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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

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NO. 63266-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESUS SILVA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The trial court did not abuse its discretion in denying a mistrial. There is not a substantial likelihood that inadmissible evidence affected the jury's verdict. The jury is presumed to have followed the court's limiting instructions.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Appellant Jesus Silva was charged by information with Count I: Unlawful Imprisonment – Domestic Violence, Count II: Robbery in the Second Degree – Domestic Violence, Count III: Assault in the Fourth Degree – Domestic Violence and Count IV: Assault in the Fourth Degree – Domestic Violence.

The jury found acquitted Silva of Unlawful Imprisonment, Robbery and one count of Assault in the Fourth Degree, but found him guilty of a lesser included Theft in the First Degree and of one count of Assault in the Fourth Degree. CP 41-45.

The State agreed at trial that it would not introduce any evidence of prior bad acts under ER 404(b), and the Defense had also moved to exclude evidence under ER 404(b). 1RP 13, 18, Supp. CP __ (sub. No. 53C, State's Trial Memorandum, at 7). The

specific “acts” to be excluded by this stipulation were not defined, and there was no stipulation or agreement as to evidence offered under ER 609 or other theories. See, generally, 1RP 13-18.

There were two motions for a mistrial during the course of the trial. The first occurred when the prosecutor asked Mejia where Silva lived when Mejia was in Mexico and she responded “He was in jail.” 2RP 39. Defense counsel moved for a mistrial. 2RP 40-41. The motion was denied and the court instructed jurors to disregard the testimony.

The second motion for a mistrial occurred when the prosecutor asked Mejia “I believe I asked you just right before the break how you feel about the defendant now” and Mejia responded “That I don’t love him, that I am afraid when he gets out because on one occasion he told me that he- -” 3RP 49. The court excused the jury *sua sponte* at that point and the interpretation of Mejia’s answer continued outside the presence of the jury. 3RP 49. Defense counsel renewed his motion for a mistrial, stating “Cumulative effects of the jail remark, along with a couple of other sort of borderline remarks during the testimony, I think give the clear implication to the jury there are prior allegations of domestic violence by Ms. Mejia against Mr. Silva.” 3RP 51. Defense

counsel did not specify or explain what he meant by “other sort of borderline remarks during the testimony.” 3RP 51. The court denied the second motion for a mistrial, stating that it was for the same reasons and same analysis as she had indicated before. 3RP 51.

There were two notable objections that were not referenced in any motion for a mistrial. The prosecutor asked Mejia to explain what she meant when she said their relationship was not good. 3RP 7-8. Mejia answered “Because he was aggressive.” 3RP 8. An objection, heard at sidebar, was overruled. 3RP 8. The prosecutor also asked Mejia “why is it that you had your purse with you when you were outside that day before the defendant came outside?” 3RP 47. Mejia answered “because I had once tried to leave, and – there were times that I had gone, and he had tried to – take away the children. And he had already done that once in a occasion, and he had hidden them away in Mexico.” 3RP 47. Defense counsel objected twice during this answer, and was overruled, but then requested a sidebar at the end. 3RP 47-48. After the sidebar, the court struck the question and the answer and instructed the jury not to consider them for any purpose. 3RP 47-48.

2. SUBSTANTIVE FACTS

Jesus Silva and Elvia Mejia had dated from 2001 to July of 2008, and they have two children together. 2RP¹ 33. There were multiple breakups and reconciliations during their relationship. 2RP 35-38. In July 2008 the couple was living together in the home of Silva's sister Sylvia. 2RP 56. Their relationship was "not good" at that point. 2RP 56. In the days prior to July 10, 2008, they moved to the home of Silva's aunt Antonia. 3RP 9-10. Mejia testified that she did not want to be there, but Silva forced her to be there, and would not let her leave the home. 3RP 9-12.

Mejia testified that while living at Antonia's home, Silva kept Mejia, took away her child, and said that he wanted to go ahead and take him to Mexico by force. 3RP 10. Mejia testified that she felt badly about the defendant wanting to take her child to Mexico because he had taken him away and didn't want to return him to her.

Mejia testified that on July 10 Silva forced her to go with him to Yakima, and in an aggressive way to get into the car with him when she told him that she didn't want to go with him. 3RP 12.

¹ The verbatim report of proceedings in this brief are referred to as follows: 1RP: February 9, 2009; 2RP: February 10, 2009; 3RP: February 11, 2009; 4RP: February 12, 2009 and 5RP: March 6, 2009.

Mejia said Silva forced her to come with him when she didn't want to. 3RP 13. Mejia didn't want to get in the car because Silva is aggressive, was aggressive, was talking to her in an aggressive way, and he had already told her to get in because she was going to get in trouble. 3RP 14. Mejia said that Silva said she should get in the car because if she didn't get in the car she was going to have problems, and that she thought he was going to assault her. 3RP 15. Mejia said Silva prevented her from leaving the car by locking all the car doors and that he was being aggressive during the drive. 3RP 16-18.

Mejia testified that during the drive Silva grabbed her purse, removed about \$400, and threw the purse and the remaining contents out the car window. 3RP 18-19, 22-24. She said Silva hit her both on the face and on the lip, and busted her lip. 3RP 18.

According to Silva's testimony, the relationship was okay in July 2008. 3RP 92. Silva said that he did not force her to stay at his aunt's house, he did not tell her that he would do something bad to her if she left, and that she left on a daily basis. 3RP 94.

Silva said that he invited Mejia to come with him to Yakima and that she said yes to whether she wanted to come with him. 3RP 96-97. He testified that while he was driving at 70 miles per

hour, she grabbed the steering wheel. He said that he struck her with the back of his closed fist in an attempt to control the car. 3 RP 100-101. When asked if Mejia appeared upset at the rest stop, Silva said that she continued along very quietly and no longer said anything to him. 3RP 102. Silva denied hitting Mejia a second time and denied taking money from her purse. 3RP 103-105, 112.

Mejia called the police from the motel office upon arrival in Yakima. 3RP 27-28. Yakima police responded and took a report from Mejia. 3RP 65. Mejia had no property or clothing with her other than what she was wearing. 3RP 65. Yakima Officer Grant testified that she appeared to be trembling, like she had just gone through a situation. 3RP 65. Mejia later gave a report and was taken to a hospital for medical care. 3RP 66-67. Officer Grant recovered \$393 from Silva's wallet on arrest. 3RP 67.

Both Antonia and Silvia testified at trial, and their account of events largely supported Silva's version of events. 3RP 73-75, 3RP 81-85.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE MOTIONS FOR A MISTRIAL

The decision to grant or deny a mistrial is within the sound discretion of the trial court and is reversible only for abuse of that discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* The trial judge is in the best position to evaluate the dynamics of the trial and to determine the prejudicial effect, if any, of a particular remark upon the jury. State v. Harris, 97 Wn.App. 865, 869, 989 P.2d 553 (1999). The fact that someone has been in jail does not mean that he or she has been convicted of a crime, does not necessarily indicate a propensity to commit murder, and it could also mean he was in jail for a minor offense. State v. Condon, 72 Wn.App. 638, 649, 865 P.2d 521 (1993) (distinguishing State v. Escalona, 49 Wash App. 251, 742 P.2d 190 (1987), in which improper statements indicated that the defendants had committed crimes similar or identical to the crimes for which they were on trial.)

Here, the trial court had clear and tenable reasons for denying both motions for a mistrial. The trial court extensively

reviewed both the Condon and the Escalona cases in the first motion, and then relied on the same analysis in the second motion. 2RP 45-47, 3RP 51. The court ruled that a limiting instruction would be sufficient in both situations. *Id.* The trial court was able to take into her account her knowledge of the dynamics of the trial thus far, as well as the offered and anticipated evidence. The court gave due consideration to existing case law in light of the evidence. The court therefore did not abuse its discretion in denying the motions for a mistrial.

When making a determination about whether there was an abuse of discretion by the trial court, appellate courts do not weigh conflicting evidence or make credibility determinations. See State v. Rodriguez, 103 Wn.App. 693, 696, 699-700, 14 P.3d 157 (2000) (trial judge is in the best position to determine the effects of trial irregularities on the jury), *aff'd*, 146 Wn.2d 260, 45 P.3d 541 (2002); State v. Fiser, 99 Wn.App. 714, 719, 995 P.2d 107 (2000) (appellate courts must defer to the fact-finder's determinations of credibility, conflicting testimony, and persuasiveness of the evidence). The appellate court's inquiry is limited to whether the trial court had tenable reasons for concluding that the defendant

was not prejudiced by the improper testimony. See Rodriguez, 103 Wn.App. at 700.

Here, the trial court noted the language in Condon in which remarks were found to have the potential for prejudice, but were not as serious as to warrant a mistrial, and which instructions to disregard were sufficient. 2RP 46. Both the reference by Mejia to Silva having been in jail, and the statement by Mejia that “that I don’t love him, that I am afraid when he gets out because on one occasion he told me that he- ” can be properly classified as statements that have the potential for prejudice. However, in the context of the entire case, the level of prejudice does not merit a mistrial.

The appellant argues that Mejia’s statements “because he was aggressive, “ and “because I had once tried to leave, and – there were times that I had gone, and he had tried to – take away the children. And he had already done that once in a occasion, and he had hidden them away in Mexico,” also provide grounds for a mistrial. However, neither statements were made part of trial counsel’s motion for a mistrial. Trial counsel simply referred to “other borderline remarks” in his second motion for a mistrial. 3RP

51. Since Mejia's statements regarding Silva being aggressive and having hidden the children in Mexico were not addressed in the motions for a mistrial, the appellate court cannot properly consider them in determining whether the trial court abused its discretion in denying the motions for a mistrial.

2. THERE IS NOT A SUBSTANTIAL LIKELIHOOD THAT INADMISSABLE EVIDENCE AFFECTED THE JURY'S VERDICT

Erroneous admission of testimony is ground for reversal when it is so prejudicial that it deprives defendant of fair trial; factors court should consider include seriousness of irregularity, whether statement in question was cumulative, and whether irregularity could be cured by instruction to disregard. State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (1993). The court will only overturn a denial of a motion for a mistrial if there is a substantial likelihood that the inadmissible evidence affected the jury's verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Jurors are presumed to follow the trial court's limiting instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

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. See generally State v. Gilcrist, 91 Wash.2d 603, 590 P.2d 809 (1979). Gilcrist suggests the following standard for reviewing trial irregularities:

A mistrial should be granted only when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” In other words, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial. (Citations omitted.) Gilcrist, at 612, 590 P.2d 809.

Here, the trial court struck objectionable testimony and gave appropriate limiting instructions. The jury is presumed to follow the court’s instructions. The verdict in this case, in which the jury acquitted on several charges and convicted only on a lesser included felony and one misdemeanor, actually suggests that the jury was quite cautious in rendering their verdict. The jury had to have had at least some doubt about some of Mejia’s admitted testimony. Had the jury been improperly swayed by excluded remarks, it is highly likely they would not have acquitted the

defendant of Unlawful Imprisonment, Robbery in the Second Degree, or the other count of Assault in the Fourth Degree.

D. CONCLUSION

The trial court was in the best position to determine whether trial irregularities in this case affected the jury's verdict. The trial court did not abuse its discretion in denying the motions for a mistrial, in fact, the trial court gave full and careful consideration to the motions and applied the appropriate legal standard. Here, any potential prejudice was such that it could be cured by striking the testimony and through curative instructions. Finally, the jury's verdict strongly suggests that Mr. Mejia received a fair verdict on the charges at stake.

DATED this 22nd day of October, 2009.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JESUS SILVA, Cause No. 63266-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Jeremiah Noble
Done in Seattle, Washington

10.22.09
Date