

73252-8

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FILED  
October 9, 2015  
Court of Appeals  
Division I  
State of Washington

No. 73252-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CRYSTAL HUNTER,

Appellant.

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

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BRIEF OF APPELLANT

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#### A. SUMMARY OF ARGUMENT

The State charged Ms. Hunter with taking a motor vehicle without permission in the second degree when she was found riding in the passenger seat of a car that had been stolen. The evidence against Ms. Hunter was very limited, and the State agreed before trial that it would not offer any evidence of her prior acts. Despite the State's representation, a deputy sheriff testified Ms. Hunter had an outstanding warrant at the time she was stopped. Because the prejudicial effect of this statement deprived Ms. Hunter of her right to a fair trial, this Court should reverse.

#### B. ASSIGNMENT OF ERROR

The trial court denied Ms. Hunter her right to a fair trial when it refused to grant her motion for a mistrial.

#### C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When a trial court denies a defendant's motion for a mistrial, this Court must evaluate the prejudicial effect of the evidence improperly presented at trial. Where the deputy sheriff testified Ms. Hunter had an outstanding warrant, in violation of the parties' pretrial agreement, the statement was not cumulative, and the irregularity could not cured by an instruction, must this Court reverse?

#### D. STATEMENT OF THE CASE

Jesus Ocha heard the engine of his Honda Accord start up early one morning. 2/4/15 RP 12. He ran outside in time to see a man stealing his car and attempted, but was unable, to stop him. 2/4/15 RP 15. A few weeks later, law enforcement stopped the car at night after noticing its back lights were out. 2/4/15 RP 33. The driver used a screwdriver to turn the car off and could not provide any paperwork for the vehicle. 2/4/15 RP 35. The sheriff's captain who stopped the car testified that he observed tools on the floorboard, heavy damage to the steering column, and a missing ignition cylinder. 2/4/15 RP 45. He was able to observe this because he had intentionally stopped the car in a well-lit area and illuminated the car with his own vehicle's headlights before approaching the vehicle. 2/4/15 RP 50-51.

Crystal Hunter was riding in the front passenger seat when the car was stopped. 2/4/15 RP 37. She was charged with taking a motor vehicle without permission in the second degree. CP 1. Prior to trial, the court ruled that if Ms. Hunter testified, the State could introduce evidence of her prior convictions. 2/3/15 RP 33. The defense moved to exclude any prior bad acts of the defendant and the State indicated it

had no intent to offer any such acts. CP 10; 2/3/15 RP 27-28. Ms. Hunter did not testify at trial.

However, despite the State's assurance that it would not be introducing any evidence of Ms. Hunter's prior bad acts, a sheriff's deputy testified Ms. Hunter had an unrelated warrant out of Renton at the time the car was stopped. 2/4/15 RP 79. The defense moved for a mistrial but the trial court denied Ms. Hunter's motion after mistakenly ruling that the defense had failed to address this issue in its motions in limine. 2/4/15 RP 90-91.

During deliberations, the jury asked whether Ms. Hunter would be acquitted if it could not reach a unanimous verdict. CP 39. The jury resumed deliberations after the court referred them to an instruction, and Ms. Hunter was ultimately convicted and sentenced to 30 days of confinement, converted to attendance in "Enhanced CCAP" (Community Center for Alternative Programs). CP 40, 44, 47.

## E. ARGUMENT

**The deputy's statement at trial, indicating Ms. Hunter had an outstanding warrant, denied Ms. Hunter her right to a fair trial.**

- a. Reversal is required where a trial irregularity denies a defendant her right to a fair trial.

A trial court should grant a mistrial when a trial irregularity deprives the defendant of a fair trial. *State v. O'Connor*, 155 Wn. App. 282, 288, 229 P.3d 880 (2010); U.S. Const. amends. V, XIV; Const. art. I, § 3. In cases where the State presents previously excluded evidence through testimony, the Court must evaluate the prejudicial effect of the witness's statement in order to determine whether reversal is required. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

This Court employs a three-part test to evaluate the prejudicial effect of inadmissible evidence improperly presented at trial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction. *Gamble*, 168 Wn.2d at 177. When a review of these combined factors shows the defendant was denied her right to a fair trial, the trial court's denial was an abuse

of its discretion and reversal is required. *Escalona*, 49 Wn. App. at 256.

b. The deputy's statement violated Ms. Hunter's right to a fair trial.

i. *The Seriousness of the Irregularity*

A serious irregularity occurs when a “professional” witness, such as a sheriff's deputy, references previously excluded evidence. *Gamble*, 168 Wn.2d at 178. At Ms. Hunter's trial, the defense moved in limine to exclude any evidence of prior bad acts committed by Ms. Hunter under ER 404(b). 2/3/15 RP 27-28; CP 10. The State indicated it did not intend to offer any such evidence. 2/3/15 RP 28. It did, however, intend to introduce impeachment evidence of Ms. Hunter's past convictions under ER 609 if Ms. Hunter elected to testify, which the trial court ruled was proper. 2/3/15 RP 33.

Despite the State's representation, a deputy sheriff testified at trial that after he initially made contact with Ms. Hunter, the first thing he did was try to confirm an unrelated warrant she had out of Renton. 2/4/15 RP 79. The trial court sustained Ms. Hunter's objection, and Ms. Hunter later moved for a mistrial, explaining this was “a very close case” and the deputy's statement significantly impacted Ms. Hunter's ability to obtain a fair trial. 2/4/15 RP 80, 90.



When the trial court rejected Ms. Hunter's motion, it stated:

There wasn't a motion in limine made, so I can't find that there was any misconduct. He said it; it was – I think it was probably inadvertent. And so I don't find that it was grounds for a mistrial.

