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WASHINGTON STATE
SUPREME COURT

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Court of Appeals
Division I
State of Washington

Supreme Court No.: 93404.5
Court of Appeals No.: 73252-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CRYSTAL HUNTER,

Petitioner.

PETITION FOR REVIEW

KATHLEEN A. SHEA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Crystal Hunter requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Crystal Hunter*, No. 73252-8-I, filed June 20, 2016. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Where a trial irregularity denies a defendant of a fair trial, the court should grant a mistrial. Should this Court grant review in the substantial public interest where a police officer referenced previously excluded evidence that prejudiced Ms. Hunter, and the jury initially indicated it could not reach unanimous agreement? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Jesus Ocha heard the engine of his Honda Accord start up early one morning. 2/4/15 RP 12. He ran outside in time to see a man stealing his car and attempted, but was unable, to stop him. 2/4/15 RP 15. A few weeks later, law enforcement stopped the car at night after noticing its back lights were out. 2/4/15 RP 33. The driver used a screwdriver to turn the car off and could not provide any paperwork for the vehicle. 2/4/15 RP 35. The sheriff's captain who stopped the car testified that he observed tools on the floorboard, heavy damage to the steering column,

and a missing ignition cylinder. 2/4/15 RP 45. He was able to observe this because he had intentionally stopped the car in a well-lit area and illuminated the car with his own vehicle's headlights before approaching the vehicle. 2/4/15 RP 50-51.

Crystal Hunter was riding in the front passenger seat when the car was stopped. 2/4/15 RP 37. She was charged with taking a motor vehicle without permission in the second degree. CP 1. Prior to trial, the court ruled that if Ms. Hunter testified, the State could introduce evidence of her prior convictions. 2/3/15 RP 33. The defense moved to exclude any prior bad acts of the defendant and the State indicated it had no intent to offer any such acts. CP 10; 2/3/15 RP 27-28. Ms. Hunter did not testify at trial.

However, despite the State's assurance that it would not be introducing any evidence of Ms. Hunter's prior bad acts, a sheriff's deputy testified Ms. Hunter had an unrelated warrant out of Renton at the time the car was stopped. 2/4/15 RP 79. The defense moved for a mistrial but the trial court denied Ms. Hunter's motion after mistakenly ruling that the defense had failed to address this issue in its motions in limine. 2/4/15 RP 90-91.

During deliberations, the jury asked whether Ms. Hunter would be acquitted if it could not reach a unanimous verdict. CP 39. The jury resumed deliberations after the court referred them to an instruction, and

Ms. Hunter was ultimately convicted and sentenced to 30 days of confinement, converted to attendance in “Enhanced CCAP” (Community Center for Alternative Programs). CP 40, 44, 47.

The Court of Appeals affirmed Ms. Hunter’s conviction. Slip Op. at 7.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

This Court should grant review in the substantial public interest because the State’s improper introduction of Ms. Hunter’s prior unrelated warrant denied her right to a fair trial.

A trial court should grant a mistrial when a trial irregularity deprives the defendant of a fair trial. *State v. O’Connor*, 155 Wn. App. 282, 288, 229 P.3d 880 (2010); U.S. Const. amends. V, XIV; Const. art. I, § 3. In cases where the State presents previously excluded evidence through testimony, the Court must evaluate the prejudicial effect of the witness’s statement in order to determine whether reversal is required. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

This Court employs a three-part test to evaluate the prejudicial effect of inadmissible evidence improperly presented at trial: (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other evidence properly admitted, and (3) whether the irregularity could

be cured by an instruction. *Gamble*, 168 Wn.2d at 177. When a review of these combined factors shows the defendant was denied her right to a fair trial, the trial court's denial was an abuse of its discretion and reversal is required. *Escalona*, 49 Wn. App. at 256.

The Court of Appeals acknowledged that, because the statement about Ms. Hunter's unrelated warrant was made by a police officer, the irregularity was serious. Slip Op. at 4. However, it determined the seriousness was minimized by the fact that officer made this statement inadvertently and it was fleeting. Slip Op. at 4-5. But if this statement was inadvertent, then the State failed to properly admonish its witnesses, as the defense had moved to exclude any prior bad acts attributed to Ms. Hunter and the State had indicated none would be offered. 2/3/15 RP 27-28.

The Court of Appeals also determined that because the trial court issued a curative instruction to the jury, a mistrial was unwarranted. Slip Op. at 5. It distinguished Ms. Hunter's case from its prior decision in *Escalona*, because in *Escalona* the testimony indicated the defendant had committed a crime similar to the one for which he was on trial. 49 Wn. App. 251, 254, 742 P.2d 190 (1987); Slip Op. at 6.

However, similar to the circumstances presented in *Escalona*, the deputy's statement violated the express policy against the admission of

evidence of prior crimes and the State's evidence against Ms. Hunter was limited. The evidence showed a man had acted alone in stealing the car and that a man was driving the car when it was pulled over. 2/4/15 RP 15, 21, 35. Ms. Hunter indicated she had been riding in the car for only about 14 to 17 blocks before it was pulled over. 2/4/15 RP 79. It was dark during the ride, as the car was stopped shortly after midnight. 2/4/15 RP 32. The sheriff's captain indicated that he observed tools on the floorboard, damage to the steering column, and a missing ignition cylinder, but this was only after the car was stopped in a well-lit area and the headlights of the captain's vehicle were used to illuminate the interior of the car. 2/4/15 RP 45, 50-51. In addition, the captain, unlike Ms. Hunter, was trained to look for things like a punched ignition when stopping a car. 2/4/15 RP 54. The only evidence that Ms. Hunter had knowledge the car was stolen was the fact she was sitting in the vehicle.

During deliberations, the jury asked whether a failure to come to unanimous agreement should result in a verdict of "not guilty," revealing that one or more jurors were initially convinced a verdict of not guilty was appropriate. The deputy's statement that Ms. Hunter had an outstanding warrant shifted how she appeared to the average person: the possibility that she was an unwitting passenger in a stolen vehicle became much less

likely once the jurors were made aware of the fact she had an ongoing criminal history.

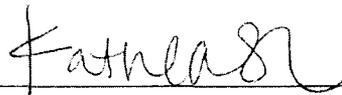
Just as in *Escalona*, the seriousness of the irregularity combined with the weakness of the State's case and the logical relevance of the deputy's statement to a lay jury all lead to the conclusion that the court's instruction could not cure the prejudicial effect of the deputy's statement. 49 Wn. App. at 256. When the trial court denied Ms. Hunter's motion for a mistrial, she was denied her constitutional right to a fair trial. The Court of Appeals decision raises an issue of substantial public interest and this Court should accept review. RAP 13.4(b)(4).

E. CONCLUSION

This Court should grant review of the Court of Appeals opinion affirming Ms. Hunter's conviction for taking a motor vehicle without permission in the second degree.

DATED this 13th day of July, 2016.

Respectfully submitted,



Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION I OPINION

June 20, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 73252-8-1
)
 v.) DIVISION ONE
) UNPUBLISHED OPINION
 CRYSTAL ANASTASIA HUNTER,)
)
 Appellant,)
)
 TOMPALL ROSS LORAH-HEGGEN,)
 AND EACH OF THEM,)
) FILED: June 20, 2016
 Defendant.)

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CLERK OF COURT
STATE OF WASHINGTON

TRICKEY, J. — Crystal Hunter appeals her conviction of taking a motor vehicle without permission in the second degree. Hunter contends that the trial court improperly denied her motion for a mistrial after a police officer testified at trial that Hunter had an unrelated warrant at the time of this incident. The trial court properly exercised its discretion when it denied Hunter's motion. We affirm.

FACTS

Early in the morning on June 25, 2013, Jesus Arreola Ochoa awoke to the sound of his car being started. The car, a 1992 black Honda Accord, was parked outside of Ochoa's house. Ochoa had not given anyone permission to take his car. Upon hearing the noise, Ochoa ran outside and saw his car being driven away. He returned inside and called the police.

A few weeks later, on the night of July 14, 2013, an officer with the King County Sheriff's Office was on patrol in White Center when he saw a dark-colored Honda traveling at a high rate of speed. The car did not have any

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taillights or brake lights. The officer stopped the car and came into contact with a male driver and a female passenger who was later identified as Hunter. The officer asked the driver for his license, registration, and proof of insurance. The driver did not have any of the requested paperwork. The officer then asked the driver to turn the car off. The driver reached down to the floor of the car, retrieved a screwdriver, inserted it into the ignition, manipulated the rods, and complied with the officer's request.

Soon after, the police dispatcher notified the officer that the car had been reported stolen. The registered owner of the car was Ochoa. Additional officers arrived, and they detained both the driver and Hunter. On further inspection of the car, the officers noticed several hand tools lying on the passenger-side floorboard, heavy damage to the steering column, exposed wiring, and a missing ignition cylinder.

Based on these events, the State charged Hunter with one count of taking a motor vehicle without permission in the second degree. Before trial, Hunter moved in limine to exclude evidence of prior bad acts under ER 404(b) and prior convictions under ER 609. The State indicated that it did not intend to offer such evidence absent testimony from Hunter. The case proceeded to a jury trial.

During the State's case in chief, a deputy police officer testified that Hunter had an "unrelated warrant" out of Renton at the time of the traffic stop. Specifically, when testifying about his encounter with Hunter, the following exchange occurred:

[Prosecutor]: And, so in—once you had contact with the defendant, what did you do after that?

[Deputy]: Um, after I had contacted [sic] with her? I tried to confirm a- a unrelated warrant she had, out of Renton.

[Defense attorney]: I would object.

[Court]: Sustained.^[1]

After the State rested, Hunter moved to strike the deputy's testimony about her unrelated warrant. The trial court granted this motion. Hunter also proposed a limiting instruction, instructing the jury to disregard the testimony. The court agreed to give Hunter's proposed limiting instruction. Finally, Hunter moved for a mistrial based on witness misconduct. The court denied this motion on the basis that there was no misconduct and the officer's statement was inadvertent.

At the close of the case, the court instructed the jury. The court's instructions included Hunter's proposed limiting instruction. The jury found Hunter guilty as charged.

Hunter appeals.

ANALYSIS

Hunter's sole challenge on appeal is to the trial court's denial of her motion for a mistrial. She contends that the trial court abused its discretion when it denied this motion, because the deputy's statement deprived her of her right to a fair trial. We disagree.

"A trial court has broad discretion to rule on irregularities during the course of a trial." State v. Wade, 186 Wn. App. 749, 773, 346 P.3d 838, review denied, 184 Wn.2d 1004, 357 P.3d 665 (2015). The trial court is in the best position to

¹ Report of Proceedings (RP) (Feb. 4, 2015) at 79-80.

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determine whether the irregularity caused prejudice. Wade, 186 Wn. App. at 773. The court should grant the mistrial “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be fairly tried.” Wade, 186 Wn. App. at 773 (quoting State v. Kwan Fai Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

We review the trial court’s denial of a motion for a mistrial for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Wade, 186 Wn. App. at 773.

To determine whether a trial irregularity warrants a new trial, we examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. Emery, 174 Wn.2d at 765. Denial of a mistrial should be overturned only when there is a “substantial likelihood” that the error affected the jury’s verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

Here, the irregularity is the statement by the deputy that Hunter had an “unrelated warrant” at the time of the traffic stop. This testimony was not cumulative with any other evidence admitted at trial. The fact that this statement was made by a police officer, a professional witness, suggests that the irregularity was serious. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973

(2010). As does the fact that the statement violated the court's pretrial ruling excluding evidence of Hunter's prior bad acts. Gamble, 168 Wn.2d at 178.

However, an unintentional introduction of inadmissible testimony is less serious than an intentional one. Gamble, 168 Wn.2d at 178. In this case, the deputy's testimony was inadvertent. Further, the statement was not a direct reference to a prior conviction or crime. Rather, the deputy's statement was ambiguous and fleeting. It did not indicate that Hunter had the propensity to commit the charged crime. See State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993). Nor was it likely to make a significant impression on the jurors. The seriousness of the statement is minimized by these factors and by the other evidence presented at trial.

Moreover, the trial court instructed the jury to disregard this testimony.

The court's curative instruction stated:

Testimony occurred at trial that suggested the defendant may have had an outstanding warrant at the time she was arrested. The testimony was objected to and has now been stricken. There is no evidence in this case the defendant may have had any warrant. The jury shall disregard anything that was said on the subject and shall not consider it in deciding this case.^[2]

Juries are presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). As a result, there is not a substantial likelihood that the deputy's statement affected the jury's verdict.

For these reasons, we conclude that the deputy's statement was not so serious as to warrant a mistrial. The court's curative instruction was sufficient to

² Clerk's Papers (CP) at 31.

alleviate any prejudice that may have resulted. The trial court did not abuse its discretion.

Hunter relies on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), to argue that the irregularity could not be cured. In that case, the State charged Escalona with second-degree assault with a deadly weapon—a knife. 49 Wn. App. at 252. At trial, the victim stated that he was afraid because Escalona “has a record and had stabbed someone.” 49 Wn. App. at 253. The trial court denied Escalona’s motion for a mistrial and instructed the jury to disregard the testimony. 49 Wn. App. at 253. On appeal, this court concluded that the trial court abused its discretion in denying Escalona’s mistrial motion, because the irregularity was “extremely serious” given the paucity of credible evidence, the testimony was not cumulative, and the irregularity could not be cured by the instruction. 49 Wn. App. at 255-56. We reasoned:

[D]espite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

49 Wn. App. at 256.

Escalona is distinguishable from the present case. There, the victim’s testimony indicated that Escalona had committed a crime similar to the one for which he was on trial. Thus, the statement was extremely prejudicial, because it was likely that the jurors would conclude that Escalona had a propensity for committing that type of crime. Here, in contrast, the deputy did not indicate that Hunter had a propensity to take motor vehicles without permission or that she

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had ever been convicted of a similar crime. Further, unlike in Escalona, the witness's testimony did not constitute the State's entire case against Hunter. Here, any prejudice resulting from the vague reference to the "unrelated warrant" was cured by the court's instruction to disregard the testimony.

We affirm the judgment and sentence.

Trickey, ACJ

WE CONCUR:

Spearna, J.

DeLusha, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73252-8-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Fredrick Johnson, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[james.johnson@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 13, 2016