

FILED

DEC 03 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, Judge
Cause No. 081000478

BRIEF OF RESPONDENT

Loreva M. Preuss
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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in denying Page's motion for a mistrial when the irregularity did not materially affect the outcome of the trial.
2. Whether the trial court abused its discretion in denying Page's motion for a mistrial when the irregularity was not the product of prosecutorial misconduct and did not affect the jury's verdict.

B. STATEMENT OF THE CASE.

1. Substantive Facts.

William Page ("Page") is a meat-cutter who lives with his wife and 17-year-old grandson in Curlew, Ferry County, Washington. 11/10/09 RP 131; 11/12/09 RP 66. He processes domestic livestock and wild game, and he sells pork from pigs that he grows on his property. 11/9/09 RP 31, 43; 11/12/09 RP 66.

Detectives Todd Vandivert and Dan Chadwick of the Washington Department of Fish and Wildlife (WDFW), working undercover, met with Page at his house for the first time on September 15, 2007. 11/9/09 RP 133; 11/10/09 RP 131. Detective Vandivert told Mr. Page that his nephew had given him Page's name, and his nephew told him to say that he had hound pups to sell. 11/9/09 RP 135; 11/10/09 RP 132. Page responded to the undercover detectives by saying that selling bear gall bladder is illegal, but that if they were selling pig gall, he would talk to them.

11/9/09 RP 135; 11/10/09 RP 133. Detective Vandivert told Page that he (the detective) had a pig gall bladder to sell to Page, and he let Page inspect the bear gall bladder he brought for the meeting. To be certain that Page knew the gall bladder they sold him was from a bear, the detectives showed Page a bear head and hide in the back of Detective Vandivert's truck, and they indicated it was the bear they took the gall bladder from. 11/9/09 RP 142-43; 11/10/09 RP 136. Upon seeing the bear head and hide, the defendant said it was a "nice pig." 11/9/09 RP 143; 11/10/09 RP 136. The defendant bought the bear gall bladder from Detective Vandivert for \$80. 11/9/09 RP 142; 11/10/09 RP 136. Page told the detectives that if they ever came back, they should always tell him they have hound pups for him to look at, and they should always refer to bear gall bladder as pig gall bladder. 11/9/09 RP 142; 11/10/09 RP 136-37.

The second sale took place on September 27, 2007, in the form of two meetings, one in the morning, and the next in the afternoon. 11/9/09 RP 143; 11/10/09 RP 137, 140. At both meetings, Detective Vandivert was accompanied by Detective Chadwick and was wearing a covert button camera. 11/9/09 RP 135; 11/10/09 RP 137. During the morning meeting, Page bought

four bear gall bladders from Detective Vandivert for \$370, but he could only pay \$200 at that time. 11/9/09 RP 151-52; 11/10/09 RP 140. He had the detectives come back in the afternoon so he could give them a check for the remaining \$170. 11/10/09 RP 140.

For the third sale, on November 16, 2007, Detective Vandivert was accompanied by Detective Chadwick and was again wearing a covert button camera. 11/9/09 RP 159; 11/10/09 RP 141, 143. Page purchased one bear gall bladder from Detective Chadwick for \$100. 11/9/09 RP 158, 161; 11/10/09 RP 142. To be sure that Page knew he was buying a bear gall bladder, Detective Chadwick told Page that the gall was from a 250-pound bear. 11/9/09 RP 163; 11/10/09 RP 142. Page responded by jokingly punching the undercover detective and saying "Pig – it's a pig." 11/9/09 RP 164; 11/10/09 RP 142.

For the fourth sale, on April 30, 2008, Detective Chadwick accompanied Detective Vandivert and was wearing a covert button camera. 11/9/09 RP 165; 11/10/09 RP 143. Page bought one bear gall bladder from Detective Vandivert for \$100. 11/9/09 RP 164, 166; 11/10/09 RP 143.

For the fifth sale, on June 17, 2008, Detective Vandivert was accompanied by WDFW Officer Maurstad. 11/9/09 RP 173;

11/10/09 RP 180. Detective Vandivert sold the defendant seven bear gall bladders for \$650. 11/9/09 RP 173, 177, 181; 11/10/09 RP 180-81.

For the sixth and final sale, on September 16, 2008, Detective Vandivert was again accompanied by Officer Maurstad. Detective Vandivert sold the defendant three bear gall bladders for \$300. 11/9/09 RP 179, 182; 11/10/09 RP 182.

Detective Vandivert had copies of the checks and cash Page paid with for each of the six sales. 11/9/09 RP 141, 153, 162, 171, 177, 183; 11/10/09 RP 52-53.

Detective Vandivert took tissue samples from all of the bear gall bladders that he and Detective Chadwick sold to Page. 11/9/09 RP 130-31, 143, 158, 173, 179. All of the tissue samples were tested either at the state Fish and Wildlife laboratory or the U.S. Fish and Wildlife laboratory, or both. 11/9/09 RP 143, 159, 173, 179; 11/10/09 RP 18-19. DNA forensics confirmed that all of the tissue samples came from North American black bear. 11/9/09 RP 96; 11/10/09 RP 65, 80, 84-85.

At trial, Detective Chadwick showed the jury video from each of the four contacts when the detectives wore a covert button camera. 11/10/09 RP 151. In video from each of the sales, Page

is seen inspecting the bear gall bladders. 11/10/09 RP 152, 154. For two of the sales, Page is seen paying the detectives. 11/10/09 RP 154, 155.

When WDFW officers executed a search warrant on Page's home and shop, they found three bear gall bladders in one of Page's freezers. 11/9/09 RP 115-16; 11/10/09 RP 106, 147; 11/12/09 RP 95. At trial, Page admitted buying bear gall bladders from the undercover detectives during all but the first contact. 11/9/09 RP 75; 11/12/09 RP 72, 77, 78, 96, 99, 101, 159, 170.

2. Procedural Facts.

The State accepts Page's statement of the procedural facts as true, with several additions and a correction. The Defendant indicates that a motion in limine was granted that prohibited any reference to his prior arrest for mail fraud. It is true that such motion was made and granted in the first trial, but the motion was not extended or renewed in this trial. 11/9/09 RP 169.

The irregularity complained of in Appellant's Opening Brief occurred during the state's direct examination of Detective Todd Vandivert. In response to a question about what was said during one of Detective Vandivert's undercover contacts with Page, the detective told Page he had a brother in Virginia who had a lot of

bear gall bladders to sell but was having difficulty moving them. 11/9/09 RP 166; 11/10/09 RP 144. Detective Vandivert asked if Page was interested in buying bear gall bladders from Virginia. 11/9/09 RP 166; 11/10/09 RP 144. Page said he was willing to, but he cautioned that shipping illegal items by mail constitutes another crime. 11/9/09 RP 167; 11/10/09 RP 144. Detective Vandivert explained to Page that only he (the detective) and the other undercover agent would know who the gall bladders were going to, and that the detective's brother wouldn't know. 11/9/09 RP 167. Then the following exchange took place in court:

Q. [Prosecutor]: "Okay and what – what did the Defendant say to that?"

A. [Det. Vandivert]: "He – he told us that he had once been arrested for mail fraud himself and that we . . ." 11/9/09 RP 167.

At that point, the defense objected to the relevance of the response and moved for a mistrial. 11/9/09 RP 167.

The trial court immediately excused the jury for a 5-minute recess. 11/9/09 RP 167. The trial court ruled that the remark was clearly not admissible because it was an arrest instead of a conviction and was beyond the 10-year period allowed under the rule for impeachment evidence. 11/9/09 RP 169. However, the

court decided to “give the jury an instruction to disregard the testimony and put it out of their mind and go on.” 11/9/09 RP 169-70. When the jury returned, the trial court said,

Please be seated. Alright and ladies and gentlemen, just before our recess here there was some testimony to the affect that Mr. Page had been arrested at an earlier date and you are to disregard any testimony about that at [sic] whatever was testified to by the witness. 11/9/09 RP 171.

