

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JIMMY LAGOD, *Appellant*.

No. 1 CA-CR 15-0715
FILED 9-13-2016

Appeal from the Superior Court in Maricopa County
No. CR2015-001471-001
The Honorable Pamela S. Gates, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender, Phoenix
By Terry J. Adams
Counsel for Appellant

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Donn Kessler joined.

H O W E, Judge:

¶1 Jimmy Lagod appeals from his conviction and sentence for resisting arrest. Lagod argues that the trial court erred in denying his motion for mistrial after the State's witness testified about precluded evidence. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 One night in December 2014, a Phoenix police officer observed Lagod riding his bicycle without a front light, a civil traffic offense. The officer immediately turned on his lights and stopped Lagod. The officer discovered that Lagod had a warrant for a parole violation and attempted to arrest him. A two-minute struggle ensued before the officer placed Lagod under arrest. While in the backseat of the police car, Lagod stated that he knew he had a warrant out and that he "didn't want to go back in before Christmas." The State subsequently charged Lagod with resisting arrest.

¶3 Before his jury trial, Lagod moved to preclude any evidence that at the time of the offense he had a warrant for a parole violation. The trial court granted in part and denied in part Lagod's motion in limine. The trial court ruled that evidence that the warrant was for a parole violation would be excluded but the statements "I have a warrant" and "I did not want to be taken in" were admissible. At trial, the officer testified that Lagod said, "he was sorry for trying to escape and that he didn't want to go back before prison - he didn't want to go back before Christmas." Defense counsel immediately asked to approach the bench and moved for a mistrial. Before fully hearing arguments on the motion, the trial court took the afternoon recess.

¶4 After hearing arguments, the trial court denied the motion. Regarding whether a curative instruction should be given, Lagod requested that the trial court provide some type of mechanism to clarify the officer's answer. Because the officer's testimony had been difficult to hear, the trial

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court proposed telling the jury that the microphone issue was worked on over the break and having the State re-ask the question to clarify the officer's answer. Lagod and the State agreed. When the jury returned from recess, the trial court explained that hearing the officer's previous testimony had been difficult because of "microphone issues" and instructed the State to repeat the question. In response to the State's question the officer read from his report Lagod's statement, "he said that he was sorry for trying to escape from me but that he knew he had a warrant and that he didn't want to go back in before Christmas."

¶5 The jury convicted Lagod of resisting arrest. At sentencing he admitted two historical prior convictions. The trial court sentenced Lagod to the presumptive term of 3.5 years' imprisonment. Lagod timely appealed.

DISCUSSION

¶6 Lagod argues that the trial court erred in denying his motion for mistrial because the State's witness testified using the word "prison" in violation of the motion in limine. We review the denial of a motion for mistrial for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 163 ¶ 67, 181 P.3d 196, 210 (2008). An abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (citation omitted). A mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶7 In deciding whether to grant a motion for mistrial based on a witness's testimony, the trial court must consider (1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors. *State v. Lamar*, 205 Ariz. 431, 439 ¶ 40, 72 P.3d 831, 839 (2003). This court gives great deference to a trial court's decision because the trial court "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citation omitted). Because the officer's testimony did not directly violate the motion in limine and did not influence the jurors, the trial court did not err in denying Lagod's motion for mistrial.

¶8 With respect to the first prong, Lagod argues that the officer's mention of the word "prison" directly violated the trial court's ruling on

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the motion in limine. But this is not true. As the court noted at the hearing on the motion, using the word “prison” did not directly violate the court’s ruling because the ruling precluded only the use of the word “parole,” not “prison.” The court did comment however, that using the word “prison” “address[ed] a topic that we had intended to exclude in the presence of the jury.” But regardless whether the officer’s testimony violated the court’s ruling, Lagod’s argument that the trial court should have granted a mistrial fails because nothing shows that the improper testimony likely influenced the jurors.

¶9 First, when the officer said the word “prison,” he immediately corrected himself by restating the sentence using “Christmas” instead of “prison.” The court then took the afternoon recess before hearing arguments on the motion to avoid jurors’ attention to the issue. Additionally, the court proposed a reasonable curative instruction that both Lagod and the State agreed to. Second, the officer clearly misspoke. The trial court concluded that “[t]he word prison doesn’t even connect to the sentence that he was speaking.” The officer testified that Lagod said he “did not want to go back in *before* prison.” He did not testify that Lagod “did not want to go back *to* prison.” Furthermore, this one mention of “prison” was the only time during the trial that the word was used and did not permeate through the remainder of the trial. Accordingly, the trial court did not abuse its discretion by denying Lagod’s motion for mistrial.

CONCLUSION

¶10 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA