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NO. 64349-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CONNOR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did Connor fail to preserve his issue for appeal by a) failing to request a mistrial after Officer DeMoss's first reference to a weapon and b) by failing to object at all to the second reference to a weapon?

2. Did the trial court appropriately exercise its discretion by overruling Connor's objection because Officer DeMoss's testimony did not violate the ruling on the motion in limine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Connor was charged with two counts of custodial assault against King County Corrections Officers David DeMoss and Abdul Mohamed, respectively. CP 1-2. A jury acquitted Connor of assaulting Officer DeMoss and convicted him of assaulting Officer Mohamed. CP 50, 51. The trial court imposed a standard-range sentence from which Connor appeals. CP 60-69.

2. SUBSTANTIVE FACTS

Connor was in custody at the King County Correctional Facility at the Regional Justice Center in Kent pending trial on

domestic violence charges. CP 3. When Connor violated the conditions of a medical authorization to wear his personal shoes, jail Sergeant Katherine Jones advised Connor that the medical authorization was revoked and ordered him to surrender the shoes. 5RP 39-42.¹ Connor responded with derogatory language and told Sergeant Jones that she would have to come into his cell to get the shoes if she wanted them. 5RP 43-44, 48-49. Based on Connor's refusal to obey a direct order and his disrespectful behavior towards jail staff, Sergeant Jones asked the unit officer, Officer Currier, to "lock out" Connor's cell so he could not return to the day room. 6RP 15. Connor became angry: he painted a target on his cell window with toothpaste and punched it; he also removed his shirt and began to flex his muscles and asked Officer Currier if he "felt threatened." 6RP 15-16.

Based on Connor's refusal to follow orders, his verbal derogation, and efforts to intimidate corrections staff, jail protocol required that he be moved to disciplinary segregation. 5RP 45-46; 6RP 96. As corrections staff prepared to move Connor, he became increasingly agitated. 6RP 110. Sergeant Jones and other

¹ The State adopts Appellant's numbering convention for the Record of Proceedings.

corrections officers who were familiar with Connor made several attempts to diffuse the situation, requesting that he allow corrections officers to handcuff him so that he could be moved without incident. 6RP 83-84, 108, 110. Connor repeatedly refused and began to prepare for a physical confrontation with corrections officers. 6RP 113. He spread a liquid on his cell floor to make it slippery and placed his mattress in front of him; he also stuffed tissue in his nose, and covered his head and body with a plastic bag and a sheet, in case officers used pepper spray. 6RP 112-13.

When it became apparent that Connor was not going to comply with the officers' requests, the captain authorized corrections staff to perform a cell extraction to forcibly remove Connor from his cell. 5RP 49. Even as the extraction team was assembled, corrections officers went to Connor's cell and repeatedly offered to allow him to be peacefully handcuffed, so as to avoid the use of physical force. 5RP 47-48, 51; 6RP 37-38. After Connor rebuffed all these efforts, a team of corrections officers approached his cell in riot gear and gave Connor a final opportunity to comply without the use of force, but Connor maintained his defensive posture in front of the window of his cell door. 6RP 112.

The extraction team unlocked the cell and Connor rushed the door. 5RP 56. Officers managed to close the door the first time, but the second time the door was opened and officers attempted to employ pepper spray, Connor rushed the door again and burst from his cell, striking at officers with something in his hand. 5RP 56-57; 6RP 41-42. Officers took Connor to the floor in front of his cell and ultimately were able to handcuff him. 6RP 57; CP 75, Exhibit 1 (video of extraction). When Connor was lifted from the floor, officers saw two golf pencils that had been joined end to end by paper and tape. 6RP 42, 71; CP 75, Exhibits 1, 4 (modified pencil). A video of the extraction shows that Connor held the lengthened pencil in his hand and made stabbing motions with it, striking Officer Mohamed in the chest area. 6RP 115; CP 75, Exhibit 1. During the struggle on the floor, Officer DeMoss felt Connor strike him in the leg but did not know whether he had anything in his hand at that time. 6RP 42.

At trial, defense moved in limine to prohibit the State's witnesses from calling the lengthened pencil a weapon or a shank. CP 14; 3RP 10. The court granted the motion, but ruled that the witnesses could say that:

[T]hey feared he was going to use it as a weapon, it looked to me like a weapon, it looked to me like a shank, I was afraid it was like that. But it's a golf pencil, so it really needs to be referred to as a golf pencil. I'm not saying they can't say that they were concerned that it might be used as a weapon.

