

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-136556-001 DT

04/15/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

JEFF W TRUDGIAN

v.

JEREMY R HASS (001)

GEORGE F KLINK

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2011-136556.

Defendant-Appellant Jeremy R. Hass (Defendant) was convicted in the Highland Justice Court of driving under the influence. Defendant contends the trial court (1) did not have jurisdiction, (2) abused its discretion in denying his Motion To Dismiss, which alleged the officers interfered with his right to consult with counsel, (3) abused its discretion in precluding certain testimony, and (4) abused its discretion in denying his motion for a mistrial. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On July 9, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2). On July 19, 2011, Defendant's attorney filed a Notice of Change of Judge, noting the matter was presently assigned to Lester Pearce, Justice of the Peace. On July 26, 2011, the North Mesa Justice Court entered an Order of Transfer, transferring the matter to the Highland Justice Court. Defendant's attorney made no objection to this Order of Transfer, and filed motions to continue the matter on September 1, September 29, October 18, November 29, 2011, and February 16, 2012.

On February 2, 2012, Defendant's attorney filed a Motion To Dismiss With Prejudice, contending the officers interfered with his right to consult with counsel. On March 8, 2012, Justice of the Peace Dan Dodge of the Highland Justice Court held the hearing on Defendant's Motion To Dismiss. Defendant's attorney made no claim that the Highland Justice Court did not have jurisdiction in this matter. (R.T. of Mar. 8, 2012, at 5.)

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At the hearing on Defendant's motion, Sergeant Christopher Dowell testified he was on duty July 9, 2011, in the vicinity of the Salt River where the tubing takes place. (R.T. of Mar. 8, 2012, at 7, 10.) That afternoon, he saw a vehicle traveling above the speed limit, so he conducted a traffic stop. (*Id.* at 9.) He identified Defendant as the driver of this vehicle. (*Id.* at 26.) Sergeant Dowell had Defendant perform the HGN test and the walk-and-turn test, and on both tests Defendant showed signs of intoxication. (*Id.* at 10.) Sergeant Dowell also administered a PBT on Defendant. (*Id.* at 11.) As a result of this information, Sergeant Dowell arrested Defendant for DUI. (*Id.* at 11, 27.)

Because Sergeant Dowell's vehicle did not have a secure area for transporting persons in custody, he had a member of the Sheriff's Posse transport Defendant to the substation. (R.T. of Mar. 8, 2012, at 11–12, 27–28.) Although Sergeant Dowell did not know the name of that person at the time of the hearing, at the trial he identified the person as Joe Wagner. (*Id.* at 15; R.T. of May 11, 2012, at 48.)

Once Sergeant Dowell arrived at the substation, he read to Defendant the Admin Per Se/Implied Consent Affidavit and read to him the *Miranda* warnings before asking him any questions. (R.T. of Mar. 8, 2012, at 16, 30–32, 50–51.) Defendant did not say anything to Sergeant Dowell about wanting to speak to an attorney, and instead said he was willing to submit to a breath test. (*Id.* at 32–33.) At 3:53 p.m., Sergeant Dowell began the deprivation period, and administered the two tests at 4:09 and 4:15. (*Id.* at 22, 33.)

Defendant acknowledged he was arrested on July 9, 2011, and placed in the Sheriff's Posse vehicle. (R.T. of Mar. 8, 2012, at 35–36.) He thought, however, there were two persons in the vehicle. (*Id.* at 37.) He said that, while he was in the vehicle, he asked if he could talk to an attorney and was told, "No." (*Id.* at 38.) He said he had two specific attorneys in mind, his corporate attorney and his brother, and he knew their telephone numbers "by heart." (*Id.* at 39, 43.)

