

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LEE NICKOLS,

Appellant.

No. 39508-8-II

UNPUBLISHED OPINION

Worswick, J. — Joseph Nickols appeals his conviction for fourth degree assault, arguing that a witness's reference to his previous incarceration was so prejudicial as to deny him a fair trial. Nickols also challenges the component of his sentence requiring him to pay \$1,200 recoupment for attorney fees, arguing that the trial court lacked authority to impose these fees and that recoupment above the amount imposed when a plea is entered is unreasonable. We affirm.

FACTS

On April 30, 2009, Samantha Tanori and Thomas Marth were in a store parking lot in Centralia, Washington, when Nickols, who had been in a romantic relationship with Tanori five months earlier, assaulted Marth.¹ Rachele Roundtree, an employee of the store, witnessed the assault.

¹ Tanori and Marth also claimed Nickols punctured a tire on their vehicle. The jury found Nickols not guilty of the malicious mischief charge.

The State charged Nickols with second degree assault and third degree malicious mischief. He offered to plead guilty to fourth degree assault, but the State rejected his offer. Pursuant to a pretrial motion, the trial court directed the State to instruct its witnesses not to volunteer information about Nickols's prior criminal history or bad acts. At trial, Nickols maintained that he committed only the lesser included crime of fourth degree assault.

When the State asked Tanori, "When did that [relationship with Nickols] start and when did that end?" she responded, "I don't remember exactly when it started actually, but it ended when he went to jail back in November of '07." Report of Proceedings at 37. Nickols moved for a dismissal or, in the alternative, a mistrial. The trial court denied the motions and instructed the jury to disregard Tanori's statement. The State also called Marth, Roundtree, and three police officers to testify.

The jury convicted Nickols of the lesser included offense of fourth degree assault and acquitted him of malicious mischief. At sentencing, the State requested the trial court impose a \$1,800 recoupment for defense counsel. Nickols argued that he be required to pay only \$600 because that amount is what would have been imposed if his plea to fourth degree assault had been accepted. The trial court imposed \$1,200 recoupment as a legal financial obligation. Nickols appeals his conviction and the imposition of recoupment and the amount.

ANALYSIS

We review both a trial court's denial of a mistrial and the amount a trial court imposes in legal financial obligations for an abuse of discretion. *State v. Williams*, 65 Wn. App. 456, 459, 828 P.2d 1158, 840 P.2d 902 (1992); *State v. Essex*, 57 Wn. App. 411, 415, 788 P.2d 589

(1990). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Madsen*, 168 Wn.2d 496, 513, 229 P.3d 714 (2010).

Trial Court Properly Denied Nickols's Motion for a Mistrial

Nickols contends that Tanori's statement about Nickols's 2007 incarceration was so prejudicial that it could not be cured short of a mistrial. Nickols further contends that the trial court applied the wrong legal standard by ruling based on the witness's intent rather than the magnitude of the prejudice. We disagree, holding that the irregularity caused by the statement was effectively cured with the trial court's instruction.

When considering whether the trial court abused its discretion, we must determine whether "the inadvertent remark, which the jury was instructed to disregard, when viewed against the backdrop of all the evidence, so taint[ed] the entire proceedings that the accused did not have a fair trial." *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962); see *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983); *Essex*, 57 Wn. App. at 415-16. The trial court should grant a mistrial only when the irregularity is so prejudicial that nothing short of a new trial will ensure the defendant of a fair trial. *Weber*, 99 Wn.2d at 165. The trial court is in the best position to understand the impact of the inadmissible statements on the jury, and we will not substitute our judgment for that of the trial court. *State v. Escalona*, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987). The trial court does not consider the witness's intent because the remark will have the same effect on the jury regardless of intent. *Johnson*, 60 Wn.2d at 29.

Whether an inadvertent remark requires reversal depends on: (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other evidence; and (3)

whether the irregularity could effectively be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. *Weber*, 99 Wn.2d at 165-66.

