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Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PAMELA SUE BENBERG	No. 49166-4-II UNPUBLISHED OPINION

JOHANSON, J. — Pamela Benberg appeals her jury trial conviction for delivery of a controlled substance (methamphetamine). She argues that (1) trial counsel was ineffective for failing to "contemporaneously" move for a mistrial when potential jurors made prejudicial statements during voir dire, (2) the trial court erred when it denied the defense motion for a mistrial brought after the verdict, and (3) the trial court erred when it imposed legal financial obligations (LFOs). We affirm the conviction but reverse and remand for the trial court to consider Benberg's present and future ability to pay discretionary LFOs.

FACTS

I. VOIR DIRE

The trial judge told the venire, in counsel's presence, that jurors could answer questions in the courtroom outside the other jurors' presence if they preferred. During voir dire, the trial court, prosecution, and defense asked questions to 44 potential jurors, 19 of whom were dismissed for

cause. During voir dire, the trial court informed the venire that Benberg was charged with delivery of methamphetamine and asked jurors to share any personal experiences involving a similar matter. Several jurors discussed negative personal and family experiences with methamphetamine and other drugs, and several said their experiences impacted their ability to be fair and impartial. All were dismissed. Two jurors who were not dismissed also had negative experiences involving family members' drug use, but both jurors stated that they could still be impartial.

The trial judge then asked the jury panel if anyone was leaning more toward one side or the other. Again, this question elicited several responses. One juror stated that as a dental director for the county, he pulls teeth as a result of drug use and thus was somewhat biased. Another juror stated that his experiences working in a prison impacted his ability to be impartial. Both these jurors were dismissed. Another juror discussed how his paramedic job impacted his bias in Benberg's specific case. This juror shared that he's familiar with addicts and addiction signs and symptoms and stated he was probably biased. This juror was dismissed.

Outside the jury's presence, the trial court expressed concern that Benberg appeared to be under the influence and acting strangely. The trial court asked the defense about Benberg's behavior. Benberg explained that her behavior was a result of sciatica, Benadryl, and attention deficit hyperactivity disorder. Benberg denied that she was under the influence.

Defense counsel also asked the venire questions. Counsel's questions were mostly directed at specific jurors to explore comments made in response to the trial court's questions. Defense counsel followed up with the paramedic who had said he was "probably already biased" based on Benberg's behavior. 1 Report of Proceedings (RP) at 47. After a sidebar, defense counsel proceeded to ask the panel whether the paramedic's comments had impacted any potential jurors'

views. Several jurors responded to defense counsel's question, all in the venire's presence, expressing various opinions.

II. JURORS SELECTED FOR PANEL

The defense exercised 5 of its 6 peremptory challenges and 19 jurors were dismissed for cause. The panel consisted of 12 jurors and one alternate. Only one panel member made statements during voir dire that Benberg now describes as "personalized" and "inflammatory." Br. of Appellant at 26. Specifically, this juror stated that Benberg appeared to be "a meth user" and "high right now" but also said,

> I wouldn't make somebody guilty based on . . . what I'm looking at right now. I would listen to the evidence and I would only call her guilty if the evidence said that she was guilty.
>
> . . . .
>
> . . . I'll listen to the facts and judge based on the facts.

1 RP at 93-94. In addition, when asked whether they would automatically believe a confidential informant's (CI) statement, this juror said, "[T]here might be more to the story and I'd want to get another source to back up that story." 1 RP at 66. Numerous other jurors made statements during voir dire that they would be unbiased.

III. TRIAL AND VERDICT

At trial, the State presented testimony that a CI worked with the Drug Task Force to engage in a controlled methamphetamine buy from Benberg. Law enforcement met with the CI and thoroughly searched his person to make sure he did not possess drugs or money. The CI, in the detective's presence, then contacted Benberg to arrange a drug transaction, including a time and location for the exchange. Detectives observed the CI meet with Benberg at the location and time they agreed upon. They engaged in a "hug" that "lasted a little while" after which Benberg walked

away. 1 RP at 203-04. The CI did not come into contact with anyone but law enforcement and Benberg during the controlled buy. After the hug, the CI was observed by law enforcement leaving the premises of the controlled buy and immediately meeting with a detective. The CI now possessed a baggie containing a substance that appeared (and was later confirmed to be) methamphetamine, which he gave to law enforcement. Benberg did not testify and presented no witnesses.

Before deliberation, jurors were instructed, "It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. . . . The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial." 2 RP at 248. The jury found Benberg guilty of delivery of a controlled substance.

IV. MOTION FOR A MISTRIAL OR A NEW TRIAL

After the jury rendered its guilty verdict, Benberg filed a motion for a mistrial or a new trial, claiming that the jury panel was tainted from comments made by prospective jurors during voir dire. The trial court heard oral argument regarding Benberg's motion.

Defense counsel argued that the jury was biased based on the comments made during jury selection. The State argued against the motion, pointing out that the selected jury members were unbiased, that defense didn't use all her peremptory challenges, and that no immediate motion for mistrial was made.

The trial court, in denying the motion, stated that the jury selection "was somewhat unusual." 2 RP at 304. The trial judge continued,

> There was a lot of people that had ideas and thoughts, and basically it was the elephant that was in the room. And the elephant that was in the room, we looked

> at it, we touched it, we drew it, we turned it, we inspected that elephant a lot with the questions. I think that was appropriate.
>
> And I think that was -- in part led to the significant number of people who were excused for cause and those that were -- you know, I think it's interest[ing] when we have a group of people here in this trial setting where you've got some people [saying], yeah, I can be fair and others saying I can't be fair. It kind of underscores the fact that that's okay. No matter where you're at, it's okay if you feel that way. It's okay if you can't be fair. It's okay if you can be fair.
>
> And that's kind of the sense I came away from that, that setting, that those who -- you know, we talked about the sciatica and those that said, you know, I can't be fair based on that, based on my prior observations. Another said that they could.

2 RP at 304.

The trial court went on to distinguish the authority cited by the defense in support of its motion for a mistrial.

> And I think the *Mach*,[1] the M-a-c-h, case that was cited was it's distinct, distinguishable, that there was no expert-like type testimony, no vouching based on educational credentials. So the hope is that with a trial we have an impartial, indifferent jurors that are capable and willing to decide the case solely on the evidence and the merits before it, not on anything else. So I think based on that, the fact that the *Mach* case basically said the court should have asked some more questions to see if the other jurors had been affected, I think here we had a very thorough discussion about that issue. And it's distinct, too, that it's not a child sex case where here is the victim -- or in the *Mach* case the child was an eight-year-old girl that the defendant allegedly performed oral sex on her. So I think notwithstanding that, this case, you know, it's serious, it doesn't create maybe as intense emotions, maybe in some cases it does, but I think here that there was a jury selected of impartial and [in]different jurors that were capable and willing to decide the case on the facts.
>
> So I'm going to deny the motion for the mistrial, and we'll move to sentencing.

2 RP at 304-05.

[1] *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997).

V. SENTENCING

At sentencing, the trial court imposed $850 in LFOs, including a $500 crime victim assessment, a $100 deoxyribonucleic acid (DNA) collection fee, and a $250 jury fee. The trial court did not inquire into Benberg's present or future ability to pay discretionary LFOs.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. PRINCIPLES OF LAW

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The federal Sixth Amendment protects defendants from ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. An ineffective assistance claim fails if either prong is unsatisfied. *Strickland*, 466 U.S. at 697.

B. DEFICIENT PERFORMANCE

Benberg argues that her counsel acted deficiently because she invited personal attacks upon her client's physical appearance and behavior and then did not seek to cure the issue by seeking a mistrial before the verdict was rendered. We disagree.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Courts engage in a strong presumption that counsel's representation was not deficient. *Grier*, 171 Wn.2d at 33. The

defendant alleging ineffective assistance of counsel bears the burden of establishing deficient performance. *Grier*, 171 Wn.2d at 33.

