IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67506-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ROGELLE HARRIS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 17, 2012

Spearman, A.C.J. —Rogelle Harris appeals his jury conviction for assault in the second degree. At trial, the victim violated an order in limine prohibiting her from testifying that Harris had previously been in prison. The trial court denied Harris's motion for a mistrial and instructed the jury to disregard the testimony. Harris contends that the trial court erred by denying his motion because the victim's testimony was so prejudicial it denied him a fair trial. We conclude that the court's instruction to disregard the testimony was sufficient to cure any potential prejudice and affirm.

FACTS

Beginning April 2009, Rogelle Harris and Glynis Harps were in a romantic relationship that lasted approximately one year. They cohabitated for about six months. In November 2010, a two-year, no-contact order was issued, prohibiting

Harris from contacting Harps.

On December 30, 2010, Harris entered Harps' apartment. At some point the two began to argue. Harps grabbed a thick drinking glass and threw it at Harris's foot. Harris picked up the glass and threw it at Harps as she turned her back. The glass struck Harps' lower back and shattered, causing a four-inch laceration. Harps' 11-year-old daughter, C.W., was present during the incident. After a neighbor called 911, paramedics took Harps to the hospital, where she received about twenty stitches to close her wound.

The State charged Harris with one count of assault in the second degree, one count of felony violation of a no-contact order, one count of interfering with domestic violence reporting, and one count of tampering with a witness. The State alleged that the presence of a minor was an aggravating factor for the first two counts. Harris pleaded guilty to tampering with a witness, and the three remaining counts went to trial.

The court granted Harris's pretrial ER 404(b) motion to exclude evidence of previous incidents of domestic violence and evidence of his probation violation.[1] In its oral ruling, the court stated:

> THE COURT: […] based on my review of the interview that was conducted with Ms. Harps, she's going to need to be informed about these rulings because there are, she makes reference in time to when she was cohabitating with Mr. Harris based on when he was released from prison and that sort of thing, so if I could just ask that you reinforce with her that, that information has been excluded and that she's to try [to] avoid, or she will avoid any --

[1] We note that the pretrial matters and the trial were heard by different judges.

> [PROSECUTING ATTORNEY]: She will avoid --
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> THE COURT: All right.
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> [PROSECUTING ATTORNEY]: Absolutely, your Honor.
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> THE COURT: Now, something that I also find helpful with lay witnesses that you might convey to her. If you ask a question and she thinks that it's going to elicit something that you've told her is excluded, if she gets confused she can always turn to me and indicate your Honor I need some help answering that question.

Verbatim Report of Proceedings (VRP 104).

At trial, the prosecuting attorney questioned Harps about when she and Harris stopped cohabitating:

> Q: Were you living with Mr. Harris at this time?
>
> A: No.
>
> Q: Okay. How long had Mr. Harris moved out by the time it gets to December 30th?
>
> A: He never lived with me. He had, uh, um, he, we weren't living together. He, he had mo--, moved out, I don't know if I can talk about it. We—
>
> Q: Well, just, you can just tell me when he moved out.
>
> A: Um, well, he, when he went to prison he moved out.

VRP at 338. Harris objected and the court sustained the objection. The court excused the jury and Harris moved for a mistrial. The court denied the motion. When the jury returned, the court gave the following curative instruction: "[T]here is no evidence that the Defendant has been to prison, and the jury is to disregard the statement of the witness and not to consider that for any purpose whatsoever in this case." VRP at 347.

After denying the State's motion to amend the information, the court dismissed the count of interfering with domestic violence reporting. The jury found Harris guilty of assault in the second degree and felony violation of the no-contact order. Upon motion by the State, the sentencing court dismissed the count of felony violation of a no-contact order. Harris was sentenced to a high-end standard-range sentence for the assault and witness tampering counts.

DISCUSSION

Harris appeals his conviction for assault in the second degree. He claims that the trial court erred by denying his motion for a mistrial because Harps' testimony denied him a fair trial. We review a denial of a motion for a mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A "court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons." State v. Hummel, 165 Wn. App. 749, 777, 266 P.3d 269 (2012) (citing In re Pers. Restraint of Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009)).

A "trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Thus, we must determine whether Harps' testimony in violation of the motion in limine was so prejudicial that Harris was denied his right to a fair trial. In making this determination, we consider (1) the seriousness of the claimed trial irregularity; (2) whether it was cumulative of other properly admitted evidence, and (3)

whether it could be cured by an instruction to disregard. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

We first consider the seriousness of the claimed irregularity. Harris argues that the jury's exposure to Harps' testimony was very serious because it violated an order in limine and informed the jury that he had been sent to prison while living with Harps. In Escalona, we concluded that witness testimony that violated an order in limine was a serious trial irregularity. Id. There, the defendant was charged with assault in the second degree while armed with a deadly weapon. Id. at 252. Before trial, the court granted a motion in limine to exclude any testimony regarding the defendant's prior conviction for the same crime. Id. At trial, the victim testified that he was nervous when the defendant threatened him with a knife because the defendant had a record and had stabbed someone before. Id. at 253. We concluded the irregularity was serious because the "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. Accordingly, we held that the trial court abused its discretion by denying a motion for a mistrial.