2/4/15 RP 91. The court's determination that the improper statement was not addressed in a motion in limine was incorrect. The defense had moved to exclude any prior bad acts attributed to Ms. Hunter and the State indicated none would be offered. 2/3/15 RP 27-28. Assuming the deputy revealed this information inadvertently, his error was the result of the State's failure to properly admonish its witnesses that they were prohibited from referencing any prior bad acts of the defendant, including any outstanding charges or convictions.

In *Escalona*, a witness stated that he was very nervous when he saw the defendant holding a knife because the defendant had stabbed someone in the past. 49 Wn. App. at 253. This Court determined this unsolicited statement was "extremely serious." *Id.* at 255. It found:

Our rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes. *See* ER 609, ER 404(b). Furthermore, the reference to Escalona's record becomes particularly serious considering the paucity of credible evidence against Escalona.

*Id.*

Similar to the circumstances presented in *Escalona*, the deputy's statement violated the express policy against the admission of evidence of prior crimes and was particularly serious given that the State's evidence against Ms. Hunter was so limited. The evidence showed that a man had acted alone in stealing the car and that a man was driving the car when it was pulled over. 2/4/15 RP 15, 21, 35. Ms. Hunter indicated she had been riding in the car for only about 14 to 17 blocks before it was pulled over. 2/4/15 RP 79. It was dark during the ride, as the car was stopped shortly after midnight. 2/4/15 RP 32. The sheriff's captain indicated that he observed tools on the floorboard, damage to the steering column, and a missing ignition cylinder, but this was only after the car was stopped in a well-lit area and the headlights of the captain's vehicle were used to illuminate the interior of the car. 2/4/15 RP 45, 50-51. In addition, the captain, unlike Ms. Hunter, was trained to look for things like a punched ignition when stopping a car. 2/4/15 RP 54.

The only evidence that Ms. Hunter had knowledge the car was stolen was the fact she was sitting in the vehicle. That this was, indeed, "a very close case" is demonstrated by the jury's inquiry, which asked whether a failure to come to unanimous agreement should result in a

verdict of “not guilty.” CP 39. Although the jury ultimately returned a verdict of guilty, this question reveals that one or more jurors were initially convinced a verdict of not guilty was appropriate.

The deputy’s statement that Ms. Hunter had an outstanding warrant shifted how she appeared to the average person: the possibility that she was an unwitting passenger in a stolen vehicle became much less likely once the jurors were made aware of the fact she had an ongoing criminal history. Because this statement came from a law enforcement witness, violated the express policy of excluding evidence of prior crimes, and was made in the context of a trial where the State presented limited evidence against Ms. Hunter, the statement must be characterized as extremely serious. *Gamble*, 168 Wn.2d at 178; *Escalona*, 49 Wn. App. at 255.

ii. *Whether the Statement was Cumulative*

As to the second factor, there is no question the deputy’s statement was not cumulative or repetitive. *Escalona* 49 Wn. App. at 255 (finding that the statement was not cumulative or repetitive of other evidence where “the trial judge had ruled in limine that the prior conviction could not be admitted”). The court excluded all evidence of Ms. Hunter’s prior bad acts under ER 404(b) and permitted the State to

introduce any evidence of prior convictions as impeachment evidence under ER 609 only if Ms. Hunter chose to testify. 2/3/15 RP 27-28, 33. When the deputy shared that Ms. Hunter had a criminal history, the State obtained the benefit of having placed this information in front of the jury, thereby prejudicing Mr. Hunter, despite the fact Ms. Hunter elected not to testify.

iii. *Whether the Irregularity Could be Cured by an Instruction*

Given that this was a serious irregularity that was not cumulative, the only remaining consideration is whether the error was cured by the instruction provided to the jurors, which directed them to disregard the deputy's statement. CP 31. This instruction, which the defense requested in the alternative to his motion for a mistrial, attempted to mitigate the prejudice to the defense. However, while a jury is presumed to follow the court's instruction to disregard testimony, "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" *Escalona*, 49 Wn. App. at 255 (quoting *State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The admissibility of evidence of prior crimes is strictly limited precisely because it is understood to be inherently prejudicial. *State v. Sexsmith*, 148 Wn. App. 497, 506, 157 P.3d 901 (2007); *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Although not legally relevant, evidence of past crimes appears to be logically relevant to lay jurors, making it difficult, if not impossible, for a jury to ignore this seemingly relevant fact in a close case. *Escalona*, 49 Wn. App. at 256; *see also State v. Holmes*, 43 Wn. App 397, 399-400, 818 P.2d 766 (1986) (before evidence can be admitted pursuant to ER 404(b) it must be legally relevant, not simply logically relevant). Because such evidence appeals to the jurors' sense of logic, they are likely to use it for its most improper purpose: to conclude Ms. Hunter acted on this occasion in conformity with the character she has demonstrated in the past. *Escalona*, 49 Wn. App. at 256.

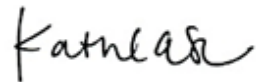
Just as in *Escalona*, the seriousness of the irregularity combined with the weakness of the State's case and the logical relevance of the deputy's statement to a lay jury all lead to the conclusion that the court's instruction could not cure the prejudicial effect of the deputy's statement. *Id.* Reversal is required. *Id.* at 257.

F. CONCLUSION

This Court should reverse Ms. Hunter's conviction because she was denied her right to a fair trial when the trial court denied her motion for a mistrial.

DATED this 9<sup>th</sup> day of October, 2015.

Respectfully submitted,

A handwritten signature in cursive script that reads "Kathleen".

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	NO. 73252-8-I
	)	
CRYSTAL HUNTER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF OCTOBER, 2015.

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