Defendant's attorney asked him, once he arrived at the substation, if he had "occasion to hear anyone talk about wanting an attorney to consult with." (R.T. of Mar. 8, 2012, at 40.) The prosecutor objected on the basis of hearsay, and Defendant's attorney said the response was not offered for the truth of any matter asserted, but was instead offered to show Defendant's state of mind and to explain why he did not tell Sergeant Dowell that he wanted to talk to an attorney. (*Id.*) The trial court sustained the prosecutor's objection. (*Id.* at 41.) Defendant's attorney made an offer of proof that Defendant observed two persons at the substation who had been arrested, and when they asked officers for the right to contact an attorney, "both of these arrestees were declined that opportunity, one law enforcement officer telling at least one of those arrestees, you watch too much television." (*Id.* at 42.) The trial court did not change its ruling. (*Id.*)

Defendant acknowledged he never asked Sergeant Dowell to speak to an attorney. (R.T. of Mar. 8, 2012, at 43, 46.) He contended Sergeant Dowell questioned him before he read him the *Miranda* warnings. (*Id.* at 44–46.)

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After hearing the testimony and the arguments of the attorneys, the trial court took the matter under advisement. (R.T. of Mar. 8, 2012, at 61–62.) The trial court later issued its ruling stating the question was one of credibility. (Ruling on Motion, dated Mar. 16, 2012.) It said, “It is simply not credible that Mr. Hass would have demanded counsel of the posse members, but then fail to do so when actually being questioned by the arresting officer.” (*Id.*) The trial court thus essentially found Defendant did not ask the posse members to speak to an attorney, and therefore denied the motion. (*Id.*)

The next court proceeding was a pretrial conference wherein the trial court set the trial for May 11 and the status conference for May 8. (R.T. of Apr. 10, 2012, at 5.) Again, Defendant’s attorney raised no question about the trial court’s jurisdiction. (*Id.* at 4–5.)

The status conference was held by Judge *pro tem* David Seyers. Judge Seyers said he would probably be the one conducting the trial and gave the attorneys a short explanation of his background. (R.T. of May 8, 2012, at 8.) Judge Seyers said he had served as a judge *pro tem* in Superior Court and justice courts, had served in Buckeye as a magistrate, and was also going to be serving as a judge *pro tem* in Scottsdale. (*Id.* at 8–9.) He further said the trial would probably take place in the building in which they presently were. (*Id.* at 14.) Again, Defendant’s attorney raised no question about the trial court’s jurisdiction. (*Id.* at 9–14.) Judge Seyers set the next day as the deadline for any pretrial motions and asked the attorneys if they could envision any issues that might be a problem that they could discuss at that time. (*Id.* at 7, 10.) In closing, Judge Seyers said he would like “to limit the gamesmanship to the bare minimum.” (*Id.* at 20.)

Trial began May 11, 2012. Sergeant Dowell testified about coming into contact with Defendant, arresting him, and having him transported to the substation. (R.T. of May 11, 2012, at 11, 15, 23, 46, 48–49.) When the prosecutor asked for the record to reflect that the Court had jurisdiction over this case, Defendant’s attorney objected to a finding of jurisdiction. (*Id.* at 16–17.) The trial court held a sidebar discussion, with the following exchange:

THE COURT: Can I ask why (indiscernible) now?

[Defendant’s attorney]: Jurisdiction can be raised at any time, Your Honor.

THE COURT: I know, but that’s not my question. My question is why am I just getting this now?

[Defendant’s attorney]: Because I wanted to cross-examine the officer with respect to jurisdiction to establish that this happened in the Mesa Justice Court, Mesa, and to absolutely nail it down. However, [the prosecutor] chose to raise the jurisdiction now, and I’m objecting to it.

THE COURT: You’re objecting to (indiscernible)—

[Defendant’s attorney]: I have no doubt that this occurred in North Mesa. What I am objection [*sic*] to is that this court, which is not the North Mesa Justice Court, has jurisdiction, and that’s what [the prosecutor] asked you to make a finding about.

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[The prosecutor]: Well, is there any indication that the transfer from North Mesa was without basis in law, to this court?

[Defendant's attorney]: I think my memorandum speaks for itself, and I'll rest on that.

(R.T. of May 11, 2012, at 17–18.) According to the record, at some point on May 11, 2012, Defendant's attorney filed a Motion To Dismiss for Lack of Jurisdiction.

Sergeant Dowell testified about meeting Defendant at the substation and reading him the Admin Per Se/Implied Consent Affidavit and the *Miranda* warnings. (R.T. of May 11, 2012, at 50–51.) He discussed giving Defendant a breath test, and that the results were BAC readings of 0.106 and 0.109. (*Id.* at 58–66.)

After the State rested its case, Defendant's attorney made a motion for judgment of acquittal, which the trial court denied. (R.T. of May 11, 2012, at 107–08.) Defendant's attorney presented witnesses and Defendant testified, after which the defense rested. (*Id.* at 109, 122, 131, 155, 171.)

When trial resumed, the trial court denied Defendant's Motion To Dismiss for Lack of Jurisdiction. (R.T. of May 30, 2012, at 6–8.) The attorneys then gave their final arguments. (*Id.* at 29, 39.) In his final argument, Defendant's attorney said the following about reasonable doubt:

I suggest to you that proof beyond a reasonable doubt—and you will get an instruction on this. And you should obviously and obligated [*sic*] to follow. Means you have to be really, really certain. You have to be morally certain about the quality of the proof that the State has presented.

(R.T. of May 30, 2012, at 41.) In rebuttal, the prosecutor began as follows, with the following exchange:

Ladies and gentlemen, I'd just like to respond to a few things that were said. One of the things I'd like to respond to first is the definition of beyond a reasonable doubt. One of the things—one of my favorite jury instructions—because even though I am a lawyer, I don't trust lawyers myself. It's what lawyers say about the facts. What lawyers say about the law. That doesn't make it so just because a lawyer said it. You have to listen to the testimony and that's what the facts are. And you have to look at the jury instructions—

[Defendant's attorney]: Your Honor, I'd like to reserve a motion.

THE COURT: Okay. You may. You may proceed, counsel.

[The prosecutor] Thank you. And you have to look at the law to determine what the law is. And this is true for me, for Defense counsel. We're not—you know, our arguments is [*sic*] not the law. And what we say is the fact. So—and this isn't to say

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that Defense counsel is misleading you in any way. I don't want to make that accusation. But just—there is a definition of burden of proof and what reasonable doubt is. One thing that the jury instruction doesn't have is any definition about anything about moral servitude [*sic*].

(R.T. of May 30, 2012, at 49–50.) The prosecutor then went on to discuss the trial court's instruction on “beyond a reasonable doubt.” (*Id.* at 50–51.)

After the prosecutor finished his rebuttal, Defendant's attorney asked the trial court to declare a mistrial. (R.T. of May 30, 2012, at 58.) The trial court and the attorneys then discussed the issue, including whether the trial court should grant a mistrial or consider some less extreme sanction. (*Id.* at 59–95.) After hearing arguments from the attorneys and doing its own research, the trial court decided to give a curative instruction. (*Id.* at 95–96.) Defendant's attorney objected to a curative instruction and again moved for a mistrial. (*Id.* at 97, 100.) The trial court then instructed the jurors as it had discussed. (*Id.* at 103.)

After deliberations, the jurors found Defendant guilty of both counts. (R.T. of May 30, 2012, at 115–16.) The trial court later imposed sentence. (R.T. of Jul. 19, 2012, at 6–10.) On July 31, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the trial court have jurisdiction in this matter.*

Defendant contends the trial court did not have jurisdiction in this matter. The Arizona statute provides as follows:

If the justice of the peace of the precinct in which the crime is alleged to have been committed is absent therefrom, or for any reason is unable to act, the prosecution may be commenced in any precinct within the county designated by the justice of the peace or in the absence of the justice of the peace in any precinct designated by the presiding judge of the superior court.

A.R.S. § 22–302. In the present case, Defendant's attorney filed a Notice of Change of Judge for Lester Pearce, the Justice of the Peace of the North Mesa Justice Court. As a result, Lester Pearce was “unable to act,” so the prosecution could be held “in any precinct within the county designated by the justice of the peace.” By Order of Transfer dated July 26, 2011, Lester Pearce transferred this matter to the Highland Justice Court. This Court concludes the Highland Justice Court therefore had proper jurisdiction in this case. And to the extent there are any other defects claimed by Defendant, this Court concludes Defendant through his attorney waived any defects by not raising them until after Defendant's trial had started.

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B. *Did the trial court abuse its discretion in finding the officers did not interfere with Defendant's right to consult with counsel.*

Defendant contends the trial court abused its discretion in finding the officers did not interfere with his right to consult with counsel. In reviewing a trial court's ruling on a motion to dismiss, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

The right to an attorney under Rule 6.1(a) is not self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney:

[A]ppellee's right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.

State v. Transon, 186 Ariz. 482, 486, 924 P.2d 486, 490 (Ct. App. 1996). In the present case, Sergeant Dowell testified Defendant never told him he wanted to talk to an attorney, and Defendant acknowledged he never made a request to Sergeant Dowell to talk to an attorney. The record thus supports the trial court's determination that Sergeant Dowell did not interfere with Defendant's right to consult with counsel.

Defendant alleges, however, he asked the posse members who drove him to the substation to talk to an attorney, and contends they refused to allow him to do so. The trial court stated this was a question of credibility and found Defendant did not ask the posse members to speak to an attorney, and therefore denied the motion. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

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State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves “an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.”

This Court notes the State’s attorney has confessed error on this issue. An appellate court is not required to accept the State’s confession of error. *Arizona Minority Coal. v. Arizona Indep. Redrist. Comm’n*, 211 Ariz. 337, 121 P.3d 843, ¶ 100 n.28 (Ct. App. 2005); *State v. Dominguez*, 192 Ariz. 461, 967 P.2d 136, ¶ 7 (Ct. App. 1998); *State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (Ct. App. 1993). In the present case, the State’s attorney confessed error because of the following:

Appellant argued that he requested to speak with an attorney and his request was denied by unknown Sheriff’s Office posse members. The State did not ascertain who these posse members were in order to rebut Appellant’s assertions. It is unknown if the identity of these individuals can be found out.

(Appellee’s Response Memorandum at 1.) Sergeant Dowell testified there was only one posse member and identified that person as Joe Wagner. (R.T. of May 11, 2012, at 48.) In light of this testimony, this Court questions whether the State’s attorney even read the transcripts. This Court thus declines to accept the State’s confession of error.

C. *Did the trial court abuse its discretion in precluding certain testimony.*

Defendant contends the trial court abused its discretion in precluding certain testimony, finding it was hearsay. An appellate court is obliged to affirm the trial court when any reasonable view of the facts and law might support the judgment of the trial court, even when the trial court has reached the right result for a different reason. *State v. Canez*, 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002); *State v. LaGrand*, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985); *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010); *State v. Rumsey*, 225 Ariz. 374, 238 P.3d 642, ¶ 4 (Ct. App. 2010); *State v. Childress*, 222 Ariz. 334, 214 P.3d 422, ¶ 9 (Ct. App. 2009); *State v. Waicelunas*, 138 Ariz. 16, 20, 672 P.2d 968, 972 (Ct. App. 1983). In the present matter, this Court concludes testimony about what Defendant might have heard other officers say to other persons was not relevant. The issue was whether the officers had done anything to Defendant to interfere with his right to consult with an attorney. Defendant acknowledged he chose not to tell Sergeant Dowell he wanted to talk to an attorney, thus that was a choice Defendant made. This Court finds the situation similar to that in *Colorado v. Connelly*, 479 U.S. 157 (1986), in which the Court held, absent police conduct causally related to the confession, a confession will not be considered involuntary, thus if a person’s own internal compulsion caused the person to confess, that internal compulsion does not make the confession involuntary. 479 U.S. 157, 164–67. Thus, if Defendant’s own internal compulsion caused him not

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to tell Sergeant Dowell he wanted to talk to an attorney, that was Defendant's own choice, and it did not matter that Defendant's choice was influenced by a conversation he overheard that was not directed to him and of which he was not a part. Because what Defendant may or may not have overheard was not relevant, the trial court properly exercised its discretion in not allowing it in evidence. Moreover, as a result of the hearing on Defendant's Motion To Dismiss, the trial court found Defendant not to be credible.

