

REC'D 69416-2

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King County Prosecutor
Appellate Unit

NO. 69416-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS WALKER,

Appellant.

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

The Honorable Susan J. Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied appellant's motion for a mistrial after a police witness referred to the existence of booking photos from previous contacts.

Issue Pertaining to Assignment of Error

A police officer on the case testified she looked up appellant in a system that compiles booking photographs from prior contacts. Because this evidence showed a propensity to commit crimes in violation of ER 404(b), did the trial court err when it refused to grant a mistrial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Curtis Walker with felony violation of a no-contact order, second-degree assault, witness tampering, and five counts of misdemeanor violation of a no-contact order. CP 91-95. The jury acquitted Walker of second-degree assault, but found him guilty of the lesser offense of fourth-degree assault as well as the other counts. CP 27-35. The jury also found each offense was committed against a family or household member. CP 36-38. The court imposed concurrent standard range sentences on the felonies and concurrent 364-day sentences on the misdemeanors for a total of 60 months confinement. CP 101-07. Notice of appeal was timely filed. CP 113.

2. Substantive Facts

a. Chesterfield's Testimony

Walker and his girlfriend Rayna Chesterfield have been together since April 2011. 6RP¹ 23. At the time of trial, they were engaged to be married. 6RP 23. Chesterfield testified Walker has supported her and inspired her to go to college. 6RP 30. Although Walker is not her daughter's biological father, Chesterfield testified, he is the only father the child has ever known. 6RP 140.

The evening of December 8, 2011, Walker and Chesterfield were making dinner at a friend's home with Chesterfield's daughter and the friend's² children. 6RP 39-44. Looking forward to a family evening, Chesterfield was upset when Walker suddenly announced he was leaving, a mere 15 minutes before the meal would be ready. 6RP 58-59. Because she had been drinking, Chesterfield concluded Walker must be seeing another woman and became enraged. 6RP 60. She followed him to the parking lot hitting him in the head and grabbing at the back of his jacket. 6RP 62, 68-69. In an attempt to get away from her that she described as "self-defense," Walker pushed her. 6RP 71. Because she had been drinking, she lost her

¹ There are nine volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 25, 26, 2012; 2RP – June 27, 2012; 3RP – June 28, 2012; 4RP – July 2, 2012; 5RP – July 3, 2012; 6RP – July 5, 2012; 7RP – July 9, 10, 2012; 8RP – July 11, 2012; 9RP – July 12, Sept. 6, 7, 2012.

² Chesterfield's close friend is occasionally referred to as her sister. 6RP 18-20.

balance and fell to the ground. 6RP 72. Walker left, and Chesterfield went back inside and began to cry. 6RP 74. Chesterfield testified Walker did not assault her. 6RP 158.

Two hours later when her friend arrived home, Chesterfield went to the police station. 6RP 97, 138. Both women had been drinking, and, on the way, her friend falsely told her Walker had been seen with another woman, which only fueled her anger. 6RP 118, 138-39. Chesterfield wanted to get her things and leave for a few days so Walker would learn to appreciate her. 8RP 80. She wanted police to escort her home because she was extremely angry and feared she would continue to fight with Walker if she encountered him. 6RP 97, 115; 8RP 74-75. She testified she only made a statement because the police would not give her an escort unless she did so. 8RP 74-75. Although she went to the police in part to get back at him, things went far beyond what she intended. 6RP 138. She testified Walker has since apologized, both for pushing her and for not appreciating her. 8RP 88. She did not request or need any medical attention. 8RP 82.

Chesterfield admitted lying about being pregnant with Walker's child. 6RP 132. She also admitted lying to a judge about having a daughter with Walker. 6RP 158. She admitted lying to defense counsel as well about having a community college degree and a job. 6RP 134-35. Despite this history, Chesterfield said she should be believed at trial because she was

under oath and was already in trouble for making a false statement to the police. 6RP 136.

b. Police Investigation

Officer Brian Whicker interviewed Chesterfield, who he described as pale, with eyes red as if she had been crying, hair tangled as if she had been in an altercation, and a split lip. 5RP 109-13. He testified she slouched and looked down as if she were afraid. 5RP 113. He saw scratches on her arm and the back of her neck; one was bleeding slightly. 5RP 116. He testified the injuries were, based on his training and experience, consistent with strangulation. 5RP 131. He did not recall her appearing to be intoxicated. 5RP 87. Whicker learned there was a no-contact order in place,³ determined there was probable cause to arrest, and asked officers in the area to watch for Walker. 5RP 133-35.

Later that evening, Officer San Miguel and her partner saw Walker in the University District. 7RP 53, 63. They asked his name, and Walker gave it. 7RP 54. They asked for identification, and Walker voluntarily provided it. 7RP 54.

During Officer San Miguel's testimony, she began to explain that she looked Walker up because, "We have what's called an RMS system, which

³ The court admitted exhibit 1, a certified copy of a Domestic Violence No-Contact Order, entered September 6, 2011 and expiring two years later. 5RP 59-66; Ex. 1. The order bears Walker's signature. Id.

has booking photos from previous contacts, so I was able to put his name into the --." 7RP 61. At that point, defense counsel objected, the objection was sustained, and the jury was instructed to disregard the partial answer. 7RP 61-62. Outside the presence of the jury, defense counsel moved for a mistrial based on the reference to prior bookings. The court stated that it did not hear specific reference to prior bookings, and that while the testimony was getting into a dangerous area, it believed the instruction to disregard was sufficient to allay any prejudice. 7RP 68-70.

Back at the North Precinct, Officer Whicker interviewed Walker. 5RP 137. Walker admitted being with Chesterfield that evening, but denied assaulting her and denied that he lived with her. 5RP 139-40. Officer Whicker then accompanied Chesterfield back to her home, where she showed him court documents bearing Walker's name as well as male clothing and a video game that she told him belonged to Walker. 5RP 141. When confronted with this evidence, Walker admitted he lived with Chesterfield. 5RP 143.

c. Jail Phone Calls

From jail, Walker called Chesterfield repeatedly. Ex. 19; Supp. CP ____ (Sub no. 56, Redacted Transcript of Jail Calls, filed 7/3/2012).⁴ Redacted versions of the calls were played for the jury. 7RP 41-44; Ex. 19.

⁴ The transcript of the calls was admitted for illustrative purposes only. 7RP 8-9, 41-44. However, for ease of reference, this brief cites to pages of the transcript.

In the first call, at 1:02 a.m., shortly after his arrest, Walker accuses Chesterfield of calling the police on him. Supp. CP ____ (Sub no. 56 at 2). Chesterfield responds, “The ambulance came when I was passed out on the stairs.” Id. She tells him, “I was in a hospital bed when I told them who the fuck did this to me.” Supp. CP ____ (Sub no. 56 at 3). The call ends with Chesterfield appearing to hang up on Walker. Supp. CP ____ (Sub no. 56 at 5).

Seven minutes later at 1:09 a.m., Walker calls Chesterfield a second time. Supp. CP ____ (Sub no. 56 at 6). He tells her, “You’re probably gonna tell them more shit to fuck me over even more. You keep saying you care for me, you’re helping me, but you, you fuck me every time.” Supp. CP ____ (Sub no. 56 at 8). Chesterfield again insists she was in the hospital when she “told them who the fuck did that shit to me.” Id. Walker responds, “Well, damn, give them a different.... Oh my god, woman, you’d rather see me in jail though?” Id. Chesterfield denies wanting to see him in jail, but protests, “Who the fuck was I supposed to tell them bashed my head in?” Supp. CP ____ (Sub no. 56 at 9). Walker tells her, “I didn’t do nothing but grab you, that don’t make no sense.” Id. Walker tells her, “If I was leaving, you should have just let me left.” Supp. CP ____ (Sub no. 56 at 10). When Chesterfield explains how hurt she was by his abrupt departure before dinner, Walker apologizes. Id.

At 1:26 a.m., Walker calls again. Supp. CP ____ (Sub no. 56 at 12).

He tells her, "I can't believe I am going through this shit again, baby. . . .

You ride with me, you ride with me. If you don't, you're still gonna be my

friend, but... I don't know, baby." Supp. CP ____ (Sub no. 56 at 12-13).

He tells her,

You keep saying stuff to them. It just don't make no sense and then you come and tell me you want to get me out. But you keep saying shit to keep me in this motherfucker longer, everytime. . . . Every time you get in front of, you switch up your story and start telling them something different. I'm fucked. They're gonna believe you anyway, baby. I'm fucked, you should try to help me get out of this. If you're not, I'm gonna be fucked."

Supp. CP ____ (Sub no. 56 at 14-15). He tells her, "Listen, I know you're

hurting and beaten, but it's like.... I didn't even do nothing but grab your

head." Supp. CP ____ (Sub no. 56 at 16). He tells her, "I'm gonna be

fucked baby, if you're not gonna help me get out of here? If you're not

gonna try to help me get out of here and do something or say something?

You always try to get me booked in here longer." Id. Chesterfield assures

him, "We'll figure it out." Supp. CP ____ (Sub no. 56 at 17).

Roughly half an hour later, Walker calls Chesterfield a fourth time saying,

Why don't you try to call my DOC officer and tell her that I don't know, just try to tell her something. Just say that... Just tell her that I didn't do it to your head or something, something.... Just tell her that you did it, but that

you try to blame it on me so that I could come to jail or something. I don't know, make something up baby, help me out or something, please?"

Supp. CP ____ (Sub no. 56 at 18).

In the fifth call, made the following evening, Chesterfield repeatedly attempts to reassure Walker. Supp. CP ____ (Sub no. 56 at 19). She tells him, "Cause I have to pay \$1300 to this lawyer next week, I'm gonna get it though, cause she's like one of the top guys, she knows exactly, all the prosecutors, all that. I'm just gonna be like. I'm gonna say, deh, deh deh, I might get... I don't know." Supp. CP ____ (Sub no. 56 at 20). Walker tells her, "We can talk about it when I call you on the other phone, though, okay?" Id. He tells her, "When you come visit me, I'm gonna tell you what to do, okay." Id.

An hour later, Walker calls again to ask Chesterfield, "Are you gonna try to get a lawyer and stuff?" Supp. CP ____ (Sub no. 56 at 21). Chesterfield assures him she will and tells him, "I got your back because I'm not about to let you go do no time for no bullshit like this. It shouldn't have even happened; I passed out, that's the only, you know, I like literally passed out on the stairs. I fell down the stairs." Id. Walker tells her, "We don't got to talk about it no more.... I see you tomorrow when we can talk about it, okay?" Supp. CP ____ (Sub no. 56 at 21-22). Chesterfield tells Walker, "I'll leave if you put your hands on me again, dough. I'm serious." Supp.

CP ____ (Sub no. 56 at 22). She tells Walker, “I don’t know how we are going to play it though, I don’t know, you know what I’m saying?” Supp. CP ____ (Sub no. 56 at 23). Walker tells her, “Come visit me tomorrow, we’re gonna talk about it, but you have to listen to me, if you fuck up one time it’s not gonna work.... You have to listen to me because I’m gonna tell you what to do.” Id.

The next evening, Chesterfield tells Walker,

We’re about to fix this shit.... I don’t remember nothing. I remember bits and pieces and my sister told me a lot of shit, and my nephew told hella shit, that I just fell down the stairs... and I gotta big ass, like hella big ass lump in the back of my head, that’s why they thought I was going to have to go into surgery before they did a catscan because, in most the ones that happened on my right hand side is from falling down the stairs when I passed out.

Id. Walker answers, “I figured so, cause I was like, damn, I know I didn’t hurt her that bad.” Id.