3RP 10.

After additional argument, the court reiterated that the witnesses could refer to the item as a "modified golf pencil" and describe why they thought it could be used as a weapon or was actually being used as a weapon at the time, or why they were concerned that it would be used as a shank. 3RP 11.

The jury watched the admitted segment of the extraction video at least twice² and heard extensive testimony about items that inmates are allowed to have in their cells and how inmates create weapons from ordinary items, including pencils, but that inmates commonly lengthen pencils to make them easier to write with. 5RP 37-40; 6RP 46-47.

² The prosecutor played the admitted portion of the video during the testimony of Officer DeMoss and Sergeant Jones. 6RP 40, 99. During deliberations, the jury asked to see the video two more times. CP 54, 56. Although it is not clear from the record, it appears that the court granted the jury's first request to review the video, but denied the jury's second request. CP 57.

C. ARGUMENT

Connor raises a single issue on appeal, claiming that Officer DeMoss violated the trial court's ruling on the motion in limine and that the trial court's overruling the objection to the testimony deprived him of a fair trial. Connor's claim fails for three reasons. First, Connor never sought a mistrial following the first alleged violation and never objected at all to the second alleged violation. Therefore, the issue is waived on appeal. Second, as the trial court found in overruling the objection, Officer DeMoss's testimony did not violate the order in limine. Finally, even if Officer DeMoss's testimony did violate the order, Connor was not prejudiced by it. For all these reasons, Connor's conviction should be affirmed.

1. CONNOR FAILED TO PRESERVE HIS ISSUE FOR APPEAL.

Connor complains about two statements by Officer DeMoss. During the first statement, the prosecutor played the video of the cell extraction and Officer DeMoss was asked to narrate certain portions. 6RP 40. The prosecutor asked Officer DeMoss about an object that is shown on the video and he replied, "That was the pencil he had modified to use as a weapon." 6RP 40. Defense

counsel objected and moved to strike, but the trial court overruled the objection. 6RP 40-41. In the second statement, Officer DeMoss was asked whether he saw Connor strike out during the extraction, to which Officer DeMoss replied:

I didn't even realize there was any kind of a weapon involved until [Connor] was pinned on the ground and I pulled his arm out from under him to try to get his arm behind his back so we could restrain him. That's when I saw the pencil come out the first time.

6RP 42.

In the first instance, although defense counsel moved to strike, counsel accepted the trial court's ruling and did not move for a mistrial. Moreover, counsel never objected to the second statement, which Connor now claims also deprived him of a fair trial. See Br. of Appellant at 5. Therefore, Connor's issue is not reviewable unless it is a manifest error of constitutional magnitude.³ RAP 2.5(a)(3); State v. Borsheim, 140 Wn. App. 357, 374-75, 165 P.3d 417 (2007); State v. Thach, 126 Wn. App. 297, 314, 106 P.3d 782 (2005).

³ The failure to object does not preclude the raising of the issue on appeal when erroneous evidence has been intentionally offered in actual violation of an order in limine. See State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1937). But that is not what happened here, and Connor does not so claim.

The admissibility of testimony is reviewed for an abuse of discretion because the trial judge is best suited to assess the prejudice of a statement. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). When reviewing for an abuse of discretion, the appellate court will not substitute its judgment for that of the trial court and will affirm unless no reasonable person could have come to the same conclusion. State v. Lord, 161 Wn.2d 276, 295, 165 P.3d 1251 (2007); In re Personal Restraint of Duncan, 167 Wn.2d 398, 406, 219 P.3d 666 (2009).

The testimony at issue here was the subject of a motion in limine. The purpose of a motion in limine is to resolve legal matters out of the jury's presence to permit counsel to make comments that might be prejudicial to their position; a party losing the motion in limine has a standing objection, unless the trial court indicates that further objections are required. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). However, where the winning party obtains an order in limine excluding certain evidence, that party has a duty to bring the violation to the attention of the court and allow the court to decide what remedy, if any, is necessary. State v. Sullivan, 69 Wn. App. 167, 171-72, 847 P.2d 953 (1993). Otherwise, a party could simply lie back, not allowing

the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. Id. at 172.

