

NO. 67858-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROYANNE WESTBROOK,

Appellant.

2012 JUL 19 PM 2:00  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

**BRIEF OF RESPONDENT**

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ORIGINAL

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**A. ISSUES PRESENTED**

The decision to grant or deny a defendant's motion for a mistrial is within the discretion of the trial court. The trial court denied Westbrook's motion for a mistrial after Detective Nelson mentioned using her booking photograph and instead gave a curative instruction. Would no reasonable judge have done the same?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Royanne Westbrook with one count of theft in the second degree. CP 1. On June 29, 2011, Westbrook's trial commenced before the Honorable Bruce Heller. 2 RP 4<sup>1</sup>. During the trial, Westbrook motioned the court to declare a mistrial. 5 RP 45. After argument and consideration, the court granted the defendant's motion for a mistrial. 5 RP 69. However, after the State moved for reconsideration, the court denied the defendant's

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<sup>1</sup> Reports of Verbatim Report of Proceedings consist of ten volumes from eight separate dates. The volumes are not consecutively paginated. In this brief, the 6/29/11 report of proceeding before the Honorable Ronald Kessler is cited as 1 RP; the 6/29/11 report of proceeding before the Honorable Bruce Heller is cited as 2 RP; the 6/30/11 report of proceeding is cited as 3 RP; and each subsequent date's report of proceeding is sequentially numbered accordingly.

motion for a mistrial. 5 RP 84. The jury found the defendant guilty as charged. 6 RP 3.

## **2. SUBSTANTIVE FACTS**

On September 26, 2010, Lori LeFavor found that her dog had been removed from the post where she secured the dog near the El Camino restaurant. 4 RP 154-60. While LeFavor was inside the restaurant, Pamela Panela saw the dog tied to a post outside the restaurant. 4 RP 46. While Panela was petting the dog, a woman approached her. 4 RP 48. Panela later identified the woman by a photomontage as Royanne Westbrook. 4 RP 48. Westbrook told Panela that the dog was hers and that Westbrook had adopted the dog. Id.

Later that same day, Lisa Podmajerski saw LeFavor's dog, which she knew from previous occasions, with Westbrook. 4 RP 74-75. Initially, Westbrook told Podmajerski the dog was hers, but later said she found the dog. 4 RP 84. However, when Podmajerski confronted her about the dog, Westbrook said she found the dog. 4 RP 84. Westbrook did not want to relinquish the dog to Podmajerski and said she wanted a reward if a reward was to be offered. 4 RP 85. Podmajerski's boyfriend then called the

police. Id. After being told that Podmajerski's boyfriend was speaking to the police and that Podmajerski had Westbrook's vehicle's license plate number, Westbrook gave her the dog and left. 4 RP 87. Podmajerski noted a description of Westbrook's vehicle and Podmajerski's boyfriend gave the vehicle's license plate number to the police. 4 RP 87-88.

The incident was initially investigated by an individual, who provided a report to Detective Eric Nelson of the Seattle Police Department for follow up work. 5 RP 37. Detective Nelson worked from Officer or Detective Misho's report. 5 RP 53. Detective Misho never testified. Detective Nelson then created the photomontage, which Panela and Podmajerski viewed. 5 RP 42.

At trial, Detective Nelson testified that he used information provided by witnesses in creating the photomontage. 5 RP 38-43. Detective Nelson first looked at a Department of Licensing database and found a name of Hartzog associated with the license plate number given Podmajerski. 5 RP 41. Detective Nelson then testified that he found the true name Westbrook for Hartzog in the King County Jail Booking System. 5 RP 41. Specifically, Detective Nelson stated,

“Well, yes, the original report listed that it involved a white female. So I focused on the female name associated with the registration, and I obtained—oh, I ran that name through the King County jail booking system and obtained a photograph, a booking photo and it resembled the description that was provided in the report and it also listed a true name of Westbrook.” 5 RP 40-41.

Then, when questioned about how he created a photomontage, Detective Nelson said,

“It’s where we use six photographs. Typically, they’re booking or DOL photographs and one of those, of course, will be Westbrook, and then we get five other people that look similar.” 5 RP 43.

The court then excused the jury. Id.

Outside the presence of the jury, Westbrook moved for a mistrial. 5 RP 45. The court took the motion under advisement until the end of testimony. 5 RP 45. During the remainder of Detective Nelson’s testimony, he acknowledged that he received a report from a Detective Misho before conducting his portion of the investigation. 5 RP 52-53.

Initially, the court granted the motion for a mistrial. 5 RP 69. Upon hearing further argument, the court reconsidered its ruling and denied the motion for a mistrial. 5 RP 84. In denying Westbrook’s motion, the court stated, “the jury could very likely associate the fact that Ms. Westbrook was in jail to something that

happened as a result of this case and this investigation.” 5 RP 84.

The court stated further,

“I don’t believe based on the arguments that have been made that the jurors would be so prejudiced by thinking that Ms. Westbrook was a convicted criminal or a bad person because there is, I think, a logical inference that she would have been arrested just in connection with this case.” 5 RP 84.

The court then proceeded to give a written curative instruction along with the other jury instructions. CP 61. In crafting the instruction, the court consulted with counsel for Westbrook for the precise language to be used, which was eventually approved by Westbrook’s counsel. 5 RP 84-90.

**C. ARGUMENT**

**THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.**

The trial court did not abuse its discretion when it denied Westbrook’s motion for a mistrial because the irregularity was not serious enough to warrant a new trial and the irregularity was properly cured by an instruction from the court to the jury to disregard the remark.

An appellate court applies an abuse of discretion standard when reviewing a trial court's denial of a mistrial. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Trial courts should only grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). This determination is to be made by the trial court, and the ruling should not be disturbed unless there is a clear abuse of discretion. State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). This is due to the fact that a trial judge, having seen and heard the proceedings, is in a better position to judge the matter than a reviewing court. State v. Perez-Valdez, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). A reviewing court will find abuse of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Three factors must be considered when determining if a prejudicial comment denied the defendant a fair trial: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to

disregard the remark, an instruction which a jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

1. Detective Nelson's Testimony Was Not So Serious As To Warrant A New Trial.

The first factor the court must consider is the seriousness of the irregularity. The irregularity in this case was not so serious as to warrant a new trial. While Detective Nelson made reference to the fact that he accessed a booking photograph he did not state that Westbrook had ever been convicted of a crime, nor did he allude to any crime for which she had been booked. Later in his testimony, he referenced that Department of Licensing photographs are used in the creation of photomontages as well. Moreover, the testimony during the trial never conclusively established a chronology of the police investigation of Westbrook, which allowed for an alternative interpretation that Westbrook had been arrested only for the case at bar. Detective Nelson's testimony stands in contrast to cases where courts have found similar irregularities to be serious enough to warrant a mistrial.

In Escalona, the defendant was charged with second degree assault with a deadly weapon. 49 Wn. App. at 252. The defendant

moved in limine to exclude any mention or reference to Escalona's prior conviction for second degree assault with a deadly weapon. Id. During cross-examination, the victim volunteered that the defendant already had a record and had stabbed someone previously. Id. at 253. The defendant moved for a mistrial, but the court denied the motion. Id. After a brief recess, the court instructed the jury to disregard the victim's testimony about Escalona having a record and having previously stabbed someone. Id. The jury convicted Escalona of the crime charged. Id. at 254.

On appeal, the court reversed the conviction, holding that the seriousness of the irregularity, combined with the weakness of the State's case and the logical relevance of the statement, led to the conclusion that the trial court's curative instruction could not cure the prejudicial effect of the victim's statement. Id. at 256.

Unlike the victim's testimony in Escalona, which specifically noted that Escalona had been convicted of the same crime previously, Detective Nelson never testified to specific acts or crimes committed by Westbrook. In contrast to the offending statement in Escalona, Nelson's statement does not have the same degree of logical relevance; the jury would not undoubtedly

conclude from Nelson's testimony that Westbrook had been previously convicted of a crime and a propensity to commit theft.

This case is similarly distinguishable from State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962).

In Taylor, a police officer testified to the fact that the defendant had a parole officer. 60 Wn.2d at 33. The defendant then moved for a mistrial. Id. When the court asked the defense for the grounds for the motion, counsel for the defendant stated, "on the grounds that nobody has a parole officer unless they have been convicted of a crime." Id. The court denied the motion. Id. Then the officer testified for a second time that the defendant had a parole officer. Id. The defendant was eventually found guilty. Id. at 34. Eventually, during a post-trial motion, the trial court agreed with the defendant's position, stating in its ruling, "[the jurors] were not told in so many words that Taylor had previously been convicted of another crime, but it was made evident that he was on probation. Laymen might easily conclude from this that he had committed one or more previous offenses." Id. at 35. On appeal, the Court affirmed the trial court's order granting a new trial. Id. at 42.

In contrast to the officer in Taylor, who twice made reference to the fact that defendant had a parole officer, which clearly implied the defendant had been previously convicted of a serious crime, Detective Nelson never testified that Westbrook had been convicted of a crime. Additionally, Detective Nelson never made any allusions that could be interpreted as evidence that she had been convicted of a crime. Detective Nelson never testified that he found photographs for her from a Department of Corrections database or from her parole officer. 5 RP 40-41. His testimony was limited to the existence of a booking photograph of her from the King County Jail. Id.

Courts have held that testimony that a defendant was in jail was not sufficiently serious to warrant a mistrial especially when a curative instruction is given. State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993). See also State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010) (prejudice in detective's testimony that he found a photograph of the defendant in the King County booking file and that the defendant was questioned at a police station was cured by court's instructions to the jury).

In Condon, the court granted a defense motion in limine to exclude any reference to the fact that the defendant was in jail.

72 Wn. App. at 648. However, a witness made reference to the fact that the defendant called her when the defendant was getting out of jail. Id. The defendant objected immediately, the testimony was stricken, and the court instructed the jury not to consider the testimony. Id. A short while later, the same witness said the defendant asked her to pick him up from jail. Id. The court, outside the presence of the jury, explained to the witness that she was not to reference the defendant having been in jail. Id. When the jury returned, the court again instructed the jury to refrain from considering the testimony that the defendant had been in jail. Id. Still later, the same witness, for a third time, alluded to the fact that the defendant had been in jail. Id. The court denied the defendant's motion for a mistrial. Id.

On appeal, the appellate court held that although the remarks had the potential for prejudice, they were not so serious as to warrant a mistrial, in part because the court's instructions were sufficient to alleviate any prejudice that may have resulted. Id. at 649. Additionally, the court noted the fact that someone who has been in jail does not necessarily mean that he or she has been convicted of a crime. Id.

In this case, Detective Nelson made reference to accessing the King County Jail booking system to look up Westbrook under an alias. 5 RP 40-41. However, he never made a direct reference to whether she had been convicted of a crime. Furthermore, Detective Nelson's statement's seriousness is lessened by the convoluted chronology of Westbrook's investigation and eventual arrest for this offense.

Detective Nelson never testified as to whether or when he arrested Westbrook after completing his portion of the investigation. Detective Nelson did testify that another officer or detective, Detective Misho, was originally involved in the investigation of the incident before Detective Nelson started his portion. 5 RP 52-53. The fact that another officer or detective investigated the case originally creates a logical inference that the booking photograph came from this particular case. In its ruling denying Westbrook's motion the court noted,

"I don't believe based on the arguments that have been made that the jurors would be so prejudiced by thinking that Ms. Westbrook was a convicted criminal or a bad person because there is, I think, a logical inference that she would have been arrested just in connection with this case." 5 RP 84.

Therefore, because of the nature of the statement and the convoluted chronology of the police investigation, Detective Nelson's statement was not so serious as to warrant a new trial.

2. The Testimony Of Detective Nelson Was Not Cumulative.

The second factor the court must consider is whether the statement in question was cumulative of other evidence properly admitted. In this case, Detective Nelson's testimony was not cumulative of other evidence properly admitted.

3. The Court's Curative Instruction Was Effective As A Prophylactic Against Improper Consideration By The Jury.

The third factor the court must consider is whether the irregularity could be cured by an instruction to disregard the remark. A trial court has wide discretion to cure trial irregularities resulting from improper witness statements. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). A jury is presumed to follow instructions. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). When determining whether a curative instruction will be sufficient, the court looks at the statements in the context of the trial as a whole. Perez-Valdez, 172 Wn.2d at 819. Ultimately, the question is "whether..., viewed against the background of all the

evidence,” the improper testimony was so prejudicial that the defendant did not get a fair trial. State v. Thompson, 90 Wn. App. 41, 47, 950 P.2d 977 (1998). Courts are concerned about trial irregularities, which have been called an “evidential harpoon” that may only be aggravated by an instruction to disregard it. Taylor, 60 Wn.2d at 37.

In this case, an appropriate curative instruction was offered by the court. The court avoided the specter of the “evidential harpoon” by refraining from highlighting the detective’s testimony, by how the instruction was presented to the jury and by the substance of the instruction.

In Taylor, argument over the improper statement occurred in part in front of the jury, thereby highlighting for the jury the potential improper inference the jury could make with the evidence. Unlike in Taylor, in this case the defendant did not object in front of the jury and no argument on the issue occurred before the jury. 5 RP 43-45.

Also in contrast to Taylor, the court avoided highlighting the testimony of Detective Nelson by refraining from instructing the jury immediately after Detective Nelson’s testimony. This delay in

addressing the offending statement aided in avoiding the evidential harpoon.

Without explicitly referencing Detective Nelson's testimony, the court addressed the issue directly for the jury in the language of the curative instruction given. CP 61. The instruction read, "Any evidence that the defendant may have been arrested shall not be considered by you for any purpose." CP 61. With this straightforward, non-witness specific instruction, the court properly instructed the jury that it could not consider testimony on the subject, while at the same time it did not highlight the testimony in question. The curative instruction lessened the damage of the potential evidential harpoon to a considerable degree. The curative instruction was offered with the other standard closing instructions, it was not placed amongst the other instructions in a position that emphasized that particular instruction, such as being read first or last, and even the font on the instruction matched the other instructions so as to avoid any potential subtle emphasis by way of standing apart from the other instructions. As such, the curative instruction effectively eliminated any prejudicial effect Detective Nelson's statements may have had on the jury.

Although Detective Nelson did make reference to accessing Westbrook's booking photograph and such evidence was not cumulative of other properly admitted evidence, the irregularity's seriousness did not rise to the level of prejudice necessitating a new trial. Detective Nelson's statements did not necessitate a new trial because the detective did not reference that Westbrook had ever been convicted of a crime and because the convoluted chronology of the investigation and eventual arrest of Westbrook allowed for an inference that the booking photograph was generated for this particular case. Even if the detective's statements are considered serious, the court's curative instruction on the issue was effective in eliminating prejudice to Westbrook. The court's decision to deny Westbrook's motion for a mistrial was not an abuse of its discretion. Therefore, this Court should affirm the trial court's ruling and affirm the defendant's conviction.

**D. CONCLUSION**

The trial court did not abuse its discretion in denying Westbrook's motion for a mistrial because, although Detective Nelson's testimony was not cumulative, it was not so serious that a

new trial was necessary and the curative instruction effectively eliminated any prejudice to Westbrook.

DATED this 18<sup>TH</sup> day of July, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROYANNE WESTBROOK, Cause No. 67858-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Angela Blocki  
Done in Seattle, Washington

7/19/12  
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