

FILED

OCT 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 287629

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM A. PAGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FERRY COUNTY
The Honorable Allen C. Nielson

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the defendant's motion for mistrial.

2. Unrelated testimony, rendered in violation of a motion in limine, only served to taint the proceedings and to prejudice the jury.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Irregularities that occur during a criminal trial implicate the defendant's due process rights to a fair trial. In determining the effect of an irregularity, a reviewing court must consider whether the irregularity was serious, whether the irregularity involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it.

Here, the defendant was targeted in a covert operation to uncover illegal bear gall trafficking enterprises throughout the state. The defendant was ultimately charged with several counts of unlawful wildlife trafficking after clandestine videotaped recordings depicted the defendant buying bear gall from undercover detectives.

The defendant was tried twice by jury. Despite a motion in limine that prohibited any reference to the defendant's prior arrests or convictions in the first trial, a detective divulged to the jury in the second trial that the defendant had been arrested for mail fraud. The defendant immediately objected and moved for mistrial.

The trial court found the detective's reference prejudicial and totally irrelevant to the proceedings, but denied the defendant's motion for

mistrial. Instead, the trial court instructed the jury to disregard the testimony, to put it out of their mind[s], and to go on. What effect did the irregularity have on the jury? (Assignments of Error #1 and #2)

III. STATEMENT OF CASE

1. Substantive Facts

William Page (Mr. Page) lives in Curlew, Washington with his wife and teenage grandson. 11/12/09 RP 66. Although basically retired, Mr. Page runs a small meat shop at his home where he processes both domestic animals and wild game. 11/12/09 RP 66. He also raises and slaughters pigs. 11/12/09 RP 67.

Mr. Page has hunted and fished since his late teens. 11/12/09 RP 67. He even served as president for the Washington State Hound Counsel and as president for the Okanogan County Hound Group. 11/12/09 RP 67.

One day, two men, dressed in camouflaged gear, walked in to Mr. Page's meat shop. 11/12/09 RP 68. One of the men claimed to have shot a bear and wanted to know how much it would cost to process it. 11/12/09 RP 68. The men talked for a while. Then, one of the men asked Mr. Page if he would like to see the bear. Mr. Page said yes and he and the men walked out to their rig. 11/12/09 RP 68. In back of the rig was an ice chest and inside the chest was a brown colored bear that had been skinned. 11/12/09 RP 68.

The men talked with Mr. Page a while longer before they noticed Mr. Page's hounds tied up along the edge of a barn. 11/12/09 RP 69-70.

One of the men told Mr. Page that he and his friend were from Sedro-Woolley and that all the hounds men in that area sold bear gall bladders. The man asked Mr. Page if he was interested in the bear gall from their catch. 11/12/09 RP 71. Mr. Page was not interested and even explained to the men that it was illegal to trade in bear gall. 11/9/09 RP 126-127; 11/12/09 RP 71.

The men left the shop. But a day or two later, the men returned. 11/12/09 RP 72. This time, the men did not have any game. Instead, the men told Mr. Page they had overextended themselves financially and needed to sell the bear gall. Again, one of the men asked Mr. Page if he was interested. 11/12/09 RP 72. That time, Mr. Page bought the bear gall. 11/12/09 RP 72.

Mr. Page is among a population of people, particularly elders of the Asian community, who use bear gall as a naturopathic remedy to treat circulatory related ailments. 11/12/09 RP 73; 11/12/09 RP 109; 11/12/09 RP 28; 11/12/09 RP 73. He suffers congenial heart failure, type II diabetes, and severe arthritis. 11/12/09 RP 73; 11/12/09 RP 93; 11/12/09 RP 74. And Mr. Page has found that bear gall helps to relieve many of his symptoms. 11/12/09 RP 74. In all, Mr. Page bought bear gall on 6 different occasions. 11/9/09 RP 158; 11/9/09 RP 164; 11/9/09 RP 172; 11/9/09 RP 181.

Then relatively early one morning, Mr. Page received a telephone call from an unknown man who claimed to have deer he needed

processed. 11/12/09 RP 88. The man told Mr. Page that he was in Tonasket but would meet him at the shop in a couple of hours. 11/12/09 RP 88. Before the man hung up, he told Mr. Page he would be driving a big motor home. 11/12/09 RP 89.

When the motor home arrived, Mr. Page walked out to greet the man. 11/12/09 RP 90. As soon as Mr. Page got close enough to shake the man's hand, a number of uniformed men filed out of the motor home, pointed AR 15 weapons at Mr. Page, and yelled, "Put your hands up!", "Search warrant!!", "Fish and Game Department!" 11/12/09 RP 90-91.

