

NO. 67858-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROYANNE WESTBROOK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in granting the State's motion to reconsider the court's grant of a motion for a mistrial after a police detective repeatedly testified that he had used a jail booking photograph of Ms. Westbrook in a montage before anyone identified her as the suspect in the current crime.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A new trial should be granted where (1) the evidentiary error in question was serious; (2) the improper evidence was not cumulative of evidence properly admitted; and (3) the error could not be adequately cured by an instruction. In this theft-of-a-dog case, the defense theory was that Ms. Westbrook took a dog to save it because it appeared to have been abandoned. The State said it was not going to introduce ER 404(b) evidence, but a detective twice testified that when trying to determine who committed this crime, he pulled a jail booking photograph of Ms. Westbrook from a database. The trial court granted a motion for mistrial but then granted the State's motion to reconsider after the State claimed the jury probably thought the booking photo was for the current charge. Where the detective's testimony made clear that the booking photo could only have come from prior charges,

should this Court reinstate the trial court's original ruling granting the motion for a mistrial?

C. STATEMENT OF THE CASE

In September of 2010 Lori LeFavor left her dog tied up outside while she and a friend enjoyed a meal at El Camino in Fremont. 7/5/12 RP 154-55. After at least 45 minutes passed, another woman took the dog. 7/5/12 RP 48, 158. Later that same day, an acquaintance of Ms. LeFavor recognized the dog outside the Goodwill near Shoreline. The woman who had taken the dog was giving it a bowl of water and letting children pet it. 7/5/11 RP 74-75.

Ms. LeFavor's acquaintance, Lisa Podmajerski, told the woman that she knew the dog's owner. 7/5/11 RP 84. The woman told Ms. Podmajerski she had found the dog unattended in Fremont. 7/5/11 RP 84. After the two argued briefly about what should be done with the dog, Ms. Podmajerski took it and the other woman left. 7/5/11 RP 85-86. Ms. Podmajerski called 911 and gave police the license plate number of the van in which the woman departed. 7/5/11 RP 87.

The State eventually charged Royanne Westbrook with second-degree theft for taking the dog. CP 1. At trial, Seattle

police detective Eric Nelson testified that the first step in investigating the crime and trying to ascertain who committed it was to run the license plate number of the van. 7/6/11 RP 36-38. He told the jury that after he matched the license plate number to the name Royanne Westbrook, he “ran that name through the King County jail booking system and obtained a photograph, a booking photo and it resembled the description that was provided in the report.” 7/6/11 RP 40-41.

Detective Nelson said he then prepared a photographic montage that included this picture. 7/6/11 RP 42. After two witnesses selected Ms. Westbrook from the montage, the State charged her with the crime. 7/5/11 RP 55, 92; CP 1. In explaining what he meant by a “photo montage,” Detective Nelson said, “It’s where we use six photographs. Typically, they’re booking or DOL photographs and one of those, of course, will be Westbrook and then we get five other people that look similar.” 7/6/11 RP 43.

Because Detective Nelson twice alluded to the fact that there were jail booking photographs of Ms. Westbrook, the court excused the jury and admonished the State’s witness. The judge said, “I’m concerned that Detective Nelson has now made two references to the fact that the defendant might have been in jail. ... I just want to

put him on notice that he needs to stay away from that subject matter.” 7/6/11 RP 43.

Ms. Westbrook then moved for a mistrial, stating, “you can’t take back what’s already been out there when it’s been put out there for the jury. It’s most difficult for them to ignore that information. It’s also a back doorway of showing that [Ms. Westbrook] is somehow a bad person, has been in jail, has been arrested on prior occasions.” 7/6/11 RP 44.

The court granted the motion for a mistrial, citing the seriousness of the error, the fact that the testimony was not cumulative of evidence properly admitted, and the low likelihood that an instruction could prevent the jury from considering the remarks. 7/6/11 RP 63, 67-69. The court noted:

[T]here’s nothing that could be more prejudicial than suggesting to the jury that somebody has been in jail The reason why we have ER 404(b) [and] all the cases surrounding that is that we need to protect a defendant from being convicted based on propensity evidence. The problem with this is that having heard that remark, the jury will assume that the defendant here has criminal propensities, and this is extremely serious.

7/6/11 RP 67-68. The testimony was not cumulative because there was no other evidence that Ms. Westbrook had a criminal record, and her prior acts would not have been admitted unless she

testified. 7/6/11 RP 68. As to whether the error could be cured by an instruction, the court stated “it can’t be cured because once the jury has heard that it’s going to be extremely difficult for them to disregard it. I don’t have confidence in their ability to do so.” 7/6/11 RP 68.

The State moved to reconsider, arguing the jury probably assumed Ms. Westbrook had been booked into jail on the current charge only, and therefore the prejudice was minimal. 7/6/11 RP 78-79. The State made this argument despite the fact that Detective Nelson testified he accessed a jail booking photograph of Ms. Westbrook at one of the earliest steps in the investigation – before they obtained witness identifications and well before they charged Ms. Westbrook with the crime. 7/6/11 RP 40-42. The court, not realizing this problem with the State’s argument, granted its motion to reconsider. The court said, “there is, I think, a logical inference that she would have been arrested just in connection with this case. And so I am reconsidering the Court’s previous granting of the motion for mistrial.” 7/6/11 RP 84.

The jury convicted Ms. Westbrook of second-degree theft as charged. CP 77. Ms. Westbrook timely appeals. CP 86-87.

D. ARGUMENT

A new trial should be granted because Detective Nelson twice testified he used a jail booking photo of Ms. Westbrook in a montage before Ms. Westbrook was arrested for the current crime.

As the trial judge recognized, courts evaluate three factors to determine whether a mistrial should be granted: (1) the seriousness of the error; (2) whether the improper statement was cumulative of evidence properly admitted; and (3) whether the error could be cured by an instruction. State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853, 858 (2011). The trial judge properly granted the motion for a mistrial based on these three factors. The only reason he later granted the State's motion to reconsider was because of a factual misstatement. The original ruling granting the motion for a mistrial should therefore be reinstated.

As to the first factor, the error was serious because the police officer twice referenced prior bad acts after the State had promised it was not planning to introduce ER 404(b) evidence. As the judge stated:

[T]here's nothing that could be more prejudicial than suggesting to the jury that somebody has been in jail The reason why we have ER 404(b) [and] all the cases surrounding that is that we need to protect a defendant from being convicted based on propensity evidence. The problem with this is that having heard

that remark, the jury will assume that the defendant here has criminal propensities, and this is extremely serious.

7/6/11 RP 67-68.

The State later claimed, in its argument to reconsider, that the error was not as serious as the court and parties had assumed because the jury probably thought the detective used a booking photo from the current crime. But this is wrong as a matter of fact. Detective Nelson testified that the first step in investigating the crime and trying to ascertain who committed it was to run the license plate number of the van. 7/6/11 RP 36-38. He told the jury that after he matched the license plate number to the name Royanne Westbrook, he “ran that name through the King County jail booking system and obtained a photograph, a booking photo and it resembled the description that was provided in the report.” 7/6/11 RP 40-41. The jury was therefore well aware that the booking photograph must have come from a prior crime.

Thus, the trial court was correct initially in recognizing that the error was serious and the prejudice was great – particularly because the current crime was relatively minor. As the judge noted, the defense argument was that Ms. Westbrook did not intend to steal the dog but took it because she was concerned for

its health and safety. The detective's telling the jury that Ms. Westbrook had been jailed before was extremely damaging to that position. 7/6/11 RP 75-77.

As to the second factor, the statements were not cumulative of other evidence because no other evidence of prior bad acts had been introduced. The State had assured the parties and court that it did not intend to present ER 404(b) evidence. 6/29/11 RP 13. Furthermore, Ms. Westbrook did not testify, so no evidence of prior acts came in under ER 609. 7/6/11 RP 68. The court stated that if Ms. Westbrook had testified, thus triggering the right for the State to present ER 609 evidence, then the second factor would have weighed against a mistrial. But because absolutely no other evidence of prior acts was presented, the second factor, like the first, cut toward a mistrial. 7/6/11 RP 68.

As to the third factor, the court properly recognized that the statements "can't be cured because once the jury has heard that it's going to be extremely difficult for them to disregard it. I don't have confidence in their ability to do so." 7/6/11 RP 68.

This Court's decision in Escalona and the Supreme Court's decision in Taylor are instructive. See State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962); State v. Escalona, 49 Wn. App. 251, 742

P.2d 190 (1987). In Escalona, a witness stated that the defendant “already has a record and had stabbed someone.” Escalona, 49 Wn. App. at 253. The trial court ordered the statement stricken and provided a curative instruction, but denied a motion for mistrial. Id.

This Court reversed, holding a mistrial should have been granted because the error was serious, the statement was not cumulative, and the instruction could not have cured the error even though we presume juries follow instructions. Id. at 254-56. This Court’s observations were similar to those of the trial court here. For instance, in recognizing the seriousness of the error, this Court stated, “[o]ur rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes.” Id. at 255. Also as in Ms. Westbrook’s case, this Court in Escalona noted that the statement “was not cumulative or repetitive of other evidence.” Id.

As to the third factor, this Court acknowledged that jurors are presumed to follow instructions, but, like the trial court here, this Court found that “no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.” Id. (internal citations omitted). In Escalona, the evidence

was inherently prejudicial because the prior crime was similar to the current charge. Here, the evidence was inherently prejudicial because the current charge was minor and Ms. Westbrook's position that she was simply caring for the dog was more credible without evidence of a criminal record. 7/6/11 RP 75-77. In fact, the jury likely assumed that whatever crimes Ms. Westbrook was jailed for in the past were worse than the current charge – a presumption that would have been highly prejudicial. Thus, as the trial court noted, this is not like cases in which the defendant was charged with murder and therefore evidence of a prior booking would have had a negligible impact. See, e.g., State v. Gamble, 168 Wn.2d 161, 176-80, 225 P.3d 973 (2010); State v. Condon, 72 Wn. App. 638, 647-50, 865 P.2d 521 (1994). 7/6/11 RP 75-77.

In Taylor, a police officer testified that he contacted the defendant's parole officer as part of his investigation. Taylor, 60 Wn.2d at 33. A new trial was granted because the statement "may have revealed to at least some members of the jury that the defendant Taylor had been in previous trouble with the law." Id. at 35. As the trial court here noted, the Supreme Court in Taylor said it is of "universal recognition" that "to place a defendant's character or reputation in issue before it becomes an element of the trial is

error of the wors[t] type.” Id. at 37. “In a trial of a criminal case the issue is singular, as to guilt or innocence: ‘Did the defendant commit the crime charged?’ and not upon the question, ‘Has the defendant the reputation of committing crime before.’” Id. at 38.

The Court was especially concerned about the prejudicial impact of the statement coming from a police officer. Id. at 36. And it recognized that a curative instruction would likely exacerbate the very problem it was meant to solve: “we deal with an evidential harpoon which would only be aggravated by an instruction to disregard.” Id. at 37.

The same is true here. The statements regarding Ms. Westbrook’s jail booking photographs were made by a police detective, which, under Taylor, makes them especially prejudicial. Also as in Taylor, providing a curative instruction only aggravated the problem by highlighting the improper evidence. The trial court agreed with this analysis, and only reversed course after the State made an argument that was factually false. This Court should therefore reinstate the trial court’s original ruling, and remand for a new trial.

E. CONCLUSION

For the reasons set forth above, Ms. Westbrook respectfully requests that this Court reverse her conviction and remand for a new trial.

DATED this 25th day of May, 2012.

Respectfully submitted,


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Respondent,)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> ROYANNE WESTBROOK 277965 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF MAY, 2012.

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