FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 39508-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Nickols,

Appellant.

Lewis County Superior Court Cause No. 09-1-00263-5

The Honorable Judge Richard L. Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Nickols's motion for a mistrial.

2. The trial court applied the wrong legal standard in ruling on Mr. Nickols's motion for a mistrial.

3. The trial court erred by imposing attorney fees on Mr. Nickols.

4. The trial court erred by imposing excessive attorney fees.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A motion for a mistrial must be granted whenever a serious irregularity that is not cumulative of other evidence prejudices the accused person, where the error could not have been cured by an instruction. In this case, the trial judge applied the wrong legal standard in evaluating Mr. Nickols's motion for a mistrial. Did the trial court err by denying the motion for a mistrial?

2. Denial of a motion for a mistrial is reviewed for an abuse of discretion. In this case, the trial judge abused his discretion by applying the wrong legal standard to Mr. Nickols's motion for a mistrial. Must the conviction be reversed and the case remanded for a new trial?

3. RCW 10.01.160 prohibits a trial court from imposing as costs "expenses inherent in providing a constitutionally guaranteed jury trial." Here, the trial court required Mr. Nickols to pay $1200 in attorney fees. Did the trial court exceed its statutory authority by imposing costs inherent in providing a jury trial?

4. An accused person has a state constitutional right to the assistance of counsel under Wash. Const. Article I, Section 22. Here, the trial court unconstitutionally burdened Mr. Nickols's right to the assistance of counsel by imposing $1200 in attorney fees. Must the order imposing $1200 in attorney fees be vacated?

5. Mr. Nickols was charged with Assault in the Second Degree, and he offered to plead guilty to Assault in the Fourth Degree. The state refused his offer. Should Mr. Nickols only be required to pay the attorney fee assessment that would have been imposed if he'd been permitted to plead guilty to Assault in the Fourth Degree?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joseph Nickols had a dating relationship with Samantha Tanori. RP (6/24/09) 15, 37. After they broke up, she entered a dating relationship with Thomas Marth. RP (6/24/09) 45, 76. One day, Mr. Nickols was walking in central Centralia and he saw Tanori and Marth, parked at a glass shop. RP (6/24/09) 45-46. He went over to them, and he and Marth fought, punching each other through the open window of the vehicle. RP (6/24/09) 76-81, 95. When the glass shop staff person tried to call the police, Tanori told her not to as Tanori didn't want to be arrested on an outstanding arrest warrant. RP (6/24/09) 50, 58-60. The employee told the group to leave, which they did. RP (6/24/09) 96. Tanori's grandmother and Marth drove around looking for Mr. Nickols so they could beat him up. RP (6/24/09) 67, 72, 87. When they were unable to find him, they reported an assault with a knife to the police. RP (6/24/09) 69.

Mr. Nickols offered to plead guilty to Assault in the Fourth Degree, but the prosecutor demurred. RP (6/26/09) 216. The prosecutor held firm to a plea offer that included Mr. Nickols pleading guilty (as charged) to Assault in the Second Degree with a deadly weapon

enhancement, and Malicious Mischief in the Third Degree.[1] RP (6/26/09) 216. The case proceeded to a jury trial.

Prior to the start of evidence, Mr. Nickols's attorney asked the court to instruct the state to advise Tanori and Marth to refrain from mentioning Mr. Nickols's criminal history. RP (6/24/09) 24-26. Both the attorney and the court noted that Tanori has previously volunteered nonresponsive prejudicial information in a trial. RP (6/24/09) 27. Mr. Nickols asked the court to direct the witnesses to refrain from volunteering negative information, and described both witnesses as historically going far beyond a question to blurt out negative information in a trial. RP (6/24/09) 29-30. He gave an example: if the question is what color was the car, the answer will likely be it was blue and Mr. Nickols used to hit me all the time. RP (6/24/09) 31. The court ruled that the state should instruct their witnesses to not volunteer information about Mr. Nickols's criminal history or prior bad acts. RP (6/24/09) 31.

The state's first witness was Samantha Tanori. She was asked when her dating relationship with Mr. Nickols started and ended. RP (6/24/09) 37. She responded, "That started – well, I don't remember

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[1] According to Tanori and Marth, Mr. Nickols came back to the van and punctured the tire. RP (6/24/09) 51, 81. The jury, however, found that this charge was not proven and found Mr. Nickols not guilty. CP 4.

exactly when it started actually, but it ended when he went to jail back in November of '07." RP (6/24/09) 37. Mr. Nickols moved for a mistrial. RP (6/24/09) 37-39. The court denied the motion, ruling that her answer was responsive and not a gratuitous volunteering of information. RP (6/24/09) 39-42. The court told the jury to disregard the previous response. RP (6/24/09) 41.

The jury returned a verdict of Not Guilty on the Assault in the Second Degree charge, and convicted Mr. Nickols of the lesser-included charge of Assault in the Fourth Degree. CP 4.

At sentencing, the state asked for Mr. Nickols to be ordered to reimburse the county for three attorney units, or $1800, since the case had gone to trial. RP (6/26/09) 215. Mr. Nickols objected, and noted that if the state had allowed him to plead to the lesser charge as he initially requested, then only one attorney unit would have been necessary.[2] RP (6/26/09) 216. The court ordered Mr. Nickols to pay two attorney units, or $1200, without comment. RP (6/26/09) 218.

This timely appeal followed. CP 3-6.

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[2] This is the charge of which the jury convicted Mr. Nickols.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. NICKOLS'S MOTION FOR A MISTRIAL.

An accused person's motion for a mistrial must be granted when a trial irregularity creates prejudice that cannot be cured by anything short of a new trial. *State v. Hager*, __ Wn. App. ___, 216 P.3d 438, 441 (2009). Factors to consider include "the seriousness of the irregularity, whether the statement was cumulative of other evidence, and whether the irregularity could have been cured by a jury instruction." *Hager*, at 441.

An appellate court reviews the denial of a motion for a mistrial under the abuse of discretion standard. *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

The trial court relied on the wrong legal standard in denying the motion for a mistrial. Instead of focusing on the seriousness of the irregularity, the absence of similar evidence, and the uselessness of a curative instruction, the trial judge examined whether or not the witness

intentionally violated the court's pretrial ruling. RP (6/24/09) 39-42. Furthermore, had the trial judge properly addressed the merits of the motion, he would have granted a mistrial for three reasons.

First, the irregularity was serious. Almost the first thing the jury learned about Mr. Nickols was that he had been to jail in 2007. RP (6/24/09) 37. Second, the error was not cumulative to other evidence: Mr. Nickols's 2007 stint in jail was wholly irrelevant, and no other evidence was introduced on this topic. Third, the error could not have been cured by an instruction. As defense counsel pointed out, an instruction would merely have served to highlight the problem. RP (6/24/09) 39.

Defense counsel anticipated that Tanori would insert prejudicial information into her testimony, and that is exactly what happened. The trial judge should have granted Mr. Nickols's motion for a mistrial. *Hudson, supra.*

II. THE TRIAL COURT ERRED BY IMPOSING AN UNREASONABLE ATTORNEY FEE ON MR. NICKOLS AS A CONDITION OF SENTENCE.

A. The trial court lacked authority to require Mr. Nickols to pay attorney fees.

A trial court's authority to impose costs following conviction derives from RCW 10.01.160. Under the plain terms of the statute, costs may not include "expenses inherent in providing a constitutionally

guaranteed jury trial..." RCW 10.01.160(2). Because the right to counsel is constitutionally mandated, attorney fees fall within the exception for expenses inherent in providing a jury trial. Accordingly, the trial court lacked the authority to impose attorney fees upon Mr. Nickols's conviction. The $1200 attorney fee recoupment must be vacated. RCW 10.01.160.

B. The imposition of attorney fees violated Mr. Nickols's state constitutional right to counsel.

Under the state constitution, an accused person is guaranteed the assistance of counsel. Wash. Const. Article I, Section 22. The state constitutional provision prohibits a trial court from requiring an indigent person to repay attorney fees as a condition of sentence. *State v. Hess*, 12 Wn.App. 787, 793, 532 P.2d 1173 (1975). Imposing such a requirement unconstitutionally burdens the state constitutional right to counsel.[3] *Hess*, at 793. This is so because imposition of attorney fees has the potential to chill an indigent accused person's decision to request counsel.

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[3] By contrast, imposition of such fees does not violate the right to counsel under the federal constitution, if certain conditions are met. *See State v. Barklind*, 87 Wn.2d 814, 821, 557 P.2d 314 (1977).

Because the trial court imposed fees in violation of Wash. Const. Article I, Section 22, the $1200 attorney fee recoupment must be vacated. *Hess, supra.*

C. The imposition of $1200 in attorney fees was unreasonable.

In this case, Mr. Nickols offered to plead guilty to Assault in the Fourth Degree. RP (6/26/09) 216. The state rejected that offer, necessitating a jury trial, which increased the attorney fee recoupment from $600 (the amount imposed in the case of a guilty plea) to $1800. RP (6/26/09) 216-217.

Because the jury convicted Mr. Nickols Assault in the Fourth Degree and acquitted him of felony assault, he should not be required to pay $1200 in attorney fees. The attorney fee recoupment must be vacated, and $600 imposed instead.

CONCLUSION

For the foregoing reasons, Mr. Nickols's conviction must be reversed and the case remanded for a new trial. In the alternative, the $1200 attorney fee recoupment must be vacated.

Respectfully submitted on November 5, 2009.

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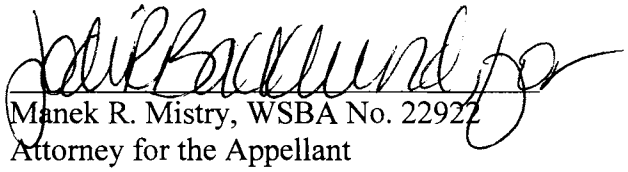

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Joseph Nickols
162 NE Summit RD
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and to:

Lewis County Prosecuting Attorney
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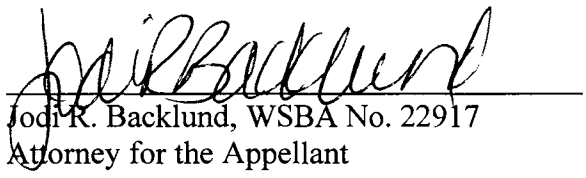
And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 5, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 5, 2009.



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