Connor cannot ask for a new trial now when counsel failed to move for a mistrial after the first statement, and cannot claim error at all regarding the second statement when he failed to object at trial. To preserve the issue for appeal, a party ordinarily must move for a mistrial or request an instruction to cure the asserted error. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); State v. Riley, 69 Wn. App. 349, 354, 848 P.2d 1288 (1993). A party's failure to move for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

Here, the trial court evaluated the prejudice of Officer DeMoss's testimony, overruled the objection, and denied the motion to strike. Both rulings were well within the court's discretion. The fact that counsel actually offered subsequent similar testimony and did not seek a mistrial shows that counsel did not believe the

alleged error was prejudicial.⁴ See Swan, 114 Wn.2d at 661. The trial court should be affirmed.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING COUNSEL'S OBJECTION BECAUSE THE TESTIMONY DID NOT VIOLATE THE ORDER IN LIMINE.

The trial court did not abuse its discretion in overruling the objection to Officer DeMoss's testimony because there was no violation of the order in limine. In accordance with the court's ruling, Officer DeMoss testified that the pencil had been modified to be used as a weapon. 6RP 40. DeMoss used the term "weapon" only in describing how the pencil was used, which the trial court explicitly authorized. 3RP 10, 11; 4RP 3, 4.

Nonetheless, Connor claims that the court's overruling his objection to Officer DeMoss's statement was a serious trial irregularity that deprived him of a fair trial. See State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987). This claim fails because the testimony here was not a serious trial irregularity and because Connor was not prejudiced by the testimony.

⁴ See, e.g., 6RP 71 ("that's the pencil that was put together for the weapon"; 6RP 118 "during the fight he displayed what appeared to be a shank[.]"). The latter testimony was elicited by defense counsel during cross examination.

In Escalona, a witness testified that the defendant "already had a record and had stabbed someone," in violation of an order in limine. 49 Wn. App. at 253. Defense moved to strike and sought a mistrial outside the presence of the jury. Id. The trial court ordered the statement stricken, but denied the motion for mistrial. Id. This Court held that the trial court had abused its discretion when it denied the mistrial, considering three factors: 1) the seriousness of the irregularity, 2) whether the statement was cumulative of other evidence properly admitted, and 3) whether the irregularity could have been cured by an instruction to disregard. Id. at 254.

This case is distinguishable from Escalona and the other cases cited by Connor, because in each of those cases, the trial courts sustained the defendants' objections to the testimony, but denied their motions for mistrial. See State v. Miles, 72 Wn.2d 67, 436 P.2d 977 (1998) (testimony that Miles had committed similar crime elsewhere in violation of order in limine); State v. Wilburn, 51 Wn. App. 827, 755 P.2d 842 (1988) overruled on other grounds by Adams. v. Dept. of Labor and Industries, 128 Wn.2d 224, 905 P.2d 1220 (1995) (rebuttal witness testified about defendant's implicit admission to rape and need for treatment). Thus, the appellate

courts were reviewing properly preserved denials of motions for mistrial. In contrast, Connor asks this Court to hold that the trial court should have granted a motion that was never made.

But even if this Court were to apply the three factors from Escalona, Connor's claim still fails. First, there was no irregularity; the trial court overruled the objection and motion to strike and defense asked for no further remedy. Second, even if, *arguendo*, the statement could be deemed an irregularity, it was cumulative of other evidence properly admitted. Sergeant Jones and Officer Mohamed testified about the lengthened pencil and how it was used; also, the jury watched the extraction on video and could see for themselves whether Connor used the pencil as a weapon against the officers. Third, unlike the patently prejudicial statements in Miles, Wilburn, and Escalona, even if a violation of the order in limine occurred, the testimony was not so prejudicial that it could not have been cured by an instruction to disregard, as demonstrated by the other similar testimony to which defense never objected. Moreover, Connor was obviously not prejudiced by Officer DeMoss's testimony because the jury acquitted Connor of assaulting DeMoss.

In sum, Connor waived the issue on appeal by failing to move for a mistrial, but regardless, Connor cannot show that he was prejudiced by Officer DeMoss's testimony and his conviction should be affirmed.

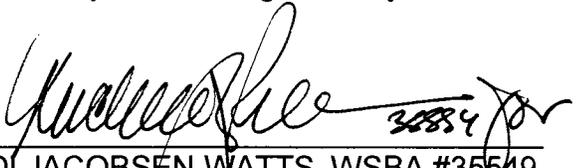
D. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm Connor's conviction.

DATED this 30th day of June, 2010.

Respectfully submitted,

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