A defendant can rebut the presumption of reasonable performance by demonstrating that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Counsel is not deficient for failing to make requests that would be futile. *State v. Denny*, 173 Wn. App. 805, 811, 294 P.3d 862 (2013). In addition, "hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43. A "'fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 689).

Benberg is correct that after a juror discussed Benberg's fidgeting and lack of focus in the venire's presence, defense counsel elicited numerous comments from jurors about Benberg's appearance, behavior, and jurors' perceptions of her guilt. Instead of relying on legal authority that her counsel was deficient for eliciting these comments, Benberg makes conclusory statements that jurors' comments "*cannot have been simply disregarded by those jurors that remained upon the panel*" such that "[t]here was no legitimate strategy here in failing to contemporaneously move for a mistrial." Br. of Appellant at 19-20 (emphasis added). But Benberg's conclusory statements do not rebut the presumption that counsel's performance was not deficient. *Grier*, 171 Wn.2d at 33.

Contrary to Benberg's argument, counsel's decisions *were* legitimate trial tactics. *Grier*, 171 Wn.2d at 33. After the juror noted the defendant's behavior, defense counsel realized that

behavior resulted in a negative impression with some jurors. Counsel's response to the situation was tactical in at least three ways.

First, it was a legitimate trial tactic to ask questions about Benberg's appearance and conduct in the venire's presence. As the trial court acknowledged when ruling on defense counsel's motion for a mistrial made after the verdict, Benberg's appearance and conduct during voir dire were the "elephant in the room." 2 RP at 304. As such, it was a tactical decision to address the "elephant in the room" in front of the venire to ensure that the defense was able to fully explore the issue and elicit honest responses from any potentially biased jurors—particularly once a juror had brought the issue to the attention of the venire.

Second, counsel acted tactically to determine which jurors were impartial and to challenge biased jurors. Defense counsel's questions led to numerous jurors stating that they were biased and at least 19 jurors were excused for cause. Benberg concedes on appeal that all jurors who expressed an inability to be fair were dismissed for cause. Br. of Appellant at 14 (stating that "[u]ltimately, jurors that articulated specifically they could not be fair were excused for cause"). Notably, defense counsel exercised only five of her six peremptory challenges, which suggests that she was satisfied with the panel chosen and strategically exercised peremptory challenges to select a jury that could provide a fair trial. And the record reveals that the ultimate jury members stated their ability to remain unbiased. In short, counsel acted tactically to assemble an unbiased jury.

Third, defense counsel's decision not to seek a mistrial before the verdict was rendered can be viewed as a reasonable trial tactic because seeking a mistrial may have been futile. Given that Benberg's appearance and behavior were unusual, defense counsel may have reasonably

determined that a new jury pool would have similar responses to Benberg as did the existing venire, such that seeking a new more sympathetic venire through a mistrial motion would be futile. And defense counsel is not required to take actions that would be futile. *Denny*, 173 Wn. App. at 811.

Only in hindsight, after the guilty verdict was rendered, did defense counsel move for a mistrial based on misgivings about the jury's alleged bias. But "hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43.

Considering counsel's challenged conduct from counsel's perspective at the time, we hold that counsel's conduct can be deemed strategic and tactical and met an objective standard of reasonableness such that her conduct was not deficient. *Grier*, 171 Wn.2d at 33.

We hold that Benberg's counsel was not deficient; thus, we need not reach the prejudice prong of the analysis. *Strickland*, 466 U.S. at 697. Benberg's ineffective assistance claim fails.

II. DENIAL OF MISTRIAL

Benberg contends that the trial court abused its discretion in denying her motion for a mistrial made after the verdict based on Benberg's claims that she was denied a fair trial. She argues that remarks made by potential jurors regarding her appearance and behavior tainted the jury pool and require reversal. We disagree.

