

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41880

STATE OF IDAHO, ) 2015 Unpublished Opinion No. 428  
 )  
 Plaintiff-Respondent, ) Filed: March 24, 2015  
 )  
 v. ) Stephen W. Kenyon, Clerk  
 )  
 MOSES RICHARD DELAROSA, ) THIS IS AN UNPUBLISHED  
 ) OPINION AND SHALL NOT  
 Defendant-Appellant. ) BE CITED AS AUTHORITY  
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Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. James C. Morfitt and Juneal C. Kerrick, District Judges.

Judgment of conviction for possession of a controlled substance, affirmed.

Sara B. Thomas, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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MELANSON, Chief Judge

Moses Richard Delarosa appeals from his judgment of conviction for possession of a controlled substance. Delarosa alleges that the district court erred in denying his motion for mistrial. For the reasons set forth below, we affirm.

Following a report of a fight, police responded to the area and encountered Delarosa in a nearby trailer. Delarosa provided a false name and was then arrested for providing false information and having an outstanding warrant for his arrest. During intake at the jail, the intake officer discovered a gray tube in Delarosa's pocket. A white powdery substance inside the tube tested positive for methamphetamine. Delarosa was charged with possession of a controlled substance and possession of paraphernalia.

At trial, the intake officer testified that, when asked about the tube, Delarosa stated he had picked it up on the way out of his house that day. Delarosa objected to this testimony based on a lack of evidence that he had been given *Miranda*<sup>1</sup> warnings prior to being questioned about the tube and moved for a mistrial. The district court denied the motion but sustained the objection, ordered the testimony stricken, and gave the jury a curative instruction to disregard the testimony. Delarosa was subsequently found guilty of possession of a controlled substance, I.C. § 37-2732(c)(1), and acquitted of possession of paraphernalia. The district court sentenced Delarosa to a unified term of five years, with a minimum period of confinement of two years. The district court then retained jurisdiction and thereafter placed Delarosa on probation. Delarosa appeals.

Delarosa argues that the district court erred by not granting his motion for mistrial based on the intake officer's improper testimony regarding Delarosa's statement about the tube. In criminal cases, motions for mistrial are governed by Idaho Criminal Rule 29.1. A mistrial may be declared upon motion of the defendant when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, that is prejudicial to the defendant and deprives the defendant of a fair trial. I.C.R. 29.1(a). Our standard for reviewing a district court's denial of a motion for mistrial is well established:

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

*State v. Urquhart*, 105 Idaho 92, 95, 665 P.3d 1102, 1105 (Ct. App. 1983). Any error will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there was no reasonable possibility that the event complained of contributed to the conviction. *State v. Norton*, 151 Idaho 176, 193, 254 P.3d 77, 94 (Ct. App. 2011); *State v. Morgan*, 144 Idaho 861,

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<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

863, 172 P.3d 1136, 1138 (Ct. App. 2007). In conducting a harmless error analysis under the circumstances presented here, we consider the strength of the evidence against Delarosa, the significance of the improperly disclosed information, and the district court's curative instruction. *See State v. Watkins*, 152 Idaho 764, 768, 274 P.3d 1279, 1283 (Ct. App. 2012).

Delarosa first contends that the improper testimony was significant because it provided the lone evidence that Delarosa knew he was in possession of the controlled substance. We disagree. The evidence of Delarosa's guilt in this case was sufficient to support the jury's verdict, even absent the offending testimony, which was of little significance. Delarosa argues that the testimony contributed to his conviction because it removed any possibility that he was unaware that the tube was in his pocket. However, the issue at trial was not whether Delarosa knew he was in possession of the tube, but whether he knew the tube contained methamphetamine. The intake officer's testimony did not show that Delarosa knew the tube contained methamphetamine, nor did it contradict Delarosa's assertion during closing argument that he was unaware of what was in the tube. The most likely effect of the intake officer's improper testimony was that it strengthened the derivative inference that, because Delarosa knew the tube was in his pocket, he also knew it contained methamphetamine; however, this reasonable inference was already available to the jury because the tube was found in Delarosa's pocket. As a result, the improper testimony was of little significance in light of the other evidence of Delarosa's guilt.

Delarosa also asserts that the district court's instruction to the jury to disregard the improper testimony was insufficient because a jury question during deliberations indicated that the jury had considered the testimony and that the testimony had influenced the jury's verdict. Delarosa's argument is meritless. During deliberations, the jury asked the following question: "Was there any testimony on how the tube got into [Delarosa's] pocket? Specifically, is there written testimony to which we can refer?" This question by the jury does not, as Delarosa claims, indicate that the jury was improperly considering testimony it had been instructed to disregard. On the contrary, this question indicates that the jury was doing as instructed. By asking whether there was "any testimony on how the tube got into [Delarosa's] pocket," the jury showed that it was, indeed, disregarding the officer's testimony on that very issue. Moreover, the district court struck the improper testimony and instructed the jury to disregard the testimony

shortly after it was presented, noting that it could not be considered “in any fashion whatsoever in rendering [its] verdicts in this case.” Prior to deliberations, the district court again instructed the jury that “testimony that has been excluded or stricken or which [it had] been instructed to disregard” was not evidence. Following the jury question, the district court instructed the jury to refer to its collective recollection of the evidence and the court’s prior instructions, which would include its instruction to disregard the improper testimony, as to what evidence the jury could and could not consider. We presume that the jury followed the district court’s instructions. *State v. Carson*, 151 Idaho 713, 718, 264 P.3d 54, 59 (2011); *State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996). There is no indication that the jury did not follow the district court’s instruction to disregard the testimony here, so Delarosa has failed to show that the district court’s instruction was insufficient in this case.

Based on the evidence of Delarosa’s guilt, the minimal significance of the improper testimony, and the un rebutted presumption that the jury followed the district court’s instructions, we conclude, beyond a reasonable doubt, that the improper testimony did not contribute to the verdict and, therefore, did not constitute reversible error. Thus, the district court did not err by denying Delarosa’s motion for mistrial. Accordingly, Delarosa’s judgment of conviction for possession of a controlled substance is affirmed.

Judge LANSING and Judge GRATTON, **CONCUR.**