

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

STATE OF WASHINGTON,)	
)	No. 64349-5-I
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
)	
RICHARD CONNOR,)	
)	
Appellant.)	
)	FILED: <u>November 15, 2010</u>

spearman, j. — Richard Connor was convicted of custodial assault for striking a correction officer with a modified pencil. We reject his argument that he was deprived of the right to a fair trial when a witness referred to the modified pencil as a weapon, and affirm.

FACTS

Richard Connor was in custody at the Regional Justice Center facility in Kent pending trial on domestic violence charges. After Connor’s medical authorization to wear personal tennis shoes was revoked, jail Sergeant Katherine Jones asked Connor to give her the shoes. Connor repeatedly refused to turn over the shoes, swore at

Jones, and told her she would have to come into his cell and get the shoes herself. He painted a target on his cell window with toothpaste and punched the window. He then removed his shirt, flexed his muscles, and asked officer Andrew Currier if he “felt threatened.”

Correction officers attempted to remove Connor from his cell. Connor became increasingly agitated and repeatedly refused to leave his cell. Connor spread a liquid on his cell floor, placed a mattress in front of the door, and stuffed tissue in his nose and placed a bag over his head in case the officers used pepper spray. After using the pepper spray, the officers opened the door and Connor rushed out, repeatedly stabbing one of the officers with two golf pencils that had been taped together.

At trial, defense counsel moved in limine to prohibit the State’s witnesses from calling the lengthened pencil a weapon or a shank. The court granted the motion, but ruled that witnesses could testify they were concerned the modified pencils could be used as a weapon:

They can say they 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 that 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 that they can’t say that they were concerned that it might be used as a weapon.

...

They can refer to it as a modified golf pencil. They can certainly describe why they think it could be used as a weapon or was actually being used as a weapon at the time. Or, they were concerned that it would be used as a shank. But in just referring to the item, they can refer to it as a golf pencil or a modified pencil.

The jury convicted Connor on one of two counts of custodial assault. He appeals.

DISCUSSION

Connor argues he was deprived of his right to a fair trial because one of the witnesses used the term “weapon” when referring to the modified golf pencil with which he struck a correction officer. When a witness remark is so irregular as to prejudice the jury, a defendant is denied his right to a fair trial, and a mistrial is warranted. See State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In reviewing an alleged trial irregularity to determine whether it may have unduly prejudiced the jury, courts look to several non-exclusive factors, including (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. Id. “Since the trial judge is best suited to determine the prejudice of the statements, the appellate court reviews the decision to grant or not to grant a mistrial under an abuse of discretion standard.” Id. at 255.

Connor identifies only two purportedly prejudicial uses of the word “weapon,” both of which came from a correction officer testifying while a video of the assault was played for the jury:

Q. What is that object that’s being shown?

A. That was the pencil he had modified to use as a weapon.

MS. SUTTON: I would object to that last comment and move to strike.

MS JACOBSON-WATTS: (INAUDIBLE).

JUDGE DOYLE: I'll allow it.

(State's Exhibit 1 finishes playing.)

...

BY MS. JACOBSON-WATTS:

Q. You may continue.

A. I based that off what I heard him say when we were in the unit the first time when I was standing at the door and they were trying to de-escalate. He said, "You're going to have to come in and get me and I'm going to take somebody with me." So I just felt he was trying to follow through on that.

Q. Did you see him strike out during the extraction?

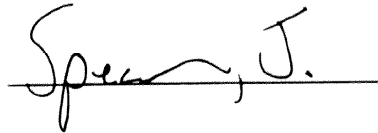
A. I didn't – I didn't even realize he had – I didn't even realize there was any kind of a weapon involved until he was pinned on the ground and I pulled his arm out from under him to try and get his arm behind his back so we could restrain him. That's when I saw the pencil come out the first time.

Connor contends these remarks violated the court's order in limine. We disagree. The order in limine explicitly permitted witnesses to refer to a "modified pencil," and further permitted witnesses to talk about their concern the modified pencil could be used as a weapon, or how it actually was used as a weapon. Moreover, the trial judge specifically ruled that the officer's testimony was within the bounds of her ruling.

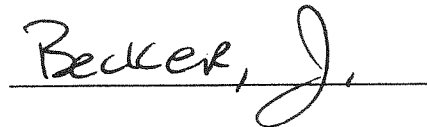
Nonetheless, relying on Escalona, Connor claims that the remarks were so prejudicial as to deprive him of his right to a fair trial. But because the facts in Escalona are nothing like this case, Connor's reliance is misplaced. In Escalona, the defendant was on trial for aggravated assault with a knife, and the trial court refused to grant a mistrial after a witness provided an unsolicited statement that the defendant "already

has a record and had stabbed someone[.]” Escalona, 49 Wn. App. at 255. Here, Connor did not move for a mistrial. More importantly, according to officer Mohamed, the video tape of the assault played for the jury shows Connor used the modified pencil to repeatedly stab officer Mohamed. Referring to the modified pencil as a “weapon,” when it actually was used as a weapon, is neither irregular nor prejudicial. Connor was not deprived of a fair trial and the trial court did not err in permitting this testimony.

Affirmed.

A handwritten signature in cursive script, reading "Spear, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Applegate, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Becker, J.", written over a horizontal line.