A. PRINCIPLES OF LAW

The right to a trial by an impartial jury is guaranteed by article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. *State v. Fire*, 145 Wn.2d 152, 167, 34 P.3d 1218 (2001). The trial court is in the best position to determine whether a juror can be fair and impartial based on observations of the juror's mannerisms, demeanor, and general behavior. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

The trial court's decision to deny a request for a mistrial is within the trial court's sound discretion, and we will not disturb that decision unless it was an abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons, or if no reasonable judge would have reached the same conclusion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

"A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be tried fairly." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). "A denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *Gamble*, 168 Wn.2d at 177. To determine an irregularity's effect, we examine "'(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.'" *Gamble*, 168 Wn.2d at 177 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

B. JURY NOT TAINTED

Benberg argues that the jury was so biased that reversal is required. We disagree.

Benberg's argument appears to address the first prong of the mistrial analysis, which considers the irregularity's seriousness. *Gamble*, 168 Wn.2d at 177. Benberg argues that, under *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), the trial court should have presumed that the jury was tainted by jurors' statements during voir dire and thus granted her motion for a mistrial. Benberg compares the "personalized, inflammatory comments" that "touched directly upon her guilt" to the Child Protective Services (CPS) worker's comments in *Mach*. Br. of Appellant at 26. And she argues that "two jurors with significant professional expertise opined in front of the panel about the scourge of methamphetamine and its effect upon users." Br. of Appellant at 27. But *Mach* is distinguishable.

The Ninth Circuit held in *Mach* that "[a]t a minimum," the trial court "should have *conducted further voir dire*" before denying the defendants' motions for a mistrial, where a juror made repeated statements that not a single sex abuse allegation had been false in the juror's time working with CPS. 137 F.3d at 633 (emphasis added). The court held that, *because the court did not conduct further voir dire*, "at least one juror was tainted" by the prospective juror's statements. *Mach*, 137 F.3d at 633.

Here, the trial court and attorneys extensively questioned the jurors, and defense counsel was able to identify jurors who expressed an inability to keep an open mind about the issues in the case. The trial court's ruling reflects that it believed the jury was comprised of fair and impartial jurors such that a mistrial was not necessary. Thus, the "further voir dire" absent in *Mach* occurred

in Benberg's case. 137 F.3d at 633. As such, the irregularity in Benberg's case was less serious than that present in *Mach*. *Gamble*, 168 Wn.2d at 177.

The trial judge's reasons for denying defense counsel's motion for a postverdict mistrial support that the irregularity of the jury's comments were not so prejudicial that a mistrial was necessary for Benberg to be treated fairly. *Gamble*, 168 Wn.2d at 177. And the trial court is in the best position to determine whether a juror can be fair and impartial based on observations of the juror's mannerisms, demeanor, and general behavior. *Noltie*, 116 Wn.2d at 839.

Thus, the trial court's denial of the mistrial motion was not "manifestly unreasonable or based upon untenable grounds or reasons," and a reasonable judge could have reached the same conclusion. *Powell*, 126 Wn.2d at 258; *Emery*, 174 Wn.2d at 765.

C. Fair Trial and Presumption of Innocence

Benberg asserts that the trial court erred by denying her motion for a mistrial because the tainted jury pool denied her right to a fair trial. Again, we disagree.

Constitutional issues are generally reviewed de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). However, we review for abuse of discretion when an appellant challenges the trial court's denial of a mistrial motion based on arguments that the denial resulted in an unfair trial. *State v. Rodriguez*, 146 Wn.2d 260, 269-72, 45 P.3d 541 (2002) (applying an abuse of discretion standard of review to trial court's denial of defendant's motion for mistrial where defendant claimed the denial resulted in an unfair trial because State's witness testified in prison garb, shackles, and handcuffs).

A mistrial should be granted only when "the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be tried fairly." *Gamble*, 168 Wn.2d at

177. And a trial court's denial of a motion for mistrial "should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *Gamble*, 168 Wn.2d at 177.

