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SUPREME COURT
STATE OF WASHINGTON
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No. 100149-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORGE NAVA MARTINEZ JR.,

Petitioner.

ANSWER TO
PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington asks that review be denied.

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion, as amended by the order denying reconsideration. App. B at 2-5; App. A at 1-2 (attached to Petition for Review).

III. REASONS WHY REVIEW SHOULD BE DENIED

The standards for granting petitions for review are set out in RAP 13.4(b)(1) through (4). The petition in this case fails to identify any of these standards as warranting review. Instead, the petition raises an assortment of evidentiary issues. Each of these is governed by established law. The application of that law to the facts of this case does not warrant review.

A. THERE IS NO BASIS FOR REVIEWING THE TRIAL COURT'S EXERCISE OF DISCRETION IN DETERMINING THAT A MISTRIAL WAS NOT REQUIRED BECAUSE OF A REFERENCE TO THE DEFENDANT'S CRIMINAL RECORD.

The defendant first claims that a mistrial should have been granted when the jury heard testimony that he had been in jail or prison. The Court of Appeals correctly analyzed this irregularity under the test set out in State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A trial court's decision to deny a mistrial is reviewed for abuse of discretion. It will be overturned only when there is a substantial likelihood that the error affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

The defendant's analysis of this issue overlooks an important fact. The defendant himself testified that he had been using drugs for five or seven years. 12/20 RP 1058. If the jurors were inclined to violate their instructions by speculating about what crime put the defendant in prison, they would most likely assume that it was a drug crime.

They heard nothing to suggest that it was anything else. The testimony about the defendant's incarceration told the jurors very little that they did not already know.

The defendant cites State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987). In that case, the defendant was charged with assaulting someone with a knife. A witness testified that the defendant "already had a record and had stabbed someone." The Court of Appeals held that this required a mistrial. This was because the jury was likely to conclude that the defendant acted "in conformity with the assaultive character he demonstrated in the past." Id. at 256. The court did *not* say that every reference to the defendant's prior criminal history requires a mistrial. Rather, a mistrial was required because of the strong similarity between the prior crime and the charged offense. In the present case, that similarity did not exist.

The defendant also seeks to compare this case to State v. Taylor, ___ Wn. App. 2d ___, 490 P.3d 263

(2021). There, the error occurred because the prosecutor had not advised an expert witness of the court's rulings in limine. This put the defense in the unfair position of having to object to testimony that should never have been offered. Id. at 271 ¶¶ 27-28. That situation did not occur in the present case. The prosecutor had warned a non-professional witness about the court's ruling, but the witness mistakenly mentioned the subject anyway. 12/17 RP 367.

The defendant argues that "a violation of a pretrial order is a serious irregularity." PRV at 9, quoting State v. Gamble, 168 Wn.2d 161, 178 ¶ 32, 225 P.3d 973 (2010). In Gamble, a police officer testified that he obtained a photograph of the defendant from a prior "booking file." Gamble, 168 Wn.2d at 176 ¶ 27. This court nonetheless presumed that the jury followed the court's instruction to disregard that testimony. Id. at 178 ¶ 32. The case thus holds that a reference to a defendant's criminal history

does *not* necessarily require a mistrial. The trial court's exercise of discretion in the present case does not warrant review.

B. THERE IS NO BASIS FOR REVIEWING THE COURT OF APPEALS' HOLDING THAT THE FACTS OF THIS PARTICULAR CASE ALLOWED AN INFERENCE THAT A GUN LINKED TO THE DEFENDANT WAS USED IN THE CRIME.

The defendant next contends that the trial court improperly admitted evidence of the defendant's access to a gun. The relevant standard is undisputed. Evidence of weapons unrelated to the crime are inadmissible. The evidence is admissible, however, "if the jury could infer from the evidence that the weapon could have been used in the commission of the crime." State v. Luvane, 127 Wn.2d 690, 708, 903 P.2d 960 (1995). The Court of Appeals applied this standard. App. B at 12-14.

With regard to this issue, the petition for review contains some inaccurate statements. First, it asserts that "the prosecution conceded on appeal there was no evidence that Tiffany Best's gun was stolen by Mr.

Martinez or that it was used to shoot Mr. Burley.” PRV at 12, citing Brief of Respondent at 25. The cited portion of the respondent’s brief says, “the jury could infer from the circumstantial evidence that this gun was involved in the murder.” The brief goes on to say that “even if the [gun] was not the murder weapon, the jury could infer that it was used in the robbery.”

The petition for review also asserts that “[t]he .38 caliber bullet that struck [the victim] was not the type of bullet Ms. Beston’s .380 caliber gun would have fired.” PRV at 13. The petition does not support this claim with any citation to the record. The firearms expert testified to the contrary, that she could *not* conclude that the bullet was not fired from that gun. 1/20 RP 908.

A witness testified that immediately after the robbery, he saw the defendant with “a little gun,” which was chrome or silver. 12/17 RP 415-16. The owner of the missing gun described it as a small, black gun that may

have had some silver on it. 12/19 RP 846. The evidence concerning the missing gun therefore corroborated this witness's testimony, by showing that the defendant had access to a gun similar to the one that the witness saw. This is sufficient to support admissibility of the weapon. The application of a well-established standard to these facts does not warrant review.

IV. CONCLUSION

The petition for review should be denied.

This Answer contains 1048 words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on September 28, 2021.

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DECLARATION OF SERVICE

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; sara@washapp.org; nancy@washapp.org;

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at the Snohomish County Prosecutor's Office.



9/28/21

Diane K. Kremenich DATE:
Legal Assistant/Appeals Unit

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

September 28, 2021 - 9:06 AM

Transmittal Information

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