
THE HONORABLE LAURA GENE MIDDGAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Whether the trial court properly exercised its discretion when it denied defendant's motion for a mistrial when the victim made a single reference to prison but where the irregularity was not serious, was cumulative and was cured by the court's subsequent instruction.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Rogelle Harris, with one count of assault in the second degree, one count of felony violation of a no contact order, interfering with domestic violence reporting, and witness tampering for his conduct involving his then girlfriend, Glynnis Harps. CP 1-12.

The State further alleged that the first three counts involved domestic violence, and, as an aggravating factor on counts I and II, the State also alleged that Ms. Harps' minor child was present. CP 9-10; RCW 9.94A.535(3)(h)(ii).

Before trial, the defendant pled guilty to count IV, witness tampering. CP 73-98; RP 11-22. The court later dismissed count III. CP 112; RP 550-56, 580, 683-84. The jury found the defendant

guilty as charged on counts I and II and found the aggravator applied to each count. CP 69-72.

Upon a motion by the State, the sentencing court dismissed count II and sentenced the defendant to a high-end standard range sentence on counts I and IV. RP 683-84; CP 84.

2. SUBSTANTIVE FACTS

In 2009, the victim, Glynnis Harps, had a relationship with the defendant for about a year where they cohabited for approximately six months in the same apartment as Ms. Harps' 11-year-old daughter C.W. RP 334-36. In November 2010, the court issued a two-year no-contact order against the defendant protecting Ms. Harps. RP 338, 472-74.

On December 30, 2010, the defendant unlawfully entered the victim's apartment, in violation of the no-contact order, and an argument ensued. RP 293-94, 302, 305, 328. The defendant threw a glass at Ms. Harps, that shattered on impact with Ms. Harps' back near her spine, causing a painful wound requiring 20 or so stitches, including derma-glue in her back. RP 291, 303, 364-68, 529-41. C.W. was present during the incident. RP 398, 431.

Pursuant to ER 404(b), the trial court granted the defendant's motion to exclude certain evidence, including previous incidents of domestic violence between the defendant and Ms. Harps, as well as related evidence regarding a probation violation on the defendant's prior federal charge. CP 16-17; RP 100-03.

Judge Beth Andrus presided over the pretrial motions. Due to scheduling difficulties, the case was eventually assigned to Judge Laura Gene Middaugh. The parties agreed that Judge Andrus' rulings remained in full force and effect. RP 216.

At trial, Ms. Harps violated a pre-trial ruling by non-responsively answering the question by the prosecutor. The question asked was: "Well, just, you can just tell me when he moved out." Ms. Harps' answer was nonresponsive when she stated: "um, well, he, when he went to prison he moved out." Defense counsel objected, and the court sustained the objection. RP 103-04; RP 338.

The jury was excused, and the defendant moved for a mistrial. RP 338-41. The court ruled that the testimony was not unduly prejudicial because the jurors already knew about the no-contact order and therefore knew there was some activity

between the defendant and Ms. Harps. RP 342. The court also noted that a curative instruction would be adequate because jurors were, "presumed to follow my instructions." RP 341-42. The court rejected the defendant's arguments that a no-contact order did not necessarily equate with incarceration and that, in any event, jurors would understand prison was more serious than jail time. RP 341-43.

When the jury returned, the court corrected the record by instructing the jury that "there is no evidence that the defendant has been to prison, and the jury is to disregard the statement of the witness and not to consider that for any purpose whatsoever in this case." RP 347.

C. ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A MISTRIAL BECAUSE THE IRREGULARITY WAS NOT SERIOUS, THE COURT TOLD THE JURY TO DISREGARD THE STATEMENT, AND THE JURY WAS GIVEN A LIMITING INSTRUCTION.

The defendant appeals his conviction on the grounds that the trial court erred when it denied his motion for a mistrial. This Court reviews the denial of a motion for mistrial under an abuse of discretion standard. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d

514 (1994). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. State v. Hummel, 266 P.3d 269, 284 (Wash. Ct. App. 2012), citing In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

A trial court will only grant a mistrial when trial irregularities rise to the level of affecting the outcome of a trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity denied the defendant a fair trial, courts examine (1) its seriousness, (2) whether it involves cumulative evidence, and (3) whether a curative instruction was given, and capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

This Court should affirm the defendant's conviction because none of the Johnson factors are met and the defendant received a fair trial.

1. The Irregularity Was Not Serious In Light Of
The Evidence Properly Before The Jury.

First, the irregularity in the present matter was not serious.

The statement made by Ms. Harps was a quick, perfunctory comment that provided no additional information about the length of any sentence or the nature of any crime committed by the defendant. See State v. Hopson, 113 Wn.2d 273, 286, 778 P.2d 1014, 1020 (1989) (determining that the irregularity was not serious enough to materially affect the outcome of the trial reasoning in part that there was no information concerning the nature or number of prior convictions).

There was overwhelming evidence to support the conviction. Both Ms. Harps and her daughter saw the defendant throw the glass at the victim's back which was corroborated by medical testimony. RP 358-62, 431-33, 528-35. Hopson, 113 Wn.2d at 286 (noting that "the jury had overwhelming evidence favoring conviction[.]" cutting against a determination of seriousness).

The defendant argues that evidence relating to a defendant's prior criminal conduct is very prejudicial. Appellant's brief page 8, relying on State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 and State v. Hardy, 133 Wn.2d 701, 706, 96 P.2d 1117 (1997). In

Perrett, the defendant contested a sheriff's deputy's testimony, in a case involving a gun charge, that "the last time the sheriffs took [the defendant's] guns, [the defendant] didn't get them back." Perrett, 86 Wn. App. at 319. The appellate court held that the contested statement was unfairly prejudicial because "it raised the inference that Perrett had committed a prior crime involving a gun, thereby making it more likely he had done so again." Perrett, 86 Wn. App. at 319-20. However, in this case, Ms. Harps did not state the reason the defendant had been sent to "prison."

In Hardy, the trial court admitted evidence of the defendant's prior drug conviction as purportedly probative of the witness's truthfulness, even while noting that the "impeachment value of the prior crime is almost nil." Hardy, 133 Wn.2d at 705-06, 713. The appellate court held that the admission of such evidence was improper because it was more prejudicial than probative of the defendant's truthfulness, which was, "important because it was virtually his word against the alleged victim's[.]" the "victim was the only other eyewitness to testify[.]" and "[t]here was no overwhelming evidence" providing the crime charged. Hardy, 133 Wn.2d at 713. By contrast, in this case, there were witnesses other

than the victim and other overwhelming evidence to support the conviction.

In sum, Ms. Harps' statement simply fails to rise to a level of seriousness that would have denied the defendant a fair trial.

2. The Reference To Criminal Activity Not Cumulative.

The second Johnson factor has not been met. While Ms. Harps only made that one isolated statement, the trial court correctly pointed out that the jury was already aware of the no-contact order between the defendant and Ms. Harps and therefore already knew of some criminal activity on the defendant's part. RP 342.

Additionally, Harris's assertion that a statement about prison time implies a conviction for a serious crime lacks merit. First, the trial court told the jury to disregard the statement and gave a limiting instruction to the jury when they returned. RP 347. Moreover, the statement made in Harris's brief, that "given the timing of Harris's incarceration, moreover, jurors were likely to infer that the pervious crime involved Harps," lacks merit as there is no

evidence in the record to support this contention. Appellant's brief page 9.

Further, Harris cites a case that when cumulative evidence of similar prior acts of the accused is admitted, it is prejudicial because it allows the jury to shift focus from the merits of the current charge. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). Trickler is distinguishable because that court allowed the jury to consider evidence the defendant was in possession of a plethora of allegedly stolen items in order for the State to show knowledge that the credit card in that case was also stolen. However, after hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler was a thief. Under the specific facts of Trickler, the appellate court concluded the trial court abused its discretion when it admitted this evidence at trial. State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445, 449 (2001).

Again, the facts in Trickler are dissimilar to the present matter. Ms. Harps' sole statement, coupled with the other properly admitted evidence regarding the no-contact order and "activity" between Ms. Harps and the defendant, does not rise to the level of

a "plethora of stolen items" that was deemed erroneously allowed admissible by the trial court in Trickler. Id.

Because evidence properly before the jury indicated some prior criminal activity, the victim's brief reference to "prison" was somewhat cumulative.

3. A Proper And Adequate Curative Instruction Was Given.

Finally, the third Johnson factor was not met because the court gave a limiting instruction assuring that the jury would disregard the statement made by Ms. Harps. RP 347.

The trial court cured the error when it instructed the jury to "...disregard the statement of the witness and not to consider that for any purpose whatsoever in this case." RP 347.

A similar curative instruction was used successfully in Hopson. The court reasoned that the third factor presents no problem. "The judge ordered the jury to disregard the remark and minimized its impact by moving the trial along. He refused to discuss the remark with counsel in front of the jury. Jurors are presumed to follow instructions." State v. Hopson, 113 Wn.2d 273,

287, 778 P.2d 1014, 1021 (1989), citing State v. Mak, 105 Wn.2d 692, 702, 718 P.2d 407 (1986).

The appellant claims that some errors simply cannot be fixed with an instruction, citing State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996), and Escalona, 49 Wn. App. at 255-56. However, Copeland does not apply in this case because it deals with prosecutorial misconduct in cross-examination where a limiting instruction is not effective when the misconduct is so flagrant that "no instruction can cure it." State v. Copeland, 130 Wn.2d at 284, (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)).

Copeland is inappropriately relied upon because the misconduct in Copeland was highly flagrant and easily distinguishable. During cross-examination, the prosecutor in Copeland asked a defense witness about his 1988 assault conviction: "You beat [the victim] black and blue and you burned her abdomen with a cigar, didn't you?" Copeland, 130 Wn.2d at 244.

However, even with this flagrant prosecutorial misconduct, the Copeland court still upheld the conviction and found that:

The prosecutor's question was a deliberate attempt to influence the jury's perception of [the defense witness's] testimony, and constitutes prosecutorial

misconduct. However, given the curative instruction and the circumstances, the misconduct was not so prejudicial that reversal is required.

Copeland, 130 Wn.2d at 285 (emphasis added). See also State v. Fullen, 7 Wn. App. 369, 387-88, 499 P.2d 893 (1972) (holding that prosecutor's reference to murder defendant's prior robbery conviction and familiarity with guns improper but not reversible error because corrected by court). There is no allegation of prosecutorial misconduct in the present case.

Juries are presumed to follow a court's instructions. In one case involving a felon in possession of a firearm, the court held that evidence the defendant possessed a stolen firearm was not enough to support a mistrial when a limiting instruction was given. United States v. VonLewis, 155 F. App'x 972, 974 (9th Cir. 2005). The jury was presumed to have followed the judge's limiting instruction and considered the evidence only as evidence of VonLewis's knowledge or intent that he possessed the firearm. Id., citing United States v. Mende, 43 F.3d 1298, 1302 (9th Cir. 1995).

In the present matter, the use of a limiting instruction ensured that improper evidence would not be considered by the jury. Because the defendant has not established that any of the three Johnson factors have been met, this Court should conclude

that the trial court properly exercised its discretion and affirm the defendant's conviction. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (affirming the defendant's conviction, in part because none of the factors were met).

D. CONCLUSION

For the foregoing reasons, this Court should affirm the conviction because the trial court did not abuse its discretion in denying the defendant's motion for a mistrial because the trial irregularity which occurred did not deny the defendant a fair trial.

DATED this _____ day of March, 2012.

Respectfully submitted,

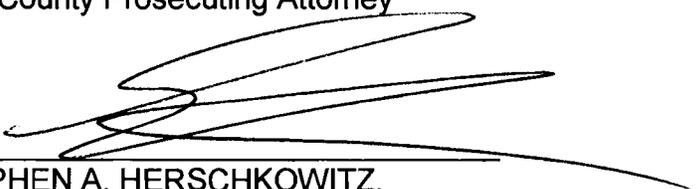
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DATED this 6th day of March, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielson , attorney for the Appellant, of Nielson, Broman, Koch, PLLC, at the following address: 1908 E. Madison St., Seattle, WA 98122 containing a copy of Brief of Respondent to be sent to Court of Appeals, in State v. Rogelle Harris, Cause No. 67506-1-I, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Lindsey Thomas

Lindsey Thomas
Done in Kent, Washington

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Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielson, attorney for the Appellant, of Nielson, Broman, Koch, PLLC, at the following address: 1908 E. Madison St., Seattle, WA 98122 containing a copy of Page 14 for the Brief of Respondent to be sent to Court of Appeals, in State v. Rogelle Harris, Cause No. 67506-1-I, in the Court of Appeals for the State of Washington, Division I.

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