Two considerations distinguish this case from Escalona and mitigate the seriousness of the irregularity here. First, the improper remark did not indicate Harris's propensity to commit the crime for which he was on trial. Rather, Harps' remark is similar to improper witness testimony we considered in State v. Condon, 72 Wn. App. 638, 865 P.2d 511 (1993). There, we affirmed the trial

court's denial of a motion for a mistrial where a witness violated an order in limine by testifying that the defendant had previously been in jail. We distinguished the facts from Escalona because the testimony did not suggest a propensity to commit the crime charged against the defendant. Id. at 649. Similarly, Harps' remark that Harris had previously been in prison did not indicate that Harris had a propensity to commit assault specifically. Second, there was ample evidence from which the jury could convict. In Escalona, we noted that the improper testimony was "particularly serious considering the paucity of credible evidence against [the defendant]." Escalona, 49 Wn. App. at 255. In State v. Hopson, 113 Wn.2d 273, 286, 778 P.2d 1014 (1989), in contrast, the court affirmed the denial of a mistrial where witness testimony indicated that the defendant had previously been in prison, in part because "the jury had overwhelming evidence favoring conviction." In this case, medical testimony indicated that Harps' wounds were consistent with an injury from glass. Harps, C.W., and Harris were the only witnesses to the incident, and Harris did not testify in his defense. Both Harps and C.W. testified that Harris threw the glass overhand at Harps. Thus, the strength of the evidence against Harris also mitigates the seriousness of Harps' testimony.

Next, we consider whether Harps' testimony was cumulative of other properly admitted evidence. The trial court concluded it was, because evidence of the no-contact order that Harris was accused of violating indicated to the jury that "there has been some activity between the parties" and "something has

happened in the past." VRP at 342. The State makes the same argument on appeal. We disagree. The trial court ruled in limine that testimony regarding Harris's prior domestic violence offenses and his federal conviction was inadmissible. Consistent with this ruling, neither the State nor Harris offered evidence of prior crimes or incarceration. Harps' remark was the only reference to Harris's having been in prison. We therefore conclude that Harp's testimony was not cumulative.

Finally, we consider whether the trial court's curative instruction was sufficient to cure the prejudicial effect of Harps' testimony. We presume that a jury "follow[s] the court's instruction to disregard testimony." Escalona at 255. But in some cases, no instruction is capable of removing the prejudice created by evidence that is "of such a nature as to likely impress itself upon the minds of jurors."[2] Id. Harris argues that Harps' remark fell into this category because, without it, he "had a viable claim [that] his actions were spontaneous and unintentional" and the appropriate charge was therefore assault in the third degree based on negligence. Appellant's Br. at 10. He points out that both Harps

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[2] In addition to Escalona, Harris cites State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) in support of this proposition. But that case does not support Harris's position. Copeland involved a prosecutorial misconduct claim in which the prosecutor asked a defense witness about his prior assault conviction: "You beat [the victim] black and blue and you burned her abdomen with a cigar, didn't you?" Id. at 284. The court upheld the conviction:

> The prosecutor's question was a deliberate attempt to influence the jury's perception of [the defense witness's] testimony, and constitutes prosecutorial misconduct. However, given the curative instruction and the circumstances, the misconduct was not so prejudicial that reversal is required.

Id. at 285. Similar to the irregularity in the present case, the prosecutor's question was a single occurrence during the course of a lengthy trial, the defendant immediately objected, and the trial court gave an instruction to disregard. Id.

and C.W. testified that he appeared shocked and surprised after the glass hit Harps. His argument is not well taken.

In Escalona, after finding the trial irregularity to be particularly serious, we concluded that the curative instruction was insufficient to cure the testimony because the testimony was "logically relevant" and in such a close case "it would be extremely difficult, if not impossible … for the jury to ignore this seemingly relevant fact." Escalona, 49 Wn. App. at 256. But as we have stated, the trial irregularity in this case more closely resembles the less serious irregularity in Condon. There, we found the court's instruction sufficient to cure any prejudice resulting from witness testimony indicating that the defendant had been in prison. Condon, 72 Wn. App. at 649-50. We distinguished the facts from Escalona, noting that the case against the defendant was "very strong." Id. at 650 n.2. Likewise, here, the testimony of both witnesses to the incident, C.W. and Harps, supports the jury's finding that Harris intentionally assaulted Harps. Furthermore, Harps' remark that Harris had been in prison was not relevant to a defense that Harris's actions during the incident in question were spontaneous and unintentional; thus, his ability to present that defense was not affected by the remark. We conclude that the court's instruction to disregard was sufficient to cure any potential prejudice.

We must ultimately determine whether Harps' testimony, "viewed against the backdrop of all the evidence," was so prejudicial that it denied Harris his right to a fair trial. Escalona, 49 Wn. App. at 254. Although Harps' testimony was

potentially prejudicial, it was not a particularly serious irregularity and the trial court's instruction to disregard was sufficient to cure any resulting prejudice. Accordingly, we conclude that the trial court did not abuse its discretion by denying Harris's motion for a mistrial.

Affirmed.

WE CONCUR: