IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27097-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JUAN LUIS SANCHEZ,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows a conviction for second degree burglary while armed with a deadly weapon and imposition of an order prohibiting contact with the victim of that crime. A juror related, in front of other prospective jurors, that her son was incarcerated on the same floor as the defendant. The court refused to declare a mistrial based on that statement. We conclude that this was not an abuse of discretion. The court also imposed a no-contact order prohibiting the defendant from contacting the woman he robbed. We conclude that this restriction was both "crime-related" and authorized by statute. We, therefore, affirm the conviction and the sentence.

FACTS

Michelle Vergara went to Bank of America to deposit money for her employer. Juan Luis Sanchez approached her before she could enter the bank, chased her, pulled a knife, and demanded that she give him the deposit bag. She threw the bag at him and fled into the bank. Mr. Sanchez ran off with the money.

The State charged Mr. Sanchez with first degree robbery while armed with a deadly weapon and the case proceeded to trial. In the course of jury selection, the court had the following exchange with a juror:

> THE COURT: Okay. The next general question. Have any of you [prospective jurors] heard of this case? Have any of you heard of this case before?
>
> We have No. 18. Just hold that thought. Thank you.
>
> Anyone else other than Juror No. 18 that may have heard of this case before?
>
> (*No response.*)
>
> THE COURT: Let me incorporate that question. Has anyone expressed to any of you concerning an opinion of this case? Also No. 18 nodding her head yes.
>
> Let me – No. 18, without discussing specifically what you have heard or opinions that have been expressed to you, understanding that you do have that information, do you believe that you could be fair and impartial on this case?
>
> JUROR NO. 18: No, no.
>
> THE COURT: Does either counsel object if I excuse this juror?
>
> MR. RAMM [for the State]: I want to make sure she knows which case this is.
>
> Are you from Sunnyside?
>
> JUROR NO. 18: My son is on the same floor, same annex.
>
> THE COURT: Mr. Ramm, this is precisely why I don't want to go into this information further. If you would like to talk to her further, I will hold her after the rest of the jurors go for a break.
>
> MR. RAMM: Okay.

> . . . .
> THE COURT: Thank you. Unless we have got an agreement, I'm going to go [forward with jury selection] and have you [Juror No. 18] remain in attendance.

Report of Proceedings (RP) at 22-23.

The court then questioned Juror No. 18 outside the presence of the other jurors. The trial judge confirmed that the juror's son was incarcerated, and the judge asked whether she had shared that information with the other members of the jury pool. Juror No. 18 responded twice that she had not. The trial judge excused the juror for cause. Mr. Sanchez moved for a mistrial based on the juror's statements. The trial court denied the motion.

The jury found Mr. Sanchez guilty of the lesser included crime of second degree robbery. The jury also found that Mr. Sanchez did not use a deadly weapon when he committed the crime.

The trial court sentenced Mr. Sanchez to a prison term and a term of community custody. The trial court prohibited Mr. Sanchez from having contact with Ms. Vergara as a condition of community custody for 10 years. He appeals his conviction and the conditions of his sentence.

DISCUSSION

Mistrial

Mr. Sanchez contends that the trial judge abused her discretion when she denied his motion for mistrial. He argues that Juror No. 18's comments in front of the other venire that her son was incarcerated with the defendant irreparably prejudiced the jury panel against him.

The articulated standard of review for a decision to deny a mistrial is abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Our review of these decisions is, nonetheless, influenced by other considerations. Reversal of a conviction is warranted where "there is a 'substantial likelihood' that the error prompting the request for a mistrial affected the jury's verdict." *Id.* at 269-70. And trial courts "'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.'" *Id.* at 270 (quoting *State v. Kwan Fai Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

Criminal defendants have a right to a fair and impartial jury. U.S. Const. amend. VI; Wash. Const., art. I, § 22. Mr. Sanchez must show that the extraneous comments here likely influenced the verdict. *Rodriguez*, 146 Wn.2d at 270.

Here, Juror No. 18 said that she had previously heard of the case and that someone previously expressed an opinion to her about the case. And when asked whether, despite her previous awareness of the case, she could serve as a fair and impartial juror, Juror No. 18 responded, "No, no. . . . My son is on the same floor, same annex." RP at 23. The trial judge went on to question Juror No. 18

outside the presence of the other prospective jurors and then dismissed Juror No. 18 for cause with the agreement of both Mr. Sanchez and the State.

Mr. Sanchez did not request a curative instruction. And the trial judge instructed the jury to consider only evidence admitted at trial. The court also instructed the jury before deliberations that "[t]he only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence" and that they were to "disregard any evidence that either was not admitted or that was stricken by the court." Clerk's Papers at 32.

Here, none of the seated jurors indicated that he or she would be unable to be fair. The trial court promptly dismissed Juror No. 18 for cause. The only statement by Juror No. 18 that the jury pool heard did not reflect directly on Mr. Sanchez's guilt. If anything, the statement simply reflected that Mr. Sanchez was being held in jail. There are three things we consider when passing on the effect of such irregularities. We "examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Here, we conclude that the comment was not serious, nor was it cumulative. And, while the court did not instruct the jury to disregard it, that was because the defendant did not ask the court to so instruct. And so there is not a sufficient showing that the comment influenced the verdict to warrant our substituting our judgment for that of the trial judge.

We, therefore, affirm the trial judge's discretionary decision to deny a mistrial here.

Imposition of a No-Contact Order

Mr. Sanchez next argues that the trial court's no-contact order is not related to the crime for which he was convicted, second degree robbery. Nor is there any factual basis to support the order, he argues, because he did not harass Ms. Vergara. He robbed her.

Whether the trial court had statutory authority to issue a no-contact order to Mr. Sanchez is a question of law that we review de novo. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9A.46.080, order restricting contact—violation, provides in relevant part: "If a defendant is found guilty of a crime of harassment and a condition of the sentence restricts the defendant's ability to have contact with the victim or witnesses, the condition shall be recorded and a written certified copy of that order shall be provided to the victim or witnesses by the clerk of the court." The statute authorizes the sentencing court to issue a no-contact order if the crime for which Mr. Sanchez was found guilty was a "crime of harassment."

Second degree robbery is not one of the 35 enumerated "crimes included in harassment" listed under RCW 9A.46.060. But the statute also provides that, "[a]s used in this chapter, 'harassment' may include but is not limited to any of the [enumerated] crimes." RCW 9A.46.060. Included on the rather expansive list are assault, criminal trespass, and burglary; crimes that are no

more inherently likely to be committed in an environment of harassment than second degree robbery. *Id.*

RCW 9A.46.020(1)(a)(i) defines harassment as knowingly threatening "[t]o cause bodily injury immediately or in the future to the person threatened." Mr. Sanchez threatened Ms. Vergara and caused her to fear bodily injury. It follows that the trial court had authority to issue the no-contact order as a condition of Mr. Sanchez's community custody.

We affirm the conviction and the sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

_____
Brown, J.

_____
Korsmo, J.