

NO. 36629-1-II
Cowlitz Co. Cause NO. 02-1-01358-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DANNY WAYNE EVANS,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JEFFREY N. RIBACK/WSBA #15952
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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**ISSUES PERTAINING TO STATE'S RESPONSE TO
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1. DID THE TRIAL COURT PROPERLY ADMIT COMPUTERIZED BOOKING RECORDS AND FINGERPRINT RECORDS UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE WHERE THE PROSECUTOR INITIALLY INDICATED THAT HE WOULD SEEK ADMISSION OF THOSE DOCUMENTS AS CERTIFIED BUSINESS RECORDS, BUT LATER ESTABLISHED THAT THE DOCUMENTS WERE BUSINESS RECORDS REGULARLY KEPT IN THE COURSE OF REGULAR JAIL AND CRIME LAB BUSINESS?
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SUPPLEMENTAL STATEMENT OF THE CASE

The prosecutor initially voiced an expectation that he would be seeking to admit computerized booking records which contained fingerprint imaging and other identifying information into evidence as certified public records under RCW 5.44.040. RP II, 130–131. However, as the trial progressed, the prosecutor set forth the foundational requirements for the booking records and fingerprint card imaging as a business record exception to the hearsay rule under RCW 5.45.020. RP 216–220.

The prosecutor similarly laid the foundation for the remaining fingerprint card exhibits as business records through the testimony of a forensic scientist with an expertise in latent fingerprint analysis. RP II, pages 244–264. The trial court admitted these exhibits into evidence.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE EXHIBITS PERTAINING TO FINGERPRINTS UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The appellant makes much of the fact that the prosecutor in the case at bar initially stated an expectation that the booking records would be admissible as certified public records. RP II, 130-31. However, as the trial progressed, the prosecutor set forth the foundational requirements for

the booking records and fingerprint cards as a Business Record Exception to the Hearsay Rule under RCW 5.45.020. RP 216–220; RP II, 244–264.

RCW 5.45.020 states, “A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”

“The decision whether to admit or refuse evidence is within the discretion of the trial court and will not be reversed absent a manifest abuse of discretion.” *See, State v. Iverson*, 126 Wn.App. 329, 108 P.3d 799 (2005). The Court of Appeals in *Iverson* specifically held that computerized jail booking records were admissible under the Business Records Exception to the Hearsay Rule set forth in RCW 5.45.020.

The facts set forth in the *Iverson* Case are startlingly similar to those in the case at bar. The State needed to identify the protected party – a Ms. Nichols - in a restraining order. Therefore, the State had the arresting police officer refer to the computerized jail booking system. The police officer stated that the computerized system was relied upon by police officers to identify suspects and defendants. The defense attorney objected

to the arresting officer's testimony, asserting that the officer was not a custodian of the records, was not qualified to answer questions about the computerized system, did not work for the Snohomish County Jail where the records were created, and thus Ms. Nichols' arrest records – which were not certified copies – were inadmissible hearsay. *Iverson* at 333-34.

The trial court did not initially rule on the defendant's hearsay objection, but instead allowed the arresting officer to continue testifying. The arresting officer stated that he found four arrest records/booking photos of Ms. Nichols in the system. He recognized Ms. Nichols as the person he interviewed at the time of Iverson's arrest. Each photo also had a birthdate that matched Ms. Nichols birthdate recorded on her statement taken at the time of Mr. Iverson's arrest. *Id.* At 334.

The officer admitted under cross examination that although he used the computerized booking system, he did not have control over how the Snohomish County Jail staff compiled booking data; no control over the accuracy of the information put into the computer by others; and no control over how the documents were collected and stored.

The court ultimately admitted the computerized jail records, ruling that there was, "sufficient evidence of their authenticity and reliability to allow them to be admitted." *Iverson* at 335.

In the case at bar, we have an actual Cowlitz County Jail employee – Paul Curtis - who testified that he was familiar with the computerized system; used the computerized system to record the appellant’s fingerprints; that the system reliably recorded fingerprints; and that he and other jail staff relied upon the computerized system to make records of fingerprints and other identifying information of the defendants that jail staff used in the regular course of running the jail. RP II, 216–220. The court ultimately admitted jail booking record with the appellant’s fingerprints as Exhibit 12A.

The State also had lead forensic scientist Randall Watson positively identify the appellant’s latent fingerprints left upon glassware denominated as Exhibits 14 and 16B-I. Mr. Watson was a supervisor at the Washington State Patrol’s Latent Prints Laboratory. RP II, 244-45. Mr. Watson testified that he used the standard methods at the latent print lab to examine latent prints placed on various cards; that this was done in the regular course of crime lab business; that the prints that were rolled on a glass sheet and recorded electronically were no different in substance to fingerprints rolled on paper; that the fingerprint cards were preserved in standard packaging, and labeled per standard procedures employed by the crime lab. RP II, 244–262. Mr. Watson further testified that the latent fingerprints recorded on Exhibit 12A and Exhibit 16I matched the left

thumbprint of the appellant. RP II, 263. Mr. Watson further compared the latent print on Exhibit 16H to the latent prints on Exhibit 12A and concluded that the print was of the appellant's right, middle finger. RP II, 264. The trial court admitted Exhibits 16B–16I into evidence. All of the aforementioned exhibits met the requirements of the Business Records Exception to the Hearsay Rule. Therefore, the computerized booking records and fingerprint cards were properly admitted into evidence.

II. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A MISTRIAL IN THAT THE COURT GAVE THE JURY A DETAILED CURATIVE INSTRUCTION, WHICH THE JURY WAS PRESUMED TO HAVE FOLLOWED.