A few days later, Walker calls again, urging Chesterfield to take care of herself to have the babies. Supp. CP ____ (Sub no. 56 at 29). He asks her to “Come tomorrow though cause we gotta talk about something. You have to do this what I tell you to do tomorrow. You have to do it, ok?” Id. He tells her “it’s nothing bad” and “it’ll help me a little bit.” Id. Chesterfield tells him her friend “doesn’t think I need to be with someone that’s gonna be beating me up.” Supp. CP ____ (Sub no. 56 at 31). Walker tells her, “Hush.

OK baby, ok ok, we on the phone baby, do you understand what I'm saying?" Id. Walker promises Chesterfield he will get a job and tells her the babies will motivate him "one Million percent." Supp. CP ____ (Sub no. 56 at 32-33).

On December 17, Walker calls Chesterfield again, this time about money. Supp. CP ____ (Sub no. 56 at 34). She tells him she only has about 300 because "I paid the attorney." Id. Still, she agrees to put some money on the books for him. Id. The couple then discusses getting a form notarized so they can be married. Supp. CP ____ (Sub no. 56 at 35).

In their final call on December 18, Walker again encourages Chesterfield to take care of herself so that her pregnancy will be successful. Supp. CP ____ (Sub no. 56 at 38). Then he tells her, "Baby...Rayna?" followed by "Oh. Fuck.... I said your goddamn name even though I'm fucked anyhow." Supp. CP ____ (Sub no. 56 at 39). Despite a lengthy effort to redact the calls, defense counsel lodged a standing objection to propensity evidence scattered throughout the calls. 3RP 133, 135.

Chesterfield testified that her accusations on the phone with Walker referred to him pushing her. 6RP 99. When confronted with her statement on the phone that he bashed her head, she testified she was drunk and spiteful and trying to make Walker feel bad. 6RP 99, 114. Chesterfield

testified Walker did not try to make her change her story of what happened that night. 8RP 70.

The State argued the calls were evidence of witness tampering and violating the no-contact order, and that even if there was no strangulation, the push Chesterfield testified to was an assault. 9RP 43, 51-52. Walker argued his contact with Chesterfield that night was neither harmful nor offensive and his statements on the jail calls were merely a family effort to resolve the problem created by Chesterfield's lies. 9RP 83-84, 94.

C. ARGUMENT

WALKER'S MISTRIAL MOTION SHOULD HAVE BEEN GRANTED BECAUSE OF REPEATED INDICATIONS TO THE JURY THAT HE HAD PRIOR CRIMINAL HISTORY.

Defense counsel moved for a mistrial after Officer San Miguel testified she looked up Walker in a system containing "booking photos from previous contacts." 7RP 61. Although the objection was sustained and the jury instructed to disregard, this was a bell that could not be unrung, particularly in light of the numerous other suggestions that Walker had been in trouble with the law before.

A court should grant a mistrial motion when a trial irregularity so prejudiced the jury that the right to a fair trial is violated. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In making its determination, the court must consider (1) the seriousness of the error, (2) whether it

involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254. The trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. The court abused that discretion here because evidence of prior bookings is inadmissible propensity evidence that is extremely likely to sway a jury.

“ER 404 is intended to prevent application by jurors of the common assumption that ‘since he did it once, he did it again.’” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). A reference to booking photos is a serious trial error because it raises a prejudicial inference of criminal propensity. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005) (citing State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000)).

In Henderson, a combination of testimony and argument about an officer already having the defendant's photograph on hand amounted to serious prosecutorial misconduct. 100 Wn. App. at 803. The prosecutor asked the officer, “The photo montage you have identified, No. 3 and No. 4, those were put together with photographs that were already on hand; is that correct?” Id. The officer answered that was correct. Id. Standing alone, the court held, this comment “may or may not have suggested to the jury that the police had a mug shot of Henderson from previous criminal activity.” Id.