In the midst of all the chaos, a detective handed Mr. Page a search warrant for illegal bear and pig gall bladders. 11/12/09 RP 95. Mr. Page readily told officers that 3 bear galls were in his freezer. 11/12/09 RP 9; 11/12/09 RP 95; 11/9/09 RP 115.

Apparently, the men who sold Mr. Page bear gall were undercover detectives for the Department of Fish and Wildlife. The Department had orchestrated *Operation Zeppelin* to uncover illegal bear gall trafficking enterprises throughout the state. 11/9/09 RP 130; 11/9/09 RP 143.

Mr. Page was targeted as person of interest because he was involved in hound hunting. 11/9/09 RP 130; 11/10/09 RP 64; 11/12/09 RP 81. Mr. Page was also targeted because of his involvement in a DNA study where he captured cougar for the Department. The Department wanted to explore whether Mr. Page, a known hound hunter, was willing to hunt outside of the study permit. 11/10/09 RP 65.

2. Procedural Facts

Mr. Page was charged with several violations that included money laundering, unlawful tracking, and unlawful hunting of big game. CP 1-6; CP 116-121. A jury trial ensued. But for reasons not clear in the appellate record, a second trial ensued later that same year.

For the second trial, Mr. Page was charged with 6 counts unlawful trafficking in wildlife. CP 176-181. The Department introduced as evidence videotaped recordings of some of the transactions between Mr. Page and the undercover detectives as well as bank records, photographs, and bear galls. CP 122-124; CP 359-361; 11/9/09 RP 145; 11/9/09 RP 159; 11/9/09 RP 165.

Despite a motion in limine that prohibited any reference to Mr. Page's prior arrest for mail fraud in the first trial, a detective divulged to the jury in the second trial that Mr. Page had been arrested for mail fraud. CP 114; 11/9/09 RP 167. Mr. Page immediately objected and moved for mistrial. 11/9/09 RP 168.

The trial court found the detective's reference prejudicial and totally irrelevant to the proceedings, but denied Mr. Page's motion for mistrial. 11/9/09 RP 169. In an effort to cure the irregularity the trial court instructed the jury to disregard the testimony, to put it out of their mind[s], and to go on. 11/9/09 RP 169.

The jury deliberated and found Mr. Page guilty on all 6 counts. 11/12/09 RP 178; CP 362; CP 363; CP 364; CP 365; CP 366; CP 367.

The court imposed financial obligations and sentenced Mr. Page to one year in jail to be stayed pending the outcome of an appeal. 12/18/09 RP 16; CP 432-441; CP 454. This appeal followed. CP 442.

IV. ARGUMENT

THE IRREGULARITY WAS SO SERIOUS AND SO PREJUDICIAL THAT ONLY A MISTRIAL COULD HAVE PRESERVED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A. The trial court erroneously denied the defendant's motion for mistrial. A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. State v. Johnson, 124 Wash.2d 57, 76, 873 P.2d 514 (1994). A trial court abuses its discretion in denying a motion for mistrial when a trial irregularity is so prejudicial that nothing short of a new trial can insure that it is remedied. Id. (quoting State v. Hopson, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989)); State v. Gilcrist, 91 Wash.2d 603, 612, 590 P.2d 809 (1979).

Trial irregularities are occurrences during a criminal trial that implicate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wash.2d 757, 761 n. 1, 675 P.2d 1213 (1984). In determining the effect of an irregularity, a reviewing court must consider whether (1) it was serious, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Johnson, 124 Wash.2d at 76, 873 P.2d 514 (quoting Hopson, 113 Wash.2d at 284, 778 P.2d 1014).

Here, the trial court denied Mr. Page's motion for mistrial when a

detective, in violation of a previously filed motion in limine, divulged to the jury that Mr. Page had been arrested for mail fraud. The trial court found the detective's testimony, in that regard, prejudicial and totally irrelevant to the proceedings, but denied Mr. Page's motion for mistrial. 11/9/09 RP 169. The effect of the detective's remark is analyzed below.

1. The irregularity was serious. Evidence of an accused's past wrongs creates a prejudice that is extremely difficult to overcome. State v. Kelly, 102 Wash.2d 188, 199, 685 P.2d 572 (1984); State v. Jones, 101 Wash.2d 113, 120, 677 P.2d 136 (1984), overruled by State v. Brown, 111 Wash.2d 124, 761 P.2d 588 (1988).

Courts have excluded prior offense evidence because they have long recognized that such evidence threatens the accuracy of trials. The reason being, jurors may give too much weight to such evidence and convict a defendant because they are convinced the defendant has a criminal character. Alternatively, jurors may convict a defendant as punishment for prior conduct, even if they are not convinced beyond a reasonable doubt that the defendant committed the crime charged. Edward J. Imwinkelried, A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions, 44 Syracuse L. Rev. 1137-38 (1993).

Washington courts have consistently found that testimony regarding a defendant's prior arrests that were similar to some extent to the current charges were in fact prejudicial. For example, in State v.

Acosta, 123 Wash. App. 424, 438, 98 P.3d 503 (2004), the court found a doctor's testimony regarding the defendant's prior arrests and convictions was highly prejudicial because the offenses were similar to some of the current charges. Similarly, in State v. Pogue, 104 Wash. App. 981, 984, 17 P.3d 1272 (2001), the court accepted the state's concession that eliciting an admission from the defendant that he had possessed cocaine in the past was prejudicial error in his trial for cocaine possession. Moreover, in State v. Escalona, 49 Wash. App. 251, 256, 742 P.2d 190 (1987), the trial court was found to have abused its discretion when it denied a motion for mistrial where a witness testified that the defendant, who was on trial for assault with a knife, had a prior conviction for having stabbed someone.

Like the testimonies in the aforementioned cases, testimony about Mr. Page's prior arrest for mail fraud was highly prejudicial for several reasons. One reason is because the mail fraud arrest was totally unrelated to the crimes with which Mr. Page was charged. And cases that involve erroneously admitted evidence of unrelated crimes provide example by analogy. *See* State v. Mack, 80 Wash.2d 19, 22, 490 P.2d 1303 (1971).

Another reason the testimony was prejudicial was because it was rendered by a detective. Testimony from law enforcement officers often carries a special aura of reliability for juries. State v. Demery, 144 Wash.2d 753, 765, 30 P.3d 1278 (2001).

Finally, the testimony was rendered in violation of a motion in

limine. CP 114; 11/9/09 RP 167. And any testimony that violates an order in limine qualifies as a serious irregularity. State v. Thompson, 90 Wash. App. 41, 46, 950 P.2d 977 (1998) (citing State v. Essex, 57 Wash. App. 411, 416, 788 P.2d 589 (1990), overruled on other grounds by State v. Parker, 132 Wash.2d 182, 937 P.2d 575 (1997)).

2. The irregularity was not cumulative. No other evidence about Mr. Page's prior offenses or prior arrests was offered to show character, motive, or intent. Therefore, the detective's remark was not cumulative of other properly admitted evidence.

3. The trial court's instruction to disregard the irregularity was insufficient. Here, the trial court instructed the jury to disregard the detective's comment about Mr. Page's prior arrest for mail fraud, to put it out of their mind[s], and to go on. 11/9/09 RP 169. Given the nature of the crimes with which Mr. Page was charged and the nature of the crime of mail fraud, it is unlikely the trial court's instruction was sufficient to erase any prejudice.

Although, it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. State v. Suleski, 67 Wash.2d 45, 406 P.2d 613 (1965).

As was aptly observed in State v. Meader, 54 Vt. 126, 132 (1881):

(T)he school boy uses his sponge to rub out the pencil marks on his slate. He eventually discovers that at some time-he never can tell when-his pencil has scratched, and learns to his sorrow, that the ugly evidence of the fact, however vigorously he may apply his sponge, cannot be removed. The question in all cases is not whether the court, if trying the case, would disregard the obnoxious evidence, but whether the court is assured that the jury has done so.

B. Given the effect of the detective's testimony, it is highly unlikely the defendant received a fair trial. The reviewing court must decide whether the irregularity, when viewed against the backdrop of all the evidence, so prejudiced the jury that there is a substantial likelihood the defendant did not receive a fair trial. State v. Post, 118 Wash.2d 596, 620, 837 P.2d 599 (1992) (citing State v. Gilcrist, 91 Wash.2d 603, 612, 590 P.2d 809 (1979)).

A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. See U.S. Const. amend. VI; State v. Devlin, 145 Wash. 44, 51, 258 P. 826, 829 (1927). A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a just application of its principles. "Unfair means may happen to result in doing justice to the prisoner in the particular case; yet, justice so attained is unjust and dangerous to the whole community." State v. Pryor, 67 Wash. 216, 121 P.56 (1912); State v. Miles, 73 Wash.2d 67, 71, 436 P.2d 198 (1968).

Here, in light of the evidence against Mr. Page- the video tape recordings of him and the undercover detectives, the bear gall found in his

freezer, and the testimony from law enforcement officers- there is a substantial likelihood that the mention of a prior arrest for mail fraud, a crime of deceit, only served to taint the jury.

V. CONCLUSION

For the reasons set forth above, Mr. Page respectfully asks this Court to reverse the trial court's decision and to declare a mistrial.

Respectfully submitted this 4th day of October, 2010.



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