C. STANDARD OF REVIEW

A trial court’s denial of a defendant’s motion for a mistrial is reviewed for abuse of discretion. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010); *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A reviewing court should overturn a denial of a motion for mistrial only when there is a substantial likelihood that the prejudice affected the verdict. *State v. Gamble*, 168 Wn.2d at 177; *State v. Greiff*, 141 Wn.2d 910, 920-21, 10 P.3d 390 (2000).

In determining the effect of a trial irregularity, a reviewing court examines (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Greiff*, 141 Wn.2d at 921; *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

D. ARGUMENT.

1. The trial court did not abuse its discretion in denying Page's motion for a mistrial because the irregularity did not materially affect the outcome of the trial.

a. The irregularity was not serious enough to be prejudicial.

The first *Hopson* factor that a reviewing court examines in determining the effect of a trial irregularity is whether the irregularity is serious enough to prejudice the defendant. *State v. Hopson*, 113 Wn.2d at 284; *State v. Greiff*, 141 Wn.2d at 921; *State v. Weber*, 99 Wn.2d at 165-66. A court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. O'Connor*, 155 Wn. App. 282, 288, 229 P.3d 880 (2010), *citing State v. Allen*, 159 Wn.2d at 10.

In the context of a given case, evidence of other crimes may not affect the outcome of the trial, and in those situations, the trial court may properly deny a defendant's motion for a mistrial. *State v. Gamble*, 168 Wn.2d at 177; *State v. Hopson*, 113 Wn.2d at 285. A trial court has wide discretion to cure trial irregularities resulting from improper witness statements. *State v. Gamble*, 168 Wn.2d at 177; *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992).

Ultimately, the question is “whether . . . , viewed against the background of all the evidence,” the improper testimony was so prejudicial that it deprived the defendant a fair trial. *State v. Gamble*, 168 Wn.2d at 177, quoting *State v. Thompson*, 90 Wn. App. 41, 47, 950 P.2d 977 (1998). Some trial courts, like *Page*, found that the testimony did not affect the trial results.

For example, in *State v. Gamble*, which consolidated several cases, appellant Matthews argued that improper witness statements violated his right to a fair trial. *State v. Gamble*, 168 Wn.2d at 176. During cross-examination and in violation of a pretrial order, a detective for the state disclosed that he began investigating Matthews using a photograph in a King County booking file. The trial court granted Matthews’s immediate motion to strike and ordered the jury to disregard the statement. *Id.* On redirect, the detective disclosed that when Matthews’s girlfriend and accomplice was brought inside a room with Matthews at the police station, she sat on his lap. The trial court sustained Matthews’s objection and told the jury that the testimony was irrelevant and stricken, and that they should disregard it. *Id.* At the end of the trial, the court denied Matthews’s motion for a mistrial based on the detective’s improper statements. *Id.*

The Supreme Court affirmed the appellate court's determination. It found that while the first statement was a serious irregularity because it was an intentional interjection of inadmissible evidence, the jury was instructed to disregard both statements. *Id.* at 176-79. The Court held that given the curative instructions, all of the evidence, and the context of the trial as a whole, Matthews was not deprived of a fair trial. *Id.* at 179.

Another example where an irregularity was not serious enough to affect the verdict is in *State v. Hopson*. In that case, during direct examination, one of the state's witnesses disclosed that the victim said she had known the defendant "three years before he went to the penitentiary the last time." *State v. Hopson*, 113 Wn.2d at 276. On appeal, the Supreme Court affirmed the trial court's denial of a motion for mistrial. It held that there was no information about the number or nature of prior convictions, that the jury had overwhelming evidence favoring conviction, and that the defendant conceded that he committed the crime. *Id.* at 286.

In Page's case, both *State v. Gamble* and *State v. Hopson* are dispositive. Page's prior arrest for mail fraud bore no similarity to the current charges of unlawful trafficking in bear gall bladder. Although Detective Vandivert's statement constituted an

irregularity, it was inadvertent. 11/9/09 RP 169. An unintentional introduction of inadmissible evidence relating to criminal history is less serious than one that is intentional. *State v. Gamble*, 168 Wn.2d at 178.

Furthermore, the jury had abundant evidence with which to convict Page. The two undercover detectives present for each bear gall-bladder sale to Page gave identical testimony relating to the sales. 11/9/09 RP 142, 151-52, 158, 165, 173, 179; 11/10/09 RP 136, 140, 142-43, 180-82. The detectives had copies of the cash and checks Page paid with. 11/9/09 RP 141, 153, 162, 171, 177, 183; 11/10/09 RP 52-53. Covert video showed Page inspecting the bear gall bladders prior to three of the sales and paying for the gall bladders in two of the sales. 11/10/09 RP 152, 154-55. Page admitted to purchasing the bear gall bladders from the detectives during all but the first contact. 11/9/09 RP 75; 11/12/09 RP 72, 77, 78, 96, 99, 101, 159, 170.

Page's case can be distinguished from cases where the courts have held an irregularity was serious enough to be prejudicial. For example, in the case of *State v. Mack*, a co-defendant stated on redirect that Mack had participated in other robberies with him. *State v. Mack*, 80 Wn.2d 19, 20, 23-24, 490

P.2d 1303 (1971). The Supreme Court reversed the lower courts, finding that there were no fruits of the robbery or eyewitness identifications to prove the guilt of the appellant. There was only the testimony of the accomplice who made the improper statement. *Id.* at 23. The Court held that it could not say the jury would have failed to believe the defendant's alibi absent the erroneously admitted statement. *Id.*

In *State v. Babcock*, the defendant was charged with raping, harassing, and kidnapping MB, and molesting AT. *State v. Babcock*, 145 Wn. App. 157, 158, 185 P.3d 1213 (2008). The trial court admitted hearsay evidence through various witnesses that Babcock had abused AT. *Id.* at 161-62. However, when AT was called to testify, she refused to answer questions. *Id.* at 162. The trial court denied Babcock's motion for a mistrial, ruled the earlier hearsay statements inadmissible, dismissed the charges related to AT, and instructed the jury to disregard the hearsay testimony. *Id.* at 162. There was no eyewitness testimony or physical evidence to corroborate the allegations concerning MB except for MB's testimony, which was at times inconsistent. *Id.* at 164. The jury found Babcock guilty of first degree child rape of MB. *Id.* at 162. The reviewing court reversed, holding that the improper hearsay

testimony relating to AT was so potentially prejudicial that that it deprived Babcock of a fair trial, and the trial court abused its discretion in denying Babcock's motion for a mistrial. *Id.* at 164-66.

In Page's case, the irregularity was not serious enough to affect the jury's verdict. There was abundant evidence with which to convict him. He admitted that he purchased bear gall from the undercover detectives in five of the six sales. 11/9/09 RP 75; 11/12/09 RP 72, 77, 78, 96, 99, 101, 159, 170. The trial court did not abuse its discretion in denying Page's motion for a mistrial.

b. The irregularity was not cumulative, but it bore no relation to the crimes charged, and it did not change the defense's strategy.

The second *Hopson* factor that a reviewing court examines in determining the effect of a trial irregularity is whether the challenged evidence was cumulative of other evidence properly admitted. *State v. Hopson*, 113 Wn.2d at 284; *State v. Greiff*, 141 Wn.2d at 921; *State v. Babcock*, 145 Wn. App. at 163; *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987), *citing State v. Weber*, 99 Wn.2d at 165-66.

In Page's case, Detective Vandivert's inadvertent statement about Page's prior arrest for mail fraud bore no similarity to the

evidence of unlawful trafficking in bear gall bladder. The statement was not cumulative of any evidence prior to or after its disclosure.

When an irregularity is not cumulative, *State v. Hopson* is instructive. In *Hopson*, the Supreme Court held that despite the irregularity being non-cumulative, it was not prejudicial because it did not change defense strategy. *State v. Hopson*, 113 Wn.2d at 286. The result in Page's case is the same. Although Page testified at his trial, he did so to justify his illegal purchases of bear gall bladders as necessary for medicinal purposes. 11/12/09 RP 74-77. He did not mention the mail-fraud arrest or any prior convictions. 11/12/09 RP 65-108.

Page's case and *Hopson* can be distinguished from cases where irregularities that were not cumulative did affect the defendant's right to a fair trial. In *State v. Babcock*, discussed previously, the evidence that Babcock molested AT was not cumulative of evidence concerning the rape and harassment of MB. *State v. Babcock*, 145 Wn. App. at 164. The charges involved entirely separate incidents. *Id.* Therefore, the reviewing court held that the non-cumulative nature of the irregularity weighed heavily in favor of mistrial, and that the trial court abused its discretion in refusing to grant a mistrial. *Id. at 164-66.* In Page's case, the

irregularity bore no relation to the crimes charged, and it did not affect the defense's strategy. The trial court did not abuse its discretion in refusing to grant a mistrial.

c. The trial court properly instructed the jury to disregard the improper testimony, and it minimized the remark's impact by promptly moving the trial along.

The third *Hopson* factor that a reviewing court examines in determining the effect of a trial irregularity is whether the trial court properly instructed the jury to disregard the irregularity. *State v. Hopson*, 113 Wn.2d at 284; *State v. Greiff*, 141 Wn.2d at 921; *State v. Weber*, 99 Wn.2d at 165-66. Reviewing courts have upheld mistrial denials when trial judges quickly instruct jurors to disregard improper remarks. This is because jurors are presumed to follow instructions. *State v. Hopson*, 113 Wn.2d at 287; *State v. Post*, 59 Wn. App. 389, 395-96, 797 P.2d 1160 (1990); *State v. Thompson*, 90 Wn. App. at 47.

For example, in *State v. Post*, the state asked a detective during direct examination how he became aware of the defendant. *State v. Post*, 59 Wn. App. at 394. The detective responded, "We became aware of Mr. Post from a telephone information call from an individual who gave us [Post's] name." *Id.* Post objected and

moved for a mistrial, in part because the testimony was contrary to the state's pretrial assurances that such evidence would not be elicited. *Id.* The trial court denied the motion for a mistrial, and it immediately instructed the jury to disregard the detective's statement. No further references to the phone call were made. *Id.* at 396. The reviewing court affirmed the mistrial denial, stating, "we presume that the jury followed the trial court's instruction to disregard Detective Constantine's remark and did not consider it as evidence before it." *Id.* The court held that the detective's statement did not deprive Post of a fair trial. *Id.*

In *State v. Hopson*, discussed previously, one of the state's witnesses disclosed that the victim said she had known the defendant "three years before he went to the penitentiary the last time." *State v. Hopson*, 113 Wn.2d at 276. On appeal, the Supreme Court affirmed the trial court's mistrial denial. *Id.* at 287. It held that the judge properly ordered the jury to disregard the remark and minimized the remark's impact by moving the trial along. *Id.* The trial judge also refused to discuss the remark with counsel in front of the jury. *Id.*

In Page's case, the trial court immediately excused the jury for a recess after Detective Vandivert's improper statement.

11/9/09 RP 167. Following argument on the objection and motion for a mistrial, the court brought the jury back and said, “. . . just before our recess here there was some testimony to the affect that Mr. Page had been arrested at an earlier date and you are to disregard any testimony about that . . .” 11/9/09 RP 171. The court then directed the state to ask its next question. 11/9/09 RP 171.

“The law presumes, and must presume, that the jury finds the facts from the evidence the court permits them to consider. Any other rule would render the administration of law impractical.” *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962); *State v. Post*, 59 Wn. App. at 395. A trial court should grant a mistrial only when nothing the court could have done or said would have remedied the harm done to the defendant. *State v. Gilchrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

In cases where reviewing courts have held a trial court’s instruction insufficient in curing the prejudice of an improper statement, the facts are very different from those in Page’s case. For example, in *State v. Miles*, a Spokane police officer who assisted in arresting Miles was asked on direct examination to relate the contents of a teletype message that served as the basis for Miles’s arrest. *State v. Miles*, 73 Wn.2d 67, 68, 436 P.2d 198

(1968). The defense objected before the officer could respond, but the trial court overruled the objection. *Id.* The officer went on to explain that the teletype described a wanted car and two subjects wanted out of Yakima who were headed to Spokane to duplicate the robbery they committed in Grandview. *Id.* The robbery in Grandview was the robbery for which Miles was on trial. *Id.*

The Supreme Court found that the improper statement was calculated to and did plant in the jury's mind the idea that Miles had committed other robberies of this type and was therefore most likely to have committed the one charged. *Id.* at 70. Although the trial court immediately instructed the jury to disregard the testimony "other than that relating to two subjects in an automobile," the Supreme Court held that the testimony was so prejudicial in nature that "its effect upon the minds of the jurors could not be expected to be erased by an instruction to disregard it." *Id.* at 69, 71. Therefore, Miles was denied a fair trial because the trial court abused its discretion in refusing to grant a mistrial. *Id.* at 71.

Page's case was different from *Miles* in two important respects. Detective Vandivert's statement in relation to Page's prior arrest for mail fraud was inadvertent. 11/9/09 RP 169. The statement related to a prior arrest that bore no relation to the crimes

charged. Therefore, the court's curative instruction was just that: curative. The trial court did not abuse its discretion in denying Page's motion for a mistrial.

2. The trial court did not abuse its discretion in denying Page's motion for a mistrial because the improper testimony was not the product of prosecutorial misconduct and did not affect the jury's verdict.

Appellant Page filed a RAP 10.10 statement of additional grounds for review on November 8, 2010. In it, he indicates that the improper testimony about his prior arrest for mail fraud was made by Mr. Cenci, and within the first fifteen minutes of his trial. A reading of the Report of Proceedings reveals that Deputy Chief Cenci made no such comment. 11/10/09 RP 87-129. Only Detective Vandivert made the comment. The comment came approximately three hours into the first day of trial, after the State had questioned a civilian witness, Travis Stirek; a forensic scientist, James LeMay; and WDFW Officer Dan Christensen.

In his statement of additional grounds, Page appears to allege prosecutorial misconduct as a basis for Detective Vandivert's improper testimony, but this is speculative and is not supported by the record. In fact, the trial court found the opposite to be true. The court stated,

Now Mr. Graham also brings a motion for accumulative misconduct and [sic] by the state and I deny that motion as well. I don't see that here in the presentation that has been made to the jury. So – but Mr. Graham, your objection of course is on the record and your motion for a mistrial I'm going to deny but that's also on the record. 11/9/09 RP 170.

Even assuming, arguendo, there was prosecutorial misconduct, and such misconduct was the basis for the detective's statement about Page's prior arrest for mail fraud, the misconduct was not prejudicial to Page. As explained above, the jury had ample evidence with which to convict him on all six counts of unlawful trafficking, and he admitted to five of the six charges.

When a defendant alleges prosecutorial misconduct, he or she bears the burden of establishing that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); *State v. Luvane*, 127 Wn.2d 690, 701, 902 P.2d 960 (1995). If the defendant proves that the conduct was improper, it still does not constitute prejudicial error unless the appellate court determines that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d at 718. A trial court ruling on prosecutorial conduct will be given deference on appeal. *State v. Luvane*, 127 Wn.2d at 701. "The trial court is in the best position to most effectively determine if

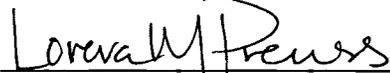
prosecutorial misconduct prejudiced a defendant's right to a fair trial." *State v. Luvene*, 127 Wn.2d at 701, quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

The *Page* trial court found no prosecutorial misconduct. There was overwhelming evidence with which the jury could convict Page. The court did not abuse its discretion in denying Page's motion for a mistrial.

E. CONCLUSION

The trial court did not abuse its discretion in denying Page's motion for a mistrial based on improper evidence of his prior arrest for mail fraud. The irregularity was not serious enough to materially affect the outcome of the trial. Although the irregularity was not cumulative, it bore no relation to the crimes charged and did not change the defense's strategy. The court properly instructed the jury to disregard the remark and promptly moved the trial along. The remark was not the product of prosecutorial misconduct and did not influence the jury's verdict. The State respectfully asks this Court to affirm Page's six convictions.

Respectfully submitted this ^{2nd} day of December 2010.



Loreva M. Preuss, WSBA# 33045
Attorney for Respondent