In the present case, a defense witness, Mr. Stranz, made an improper reference to evidence being suppressed as a result of a previous appeal. RP II, 350. The appellant failed to make any objection at the time of the statement. However, the appellant moved for a mistrial after Mr. Stranz completed his testimony. At this time, the appellant admitted to two things. First, he told Mr. Stranz to not testify to facts pertaining to the appeal. Second, that the State did nothing to intentionally elicit the defense witness' improper statement. RP II, 354-55.

The trial court denied the appellant's motion for a mistrial. In doing so, he reasoned:

“I don’t think that there was any intentional misconduct. I think it is a situation that can be addressed by way of a curative instruction. I don’t think the jury is so foolish as to, you know, all – we try to, I guess, assume that they’re living in a glass bubble. We’re dealing with a case that [is] five years old. They’ve heard testimony a number of times about prior proceedings. I don’t think we’re giving them anything necessarily that they don’t know about the fact that there was a prior proceeding . . .” (emphasis added)

RP II, 359–60.

The trial court subsequently gave the following detailed curative instruction:

- “Ladies and gentlemen, I do need first to address one issue from the prior witness. You heard some reference during the testimony of Mr. Stranz to an appeal and some evidence being tossed, I think is how he put it. Number one, I’m instructing the jury to disregard that comment. It’s got nothing to do with this case. And just so the jury is aware and has [a] little bit more comfort in doing exactly that, the evidence he was referencing at no point had any bearing on this case – this particular case. The evidence referred to was not in any way at that -- in the past or now involved in the case that we’re here trying now. So this is one of the things that we as – are sometimes required as judges to do or something that’s asked jurors to do is disregard something that you’ve heard. I understand it’s not an easy task but it is required in this case. So I’d ask you to disregard that comment entirely.”

RP II, 364-65.

The Washington State Supreme Court has stated that jurors are presumed to follow curative instructions. *See, State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Another, “underlying presumption is that jurors are intelligent and responsible individuals” who are, “instructed and solemnly charged by the court with the duty to avoid bias or prejudice.”

See, State v. Lord, 161 Wn.2d 276, 279, 165 P.3d 1251 (2007) (which upheld a denial of a defense motion for a mistrial where spectators wore buttons with a picture of the murder victim). A decision to deny a motion for a mistrial is within the discretion of the trial court, and will not be reversed absent a manifest abuse of discretion. *See, State v. Grief*, 141 Wn.2d 910, 10 P.3d 390 (2000).

State v. Escalona, 49 Wn.App. 251, 742 P.2d 190 (1987), is the one case in which an appellate court appears to have found that a curative instruction was not sufficient to cure a trial irregularity. In *Escalona*, the defendant was charged with assault in the second degree for threatening the victim with a knife. 49 Wn.App. at 252. During cross-examination, the victim (who was the State's witness) made an unsolicited statement that the defendant had a record and had stabbed someone. *Escalona*, 49 Wn.App. at 253. On appeal, this statement was deemed to be a serious irregularity because it related directly to the conduct with which the defendant was charged. The court noted that the jury was likely to consider this prior conviction to be logically relevant and conclude that the defendant acted in conformity with his past behavior. *Escalona*, 49 Wn.App. at 255-56. The *Escalona* court concluded that in light of the extreme weakness of the State's case and the direct logical connection between the improper testimony and the

charged crime, a curative instruction was insufficient. 49 Wn.App. at 255-56.

By contrast, the improper statement here did not reveal with any specificity what was suppressed on appeal. In fact, the trial court correctly pointed out that the conduct referred to by Mr. Stranz did not relate to the case that was being tried. The comment also had nothing to do with information that the defendant acted in conformity with the crime he was presently charged with. Therefore, the seriousness of the irregularity was not as severe as in *Escalona*. It was also the State's witness in the *Escalona* case that made the improper remark. In the case at bar, it was a defense witness that made the passing reference to the earlier appeal.

The defense attorney in the present case did not object at the time his witness made the improper remark. The defense attorney in *Escalona* immediately objected and asked for a curative instruction.

The prosecutor in the present case did not attempt to elicit the defense witness' improper remark. The prosecutor also took immediate action to cut off any further improper statements from the defense witness. RP II, 355.

Furthermore, the case against the appellant was stronger in the case at bar than was the case against Escalona. There was overwhelming,

and essentially uncontested, evidence that the appellant was connected with the premises where the methamphetamine lab was located. More importantly, the defendant's fingerprints were found on laboratory glassware found on the premises: glassware that the jury reasonably inferred was used in connection with the production of methamphetamine. Under the facts of this case, a passing reference to some evidence being suppressed on a prior appeal was not so prejudicial as to deprive him of his right to a fair trial. The trial court did not abuse its discretion in denying the appellant's motion for a mistrial.

CONCLUSION

The computerized booking records and fingerprint cards were properly admitted into evidence under the Business Records Exception to the Hearsay Rule under RCW 5.45.020. The appellant has failed to show that the trial court in any way committed a manifest abuse of discretion in admitting the exhibits. Moreover, the appellant has similarly failed to show that the trial court committed an abuse of discretion in not granting the motion for a mistrial. The prosecutor did not elicit the improper response, and even took immediate action to stop the defense witness from making any further improper comments. The trial court gave a specific curative instruction to the jury to disregard the defense witness' comment; and even went so far as to tell the jury that the comment had nothing to do

with the case that was being tried. Finally, there was strong evidence at trial that connected the appellant to the premises and the glassware that the jury could reasonably infer was used to produce methamphetamine. Therefore, the trial court's decision to admit the exhibits and to deny the defense motion for a mistrial should be upheld.

Respectfully Submitted this 3rd day of April, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By Jeffrey N. Riback
JEFFREY N. RIBACK, WSBA
#15952
Deputy Prosecuting Attorney
Attorney for Respondent