However, when combined with the prosecutor's comment in closing argument that "the sheriff's department had a photograph of him on hand before that," the implication of previous criminal activity was clear. Id. The court declared, "[M]ug shots from a police department rogues' gallery are generally indicative of past criminal conduct and will likely create in the minds of the jurors an inference of such behavior.'" Id. (quoting United States v. Fosher, 568 F.2d 207, 213 (1st Cir. 1978)). The court held the prosecutor's reference to booking photos was misconduct that contributed to cumulative reversible error. Id.

Walker's case also involves officer testimony that strongly suggests criminal history based on the existence of booking photos. As in Henderson, the potentially ambiguous reference to booking photos paints a clear picture of criminal history when combined with other references in the trial, in this case the jail calls.

In redacting the jail phone calls, the parties and the court actively tried to avoid any suggestion of previous criminal activity under ER 404(b). 2RP 36, 42, 60-61, 75, 80-81, 132-33, 134-35, 140-41, 143. However, that effort was insufficient. The jail calls contain numerous statements that should have been excluded under ER 404(b) and that serve only to exacerbate the prejudice from San Miguel's testimony:

- “You’re probably gonna tell them more shit to fuck me over even more. You keep saying you care for me, you’re helping me, but you, you fuck me every time.” Supp. CP ____ (Sub no. 56 at 8) (emphasis added).
- “I can’t believe I am going through this shit again.” Supp. CP ____ (Sub no. 56 at 12) (emphasis added).
- “You keep saying stuff to them. It just don’t make no sense and then you come and tell me you want to get me out. But you keep saying shit to keep me in this motherfucker longer, every time.” Supp. CP ____ (Sub no. 56 at 14) (emphasis added).
- “You always try to get me booked in here longer.” Supp. CP ____ (Sub no. 56 at 16) (emphasis added).

As in Henderson, the combination of these events was likely to create an inference of criminal propensity in the minds of the jurors. San Miguel’s testimony was a serious trial irregularity because it improperly injected propensity evidence into the trial.

Her testimony was not cumulative of any properly admitted evidence. Even assuming the statements from the jail calls were properly admitted under an exception to ER 404(b), such as res gestae, San Miguel’s testimony was not cumulative of the information contained in the jail calls.

Taken separately, either the jail call statements or San Miguel's testimony might be seen as only suggestive of prior criminal history. It is the combination of the two that puts the puzzle pieces together and strongly creates the forbidden inference of guilt based on propensity.

Particularly when viewed in conjunction with the jail phone calls, the reference to prior booking photos presents a clear picture of jail time arising from previous domestic violence. Nothing short of a new trial could cure the prejudice to Walker. Despite the presumption that juries follow the court's instruction, courts have noted that a bell once rung cannot be unrung. State v. Easter, 130 Wn.2d 228, 238 39, 922 P.2d 1285 (1996) (quoting State v. Trickel, 16 Wn.App. 18, 30, 553 P.2d 139 (1976)). "[I]f you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). In particular, evidence of prior similar crimes is "extremely difficult, if not impossible" for a jury to ignore. Escalona, 49 Wn. App. at 255-56; see also State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (prior similar crimes evidence "beyond hope of cure by corrective instruction.").

In this case, any instruction would only have highlighted the prior crimes and given them more significance in the eyes of the jury. Any instruction about these oblique references to prior crimes would necessarily have confirmed the jurors' suppositions about past events, thereby both

emphasizing them and giving them even more substance. A mistrial was the only remedy that could ensure a fair trial. Walker asks this Court to reverse his convictions because the improper references to prior offenses denied him a fair trial.

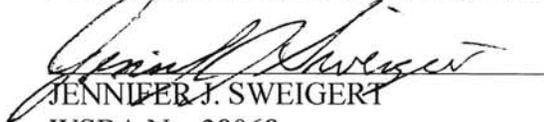
D. CONCLUSION

Because the injection of propensity evidence violated his right to a fair trial, Walker's convictions should be reversed.

DATED this 10th day of July, 2013.

Respectfully submitted,

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