Nickols relies on *State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009), to support the proposition that Tanori's statements were so egregious as to demand a mistrial. However, *Hudson* is distinguishable as the offending statements were from an expert witness who testified that the victim's injuries were caused by a rape, not consensual sex—the only contested issue in the case. 150 Wn. App. at 653. The statement here does not involve an expert witness or the central issue in the case. Further, Tanori was not the victim of the assault. The victim also testified, as did four neutral witnesses.

Here, we affirm the trial court's ruling denying a mistrial because Nickols was not prejudiced by Tanori's statement. The statement was an oblique reference to Nickols having been in jail; there was no connection between it and any specific crime, let alone the specific crime charged. *See Escalona*, 49 Wn. App. at 255-56.

Nickols's defense was that he had committed the lesser included offense of fourth degree assault, the crime for which he was convicted. We fail to see how Nickols was prejudiced, and we affirm the trial court.²

Trial Court Did Not Err When it Imposed a \$1,200 Defense Cost Recoupment

Nickols next contends that the trial court exceeded its statutory authority and violated his constitutional right to counsel by imposing recoupment for attorney fees. Additionally, he

² Even if the trial court considered the witness's intent, as Nickols argues, the record still demonstrates that the trial court properly considered the prejudicial effect of the statement.

contends that the recoupment for defense costs was excessive, violating his right to a jury trial and that he should only be required to pay costs based on the entry of a plea because that was ultimately the only charge of which he was convicted. The State responds that recoupment of defense attorney costs is permitted by statute.

Upon conviction, the trial court may impose the costs of a trial on the defendant that are not “inherent in providing a constitutionally guaranteed jury trial,” subject to certain constitutional safeguards.³ RCW 10.01.160(2). The defendant does not contend that the sentence violates any of these safeguards.

The trial court is required to balance the defendant’s ability to pay against the burden of his obligation, but the court is not required to enter specific findings on the record. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); *Williams*, 65 Wn. App. at 459. A statute requiring a defendant to repay the attorney fee is said to have a chilling effect that violates the state and federal constitutions only when repayment is made conditional to the initial appointment of counsel or when the repayment is mandatory regardless of the defendant’s financial situation. *See State v. Barklind*, 87 Wn.2d 814, 816, 818, 557 P.2d 314 (1976). Nickols’s constitutional arguments regarding the permissibility of imposing fees have been roundly rejected. *Barklind*, 87

³ Those constitutional safeguards are: (1) repayment may not be mandatory to receiving appointed counsel; (2) repayment may only be imposed on convicted defendants; (3) the court must find the defendant is able to pay; (4) the court must balance the defendant’s ability to pay against the burden of repayment; (5) the defendant must not be permanently indigent; (6) the defendant must be permitted to petition the court for remission of payment; and (7) the defendant may not be held in contempt for refusal to pay unless the refusal is intentional or the defendant fails to make a good faith attempt to repay. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); *State v. Barklind*, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976).

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Wn.2d 815-18.

Nickols also challenges the amount of the recoupment, contending that \$600 of the \$1,200 attorney fee is excessive because he offered to plead guilty to the charge of which he was ultimately convicted.

The amount of recoupment is within the discretion of the trial court. The trial court abuses its discretion by imposing costs for improper reasons. *State v. Richardson*, 105 Wn. App. 19, 22, 19 P.3d 431 (2001). In *Richardson*, the defendant rejected a plea offer made by the State and the jury ultimately convicted him of a lesser charge. 105 Wn. App. at 20-21. At sentencing, the trial court stated that it was imposing costs only because Richardson rejected the State's offer. *Richardson*, 105 Wn. App. at 21. The court held that this improperly penalized the defendant for exercising his rights. *Richardson*, 105 Wn. App. at 22. Here, there is no such statement by the trial court.

The trial court may permissibly require Nickols to pay the cost of his entire defense even though he was convicted of lesser charges. *See State v. Baggett*, 103 Wn. App. 564, 571-72, 13 P.3d 659 (2000); *State v. Buchanan*, 78 Wn. App. 648, 653, 898 P.2d 862 (1995). We hold that the trial court acted within its discretion.

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Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Penoyar, C.J.

Sweeney, J.