At least 19 jurors, including all jurors who expressed an inability to be fair, were dismissed for cause. Extensive voir dire ensured that jurors selected to serve on the jury panel were not affected by the biased statements of other jurors. Statements by jurors on the jury panel also demonstrate that they were not biased. In addition, the jurors were instructed, "It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. . . . The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial." 2 RP at 248. And jurors are presumed to follow their instructions. *State v. Brown*, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

Given that the jury panel professed its ability to be impartial and received instructions to consider only evidence presented at trial, Benberg has not shown that dismissed jurors' statements during voir dire created a substantial likelihood that prejudice affected the verdict. *Gamble*, 168 Wn.2d at 177. As such, the trial court did not abuse its discretion when it denied her motion for a mistrial. *Powell*, 126 Wn.2d at 258; *Emery*, 174 Wn.2d at 765.

III. DISCRETIONARY LFOS

Benberg argues that the sentencing court erred when it imposed discretionary LFOs without the required individual inquiry into her ability to pay them. We agree with Benberg to the extent that discretionary LFOs were imposed without an inquiry into her ability to pay.[2]

[2] Following *State v. Blazina*, we exercise our discretion to reach LFO issues first raised on appeal. 182 Wn.2d 827, 830, 835, 344 P.3d 680 (2015).

An order for payment of discretionary LFOs is proper only if the record reflects that the sentencing court conducted an individualized inquiry into the defendant's present and future ability to pay the obligations. *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016). It is not sufficient for the sentencing court to make boilerplate findings regarding the defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Instead, the sentencing court must consider facts related to the defendant's financial situation. *See Blazina*, 182 Wn.2d at 838-39.

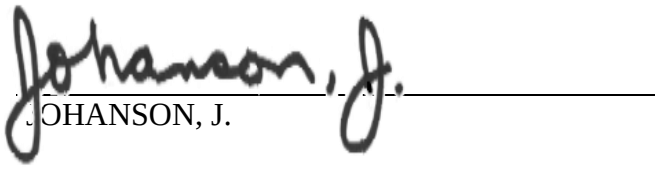
Here, the sentencing court imposed $850 in LFOs, including a $500 crime victim assessment, a $100 DNA collection fee, and a $250 jury fee without conducting an individualized inquiry into Benberg's ability to pay. The crime victim assessment and DNA collection fee were required by statute and thus were not discretionary. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). But the jury fee is a discretionary fee. RCW 10.01.160(2); *Lundy*, 176 Wn. App. at 107.

The boilerplate language in the judgment and sentence does not satisfy the inquiry *Blazina* requires. *See* 182 Wn.2d at 838-39. There is no evidence that the sentencing court considered facts related to Benberg's ability to pay when it ordered the payment of discretionary LFOs. Because the sentencing court failed to consider factors relevant to Benberg's financial situation, it erred to the extent that it imposed discretionary LFOs. *Blazina*, 182 Wn.2d at 838-39.

We affirm the conviction, reverse the jury fee, and remand for the sentencing court to make an individualized inquiry into Benberg's present and future ability to pay discretionary LFOs.

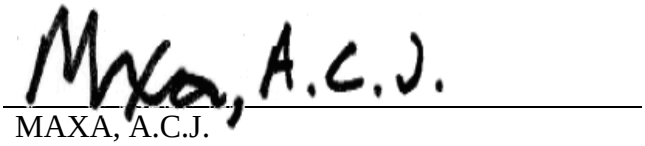
Affirmed in part, reversed in part and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



JOHANSON, J.

We concur:



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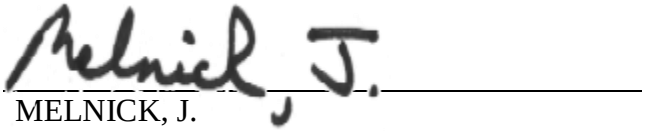

MELNICK, J.