D. *Did the trial court abuse its discretion in denying his motion for a mistrial.*

Defendant contends the trial court abused its discretion in denying his motion for a mistrial. The trial court enjoys broad discretion in determining whether to grant a mistrial, and a reviewing court will reverse the trial court's ruling only if that court's conduct is palpably improper and clearly injurious. *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989). A declaration of 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 jurors are dismissed and a new trial granted. *State v. Dann*, 220 Ariz. 351, 207 P.3d 604, ¶ 50 (2009). To determine whether the prosecutor's remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether misconduct exists and (2) whether a reasonable likelihood exists that the misconduct could have affected the jurors' verdict, thereby denying defendant a fair trial. *State v. Nelson*, 229 Ariz. 180, 273 P.3d 632, ¶ 38 (2012). Further, the defendant must show the offending statements were so pronounced and persistent that they permeated the entire atmosphere of the trial and so infected the trial with unfairness that they made the resulting conviction a denial of due process. *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184, ¶ 26 (1998). Finally, the prosecutor is permitted to make comments that are a fair rebuttal to comments made by the defendant's attorney. *State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (Ct. App. 1993).

In the present case, Defendant's attorney told the jurors proof beyond a reasonable doubt requires them to be "really, really certain," and that they "have to be morally certain about the quality of the proof that the State has presented." (R.T. of May 30, 2012, at 41, ll. 11–12.) This was contrary to the instruction the trial court later gave, which informed the jurors, "There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every doubt." (*Id.* at 104, ll. 10–13.) It was thus permissible for the prosecutor to argue to the jurors that there were not required to accept at face value everything the attorneys said, and that they should instead rely on the instructions the trial court would give.

Defendant's objection was directed to the prosecutor's comment that "I don't trust lawyers myself," contending this "put in the jury's mind the seed that defense counsel is not to be trusted." (R.T. of May 30, 2012, at 59, ll. 16–17.) Similar cases are the following. In *State v. Cornell*, 179 Ariz. 314, 330–32, 878 P.2d 1352, 68–70 (1994), the court held it was not fundamental error when the prosecutor insinuated that the defendant's attorney had coached the defendant on how to claim he was suffering from epilepsy. In *State v. Amaya-Ruiz*, 166 Ariz. 152,

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171–72, 800 P.2d 1260, 1179–80 (1990), the court held it was not fundamental error when the prosecutor said, “That is quite an outrageous argument for her [defendant’s attorney] to make; she may not be outraged by this prospect, but I certainly am.” In *State v. Dumaine*, 162 Ariz. 392, 402–03, 783 P.2d 1184, 1194–95 (1989), the court held, when the prosecutor objected by saying, “I’m going to object; he knows darned well that isn’t true,” the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial. In *State v. Gonzales*, 105 Ariz. 434, 436–37, 466 P.2d 388, 390–91 (1970), the court held it was improper for the prosecutor to accuse the defendant’s attorney of talking “out of two sides of his mouth, or as the Indian might say a forked tongue,” but noted the defendant’s attorney waited until after the closing arguments and the trial court’s instructions to ask for a mistrial, and held the trial court did not abuse its discretion in denying the motion for mistrial. And in *State v. Rosas-Hernandez*, 202 Ariz. 212, 42 P.3d 1177, ¶¶ 21–25 (Ct. App. 2002), when the prosecutor said the defendant’s attorney’s opening statement was “as if it were a lie,” the court held a mistrial was not warranted because the trial court sustained the defendant’s attorney’s objection and instructed the jurors to disregard the prosecutor’s statement. In the present case, once the prosecutor made the statement, Defendant’s attorney did not ask the trial court to do anything at that time, but merely said, “Your Honor, I’d like to reserve a motion.” (R.T. of May 30, 2012, at 50, l. 10.) Defendant’s attorney did not state the basis of the objection until the prosecutor had finished his rebuttal argument. (*Id.* at 58.) The trial court then had to excuse the jurors while the trial court and the attorney’s discussed the issue. (*Id.* at 58–59.) If Defendant’s attorney had objected and asked to approach the bench, the trial court would have been able to instruct the jurors at that time to disregard the prosecutor’s comment. After thoroughly exploring the alternative forms of relief, the trial court chose to give the jurors an instruction that included the following: “If any comment of counsel has no basis in the evidence, you are to disregard that comment.” (*Id.* at 103, ll. 15–17.) This Court concludes the trial court did not abuse its discretion in fashioning that form of relief.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court (1) did have jurisdiction in this matter, (2) did not abuse its discretion in denying Defendant’s Motion To Dismiss, (3) did not abuse its discretion in precluding certain testimony, and (4) did not abuse its discretion in denying his motion for a mistrial and instead giving a corrective instruction.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT