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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 302580-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TONY CANTU, Appellant,

v.

STATE OF WASHINGTON, Respondent,

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

As a preliminary matter, Appellant would like to withdraw Argument “2” regarding prosecutorial misconduct as stated in his Opening Brief. Instead, Mr. Cantu would like the Court to focus its analysis and ruling on Argument “1”, “That the trial court erred when it denied Mr. Cantu’s motion for a mistrial.”

II. REPLY ARGUMENTS

1. **Even if the standard of abuse of discretion did apply to allegations of juror misconduct, the trial court erred when it denied Mr. Cantu’s Motion for a mistrial**

Citing *State v. Weber*, the State argues that the appropriate standard to apply when reviewing a motion for a mistrial is abuse of discretion. The *Weber* court offered this standard of review for an appellate court when reviewing a trial court’s ruling on a motion for mistrial based upon a “trial irregularity: “To determine whether a trial was fair, the court should look to the trial irregularity and determine whether it *may have influenced the jury*. In doing so, the court should consider whether the irregularity *could be cured by instructing the jury to disregard the remark.*” *State v. Weber*, 99 Wn. 2d 158, 166, 659 P.2d 1102 (1983) (emphasis added). Here, even if this were the correct standard, the trial court abused its discretion because the alleged

error *could not have been cured by a curative instruction* and it *may have affected the outcome of the trial*.

The standard of review for a “trial irregularity such as that in *Weber* is similar to the standard in cases in which the appellant argues that a new trial is justified based upon prosecutorial misconduct. *See State v. Jones*, 117 Wn. App. 89; 68 P.3d 1153 (2003) (an officer's accusation that a defendant is lying constitutes inadmissible opinion evidence and was so prejudicial as to warrant a new trial). Applying the standard advanced in by the State (i.e. in *Weber*), the trial court abused its discretion by denying the defendant’s motion for a mistrial because the trial irregularity could have affected the jury verdict and could not have been cured by a jury instruction.

First, the statement that Mr. Cantu was a “rival gang member” could not have been cured by a curative instruction. As defense counsel argued, such an instruction “would only make things worse,” by bringing more attention to the fact that Mr. Cantu may have been involved in a gang. RP 56. The timing of the statement (during voir dire) of this “trial irregularity cannot be underscored enough: it occurred before the trial had even began and in the presence of the entire jury venire. In fact, the court agreed with defense counsel on this point, stating, “I agree it would probably highlight the issue to give any kind of a curative instruction at

this point.” RP 58. A jury instruction in this situation would have done little if any good in fixing the trial irregularity. *See State v. Dixon*, 150 Wn. App. 46, 207 P.3d 459 (2009) (prosecutor’s comments regarding the defendant’s failure to call a potential witness was prejudicial and could not have be cured by a curative instruction).

Second, the potential prejudice from this statement “may have affected the trial,” the perspective juror announced in front of the entire jury panel that Mr. Cantu was a “rival gang member.” The statement by the prospective juror, although unprovoked, put Mr. Cantu in the most unfair position: he was forced with a Hobson’s choice of discussing his gang involvement or criminal history in his own defense or to ask the jury to completely ignore the statement by his rival gang member in a case where no such evidence was admissible. It would defy common conceptions of fairness and justice in our criminal system to conclude that Mr. Cantu received a fair trial under such circumstances, even though the comment was completely accidental. *See id.* (emphasizing that whether the statement was accidental or purposeful has no bearing on a court’s evaluation of whether the appellant received a fair trial).

III. CONCLUSION

For the reasons stated above, Mr. Cantu respectfully requests that the court grant the relief as designated above in his opening brief.

DATED this 2nd day of October, 2012.



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PROOF OF SERVICE

On October 4, 2012 I filed with the Court of Appeals, Division III via the United States Postal Service to be delivered to their office at **500 N Cedar St, Spokane, WA 99201-1905** one original and one copy of the attached Appellant's Reply Brief and proof of service. On this same date, I deposited into the United States Postal service a copy of this Brief and proof of service to the Adams County Prosecuting Attorney's Office, Appellate Unit at 210 W. Broadway, Ritzville, WA 99169. The defendant on this case, Mr. Cantu DOC#762542, was sent a copy of this Statement and this proof of service via the United States Postal Service at Airway Heights Corrections Center, 11919 W. Sprague Avenue, P.O. Box 1899, Airway Heights, WA 99001-1899.

Dated this 4th day of October, 2012,



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