NO. 42890-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY MICHAEL GARCIA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 11-1-01800-0

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

On April 28, 2011, the Pierce County Prosecutor's Office (State) charged Johnny Michael Garcia (defendant) with assault in the first degree with a firearm enhancement, unlawful possession of a firearm in the second degree, and unlawful possession of a controlled substance, methamphetamine. CP 1–2. The State amended defendant's charge of unlawful possession of a firearm to the first degree. CP 7–8. Defendant's jury trial began on October 18, 2011, before the Honorable Frederick Fleming. 1RP 13.

As one of the elements of defendant's charge of unlawful possession of a firearm, the State had to prove that defendant had been previously convicted of a serious offense. CP 241 (Instruction No. 20). When the State introduced evidence pertaining to defendant's criminal history, the defense offered to stipulate that defendant had been convicted of a serious offense. 7RP 53–60. The court accepted the stipulation, and gave an appropriate instruction to the jury regarding it. 7RP 53–60.

Notwithstanding the stipulation, the proposed jury instruction regarding defendant's charge of unlawful possession of a firearm (Instruction No. 20) stated that the jury had to find "[t]hat the defendant had previously been convicted of Robbery in the First Degree, a serious offense." CP 29 (Plaintiff's proposed instructions to the jury); CP 202 (Instruction No. 20). The State had initially intended on introducing evidence about defendant's previous robbery conviction, and had drafted the instruction before defendant stipulated to a conviction for a serious offense. 8RP 20–21, 27–28. The State did not amend the instruction after the stipulation, nor did the defense object to the instruction when the court formally took objections and exceptions to the proposed jury instructions.

During his closing argument, the prosecutor noticed that Instruction No. 20 stated "robbery," instead of "a serious offense," while he was reviewing the instructions with the jury. 8RP 16, 20–21. He quickly proceeded to another instruction, and outside of the jury's presence, moved the court to amend the instructions when he finished.

8RP 16, 20–21. Defense counsel admitted that he did not catch the mistake earlier and offered ideas on how to correct the instruction. 8RP 22. The parties agreed to collect the jurors' instructions, amend Instruction No. 20 to omit any reference to a robbery conviction, and instruct the jury that the instruction had been corrected. 8RP 22–26.

The court collected the jurors' instructions and discovered that one juror had underlined "robbery" on the instruction, and another juror drew a star next to the element that referenced robbery. 8RP 26–27; CP 203–16 (Juror copies of Instruction No. 20). Upon this discovery, defense counsel moved for a mistrial. 8RP 26–27. The court denied the motion, reasoning that the instruction's reference to robbery did not prejudice defendant's fair trial. 8RP 29. The court distributed the corrected instructions to the jury and gave a curative instruction to disregard the old instruction, telling the jury that the original Instruction No. 20 was the "wrong instruction for this case." 8RP 32–33.

The jury found defendant guilty as charged. 8RP 69–70; CP 251–54. On December 2, 2011, the court sentenced defendant to 378 months,[1] and 60 months for the firearm enhancement. 8RP 83; CP 259–272. This appeal timely followed on December 13, 2011. CP 273–83.

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[1] Defendant had an offender score of 13 for the assault charge, with a standard range of 300–378 months. CP 262 (Paragraph 2.3). Defendant had an offender score of 12 for his convictions of unlawful possession of a firearm and unlawful possession of methamphetamine, with respective standard ranges of 87–116 and 12–24 months. CP 262 (Paragraph 2.3).

2. Facts

On April 22, 2011, Catherine Elliott heard Tara McCloud[2] screaming for help next door. 6RP 7, 10–12. Ms. Elliott called 911, and while speaking to the operator, saw defendant leave the home where Tara had screamed. 6RP 9–12, 17. Tara had been in a relationship with defendant at that time. 4RP 45. Ms. Elliott went outside after finishing the call and found Tara at the house with blood on her hands, face, and hair, and lacerations under her eyes. 6RP 11. When Ms. Elliott told Tara that she had called 911 for help, Tara became upset and said she did not want help from the police. 6RP 11.

After officers arrived, Tara barricaded herself in the home until she finally permitted officers to enter. 6RP 46–53; 7RP 10–11. Tara falsely identified herself as Wauleia Simmons, and that her boyfriend, a person she claimed to be named Jonathan Redding, had beaten her up when she refused to give him money. 6RP 52–53; 7RP 13–14. Officers helped her into an ambulance to receive medical treatment, but Tara ran away from emergency medical technicians before they reached the hospital. 7RP 14. At trial, Tara claimed to have no recollection of any of these events. 4RP 46.

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[2] This case involves multiple parties with the last name, McCloud—Tara McCloud, and her cousin, Mark (or Marcus) McCloud. The State will refer to these parties by their first names for clarity, and means no disrespect to the parties.

The next day, Phillip Noel was visiting his friend Mark McCloud—Tara's cousin—in a residential garage located near the Tacoma/Fife border. 1RP 28–29; 2RP 22–24. The garage was located on property owned by Darryl Oya, and was adjacent to Mr. Oya's house. 2RP 22–24. Tara was also present, lying down on a couch with a blanket draped over her head. 2RP 24–27. Tara's face was still badly injured from the previous day. 1RP 80–82; 2RP 39, 100.

Mr. Noel was sitting on a couch next to Tara when she began a conversation with someone on her cellular phone. 2RP 26–29. Mark sat close by Tara to listen in on the conversation. 2RP 26–29. Although Mr. Noel could not understand what the person on the other line was saying, he heard the person speaking loudly, and noticed that both Mark and Tara grew angrier as the conversation commenced. 2RP 26–30. Eventually, Tara's phone battery died and the conversation ended. 2RP 28.

Shortly thereafter defendant and Mason Filitaula arrived at the garage. 2RP 34–35. Defendant approached Tara and engaged her in a heated conversation. 2RP 36–40. When Mark stood up to join the dispute, defendant directed the argument towards Mark. 2RP 38. The two men started walking at each other, so Mr. Noel also stood up, expecting a fight. 2RP 39–40, 46–47.

Before the men came in contact with each other, defendant removed a semiautomatic pistol from his pocket, swung it sideways past Mr. Noel's face, and shot Mark in the abdomen and arm. 2RP 42–44, 47–

48. Mark exclaimed that he had been shot and hunched over. 2RP 45–50. Mr. Noel rushed over to Mark, treated him for shock, and called 911. 2RP 45–50. Because Mr. Noel did not know the address of the garage, he ran out into the street to direct officers there. 2RP 51–52. Before officers could arrive, defendant fled the garage and drove away. 2RP 12–13.

Officers from both the Tacoma Police Department and the Puyallup Tribe arrived quickly at the scene. 1RP 27–29, 66–67, 77–78; 2RP 96–97; 3RP 41–42; 5RP 54–58. While securing the area, officers discovered Tara hiding in the garage's loft. 1RP 45, 79–80; 2RP 100–01. Tara falsely identified herself again as Wauleia Simmons. 2RP 101. Meanwhile, paramedics rushed Mark to the hospital where he underwent surgery on his stomach, intestines, and colon. 5RP 4–5, 8–12.

Mr. Noel identified defendant and Mr. Filitaula from a photo montage shortly after the crime. 3RP 58–61. Although nobody identified defendant as the shooter in court, one of defendant's previous girlfriends, Sophia Ocasio-McDonald, testified that defendant had told her that he and Tara had had an argument, and that he shot Mark when Mark got involved. 4RP 20–21. Lucy Tom, a relative of the McCloud family, testified that Mark admitted that defendant had shot him as a result of the argument between defendant and Tara. 6RP 70, 94. Ms. Tom testified that both Tara and Mark had identified defendant as the shooter shortly after the shooting. 6RP 70–73. A detective also testified that during his interview with Tara, she said that the whole ordeal had originated from the

domestic dispute between her and defendant from the day before the shooting. 6RP 93.

After discovering the shooter's identity, officers apprehended defendant at an apartment in central Tacoma on April 27, 2011. 3RP 81–83, 86; 4RP 13. Upon searching defendant incident to his arrest, officers found a bag of methamphetamine. 3RP 87–88; 4RP 70–71.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL BECAUSE IT HAD REMEDIED ANY ALLEGED PREJUDICE THROUGH A CURATIVE INSTRUCTION

The court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. ***State v. Emery***, 278 P.3d 653, 666 (2012); ***State v. Rodriguez***, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); ***State v. Tigano***, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991) ("[W]hether to grant a motion for mistrial is a matter addressed to the *sound discretion of the trial court* . . . .") (emphasis added).

A trial court abuses its discretion only when "no reasonable judge would have reached the same conclusion." ***Emery***, 278 P.3d at 666 (quoting ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). A reviewing court should overturn a trial court's denial of a motion for mistrial only if there is a substantial likelihood that the alleged error

affected the jury's verdict. ***Rodriquez***, 146 Wn.2d at 269; ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The Washington State Supreme Court has held that trial courts should grant a mistrial only when nothing short of a new trial can insure that defendant will be tried fairly. ***Rodriquez***, 125 Wn.2d at 269. Thus, the reviewing court should afford "great deference" to the trial court because the trial court is in the best position to discern prejudice. ***State v. Smith***, 124 Wn. App. 417, 428, 102 P.3d 158 (2004).

When determining whether an irregularity has prejudiced the defense, the court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it, hereinafter the "***Hopson*** factors." ***Hopson***, 113 Wn.2d at 284.

The instructional irregularity in this case did not warrant a mistrial because the trial court recognized the seriousness of the irregularity, and properly cured the error by gathering the original instructions, distributing a corrected instruction, and specifically instructing the jury to disregard the old one. 8RP 20–29.

The irregularity at issue here is Instruction No. 20, the original "to convict" instruction pertaining to defendant's charge of unlawful possession of a firearm. CP 202 (Instruction No. 20). The court distributed this instruction to the jury before closings arguments. 8RP 3. The instruction, which defendant did not object to when the court formally

took objections and exceptions, included the name of the previous offense for which the defendant had been convicted:

> To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 23rd day of April, 2011, the defendant knowingly had a firearm in his possession or control;
>
> *(2) That the defendant had previously been convicted of Robbery in the First Degree, a serious offense; and*
>
> (3) That possession or control of the firearm occurred in the State of Washington.

CP 202 (Instruction No. 20) (emphasis added).

As a preliminary matter it is important to note that the instruction above was inadvertently included in the original packet of jury instructions. Defendant does not argue, either at trial or on appeal, that this was intentional. The prosecutor first recognized the irregularity during closing argument while discussing the elements of unlawful possession of a firearm. 8RP 16. Upon finishing his closing argument, the prosecutor immediately requested the jury to be excused and moved the court to amend the instruction, stating:

> I would ask the Court amend the instruction to include the prior serious offense. Obviously, the instruction was drafted at the point in time when we didn't have a stipulation. Subsequently, during trial, there was a stipulation, which means that they know the necessary predicate offense which is a serious offense was committed, but the

> instruction literally requires them to conclude that he was convicted of Robbery in the First Degree and there's been no evidence of that because of the stipulation.

8RP 21–22. Even defense counsel stated that he "didn't catch this either" when the court formally took objections and exceptions. 8RP 22.

Once the error had been raised, the court asked the defense what remedy it thought proper to resolve the issue. 8RP 22. Defense counsel recommended several ideas, such as using a marker to redact the jurors' instructions, collecting each juror's instructions and replace them with new ones, and offering a curative instruction. 8RP 22–25. Ultimately, the parties and the court agreed to the defense's suggestion to collect each juror's Instruction No. 20, draft a new version that omitted any reference to robbery, and have the court give a curative instruction. 8RP 22–25.

When the court offered to specify to the jury what the error was, defense counsel requested the court to avoid speaking directly about the error:

> THE COURT: Let me think here a second. I can have each number 20 pulled and replaced with, like I just indicated, which would say that the defendant had previously been convicted of a serious offense. And have that replacement, put copies made, and each of the 14 and one for the State, one for the defendant, and the original, and I'll just tell them I misspoke.
>
> [DEFENSE COUNSEL]: Well, I would prefer, your Honor, and I think you have to, you have to read that one again, maybe just say, we have corrected 20, don't tell them the correction.

> THE COURT: I misspoke.
>
> [DEFENSE COUNSEL]: Don't tell them what it was.
>
> THE COURT: I won't tell them what it was, I'm reading 20 again because I misspoke.
>
> [DEFENSE COUNSEL]: I think the chance of them remembering what changed is slim. It's the best we can do.

8RP 24–25. The court then collected the original instructions. 8RP 26. Upon discovering that two jurors had made notations near the word "robbery" on their instructions, defendant moved for a mistrial, arguing, "[n]ow that I have seen [the instructions], I don't think [a curative instruction] is a procedure I want to agree with. So I'll object to this procedure for the record at this time and move for a mistrial." 8RP 26–27.

The court denied the motion, reasoning that in light of a curative instruction, "that it appears in the judgment of this Court that [defendant] obviously is entitled to a fair trial, not a perfect trial, but I don't think the perfection issue rises to the level that a mistrial should be granted." 8RP 29. The court further reasoned that "[j]uries are made up of very capable people. And there's a stipulation in this record regarding a serious offense and I am satisfied that what we're doing is appropriate, and, again, does not warrant a new trial." 8RP 30.

After denying the motion for mistrial, the court brought the jury in, provided a corrected Instruction No. 20, read the instruction, and gave a curative instruction. 8RP 33.

a. The trial court did not abuse its discretion by finding that the seriousness of the irregularity did not warrant the exceptional remedy of mistrial

Generally, it is a serious irregularity to disclose the nature of a defendant's prior offense where the defense has stipulated to having been convicted of a prior offense. *See, e.g.*, ***State v. Young***, 129 Wn. App. 468, 119 P.3d 870 (2005); ***State v. Johnson***, 90 Wn. App. 54, 950 P.2d 91 (1998). In ***Young***, the State charged defendant with unlawful possession of a firearm. ***Young***, 129 Wn. App. at 470. Before trial Young stipulated to having been convicted of a serious offense, which was one of the elements of his charge. *Id.* In spite of the stipulation, the court mistakenly disclosed the nature of the Young's previous conviction—second degree assault—when it read the defendant's charging information during the jury venire. *Id.* at 470–71. Although Young moved for a mistrial upon the disclosure, the court denied his motion, and the jury subsequently found him guilty. *Id.*

Following the ***Hopson*** factors, the reviewing court reversed Young's conviction because it determined that the trial court had abused its discretion in denying Young's motion for mistrial. ***Young***, 129 Wn. App. at 473–79. The reviewing court held that disclosing the nature of the defendant's prior conviction was a serious irregularity that did not involve cumulative evidence. *Id.* at 473–76. The court also reasoned that under the third ***Hopson*** factor, the trial court had failed to offer a curative instruction

or direct the jury to disregard the information. *Id.* at 476–77. Absent any steps to cure the error, the court held that Young's trial had been prejudiced. *Id.* at 477–79.

Unlike the court in ***Young***, the record shows that the trial court in this case was cognizant of the potential seriousness of the trial irregularity, and that it carefully considered any prejudice the irregularity might have had on defendant's trial. The court excused the jury, thoroughly discussed the issue with the parties, and permitted the defense to propose any remedy shy of a mistrial to cure the error. 8RP 21–33. When the defense moved for a mistrial, the court weighed the prejudicial impact that the error potentially had on the defense, and ultimately concluded, "[I]t appears in the judgment of this Court that [defendant] obviously is entitled to a fair trial, not a perfect trial, but I don't think the perfection issue rises to the level that a mistrial should be granted." 8RP 29. It is telling that the trial court termed the problem as a "perfection issue" because this language infers how unlikely the trial court thought the error had affected the trial. 8RP 29. This Court should defer to the trial court's ruling because the trial court was in the best position to discern the seriousness of the irregularity. *See* ***Smith***, 124 Wn. App. at 428.

The trial court in this case properly assessed the seriousness of the irregularity because there was nothing from trial that created a nexus between defendant and the nature of his prior offense. From the jury's perspective, they were given an instruction (the original Instruction No.

20) that required them to find that the State had proven that defendant had previously been convicted of robbery in the first degree. However, nothing from trial pertained to that point. This likely explains why one juror drew a question mark next to the word "robbery" on his or her instruction. CP 203–16 (original copies of Instruction No. 20). Because no evidence inferred that defendant had in fact previously committed robbery, the seriousness of the irregularity is questionable. The inadvertent inclusion of "robbery" on the original jury instructions did not likely impact the jury's verdict.

Defendant relies primarily on ***Old Chief v. United States***, 519 U.S. 172, 117 S. Ct. 644 (1997), ***Young***, and ***Johnson***, to argue that the trial irregularity here was so serious that nothing short of a new trial would ensure defendant his right to a fair trial. Brief of Appellant at 21–29. However, in each of those cases the jury received direct evidence that the defendant had actually committed a specified crime (respectively, assault causing serious bodily injury,[3] second degree assault,[4] and rape[5]). For example, in both ***Old Chief*** and ***Johnson***, the trial courts improperly permitted the State to reveal the nature and details of the defendant's prior convictions *despite* the defendants' offers to stipulate. *See* ***Old Chief***, 519 U.S. at 175–77; *see also* ***Johnson***, 90 Wn. App. at 61–63. The court in

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[3] ***Old Chief***, 519 U.S. at 175.
[4] ***Young***, 129 Wn. App. at 475.
[5] ***Johnson***, 90 Wn. App. at 61.

Young erred by reading defendant's charging information to the jury venire, information that specifically informed the jury that Young had been previously convicted of second-degree assault. *See* ***Young***, 129 Wn. App. at 471. In all three cases, the jury received direct information that the defendant had committed a specified crime.

That situation is not present here. The challenged instruction did not directly inform the jury that defendant had been convicted of robbery. CP 202 (Instruction No. 20) (requiring the jury to find that the State had proved "[t]hat defendant had previously been convicted of Robbery in the First Degree, a serious offense"). As argued above, from the jury's perspective, the trial court distributed the wrong instruction for the case, redistributed a new one, and asked the jury to disregard the old one. The trial irregularity at issue here is notably dissimilar to defendant's cited authority in this regard.

b. The irregularity did not involve cumulative evidence

As argued above, nothing from trial showed that defendant had previously been convicted of robbery in the first degree. The State acknowledges that the irregularity here did not involve cumulative evidence.

c. The trial court adequately remedied any alleged prejudice by correcting Instruction No. 20 and directing the jury to disregard the old instruction.

Even if this Court were to determine the irregularity was serious, the trial court properly remedied any potential error through several curative mechanisms. First, the trial court had already issued a general instruction that "[e]vidence of uncharged allegations may not be considered by [the jury] to prove the character of the defendant to show he acted in conformity with it." CP 225 (Instruction No. 5). The jury was thus aware of its responsibility to use evidence pertaining to defendant's prior conviction only for limited purposes.

Next, the court gathered the erroneous instructions and provided a new "to-convict" instruction, which correctly stated the elements of defendant's charge. 8RP 32; CP 241 (Instruction No. 20) (requiring the State to prove "[t]hat the defendant had previously been convicted of a serious offense"). Thus, before deliberations, the jury received a correct set of jury instructions. Similar to the court in ***Hopson***, the trial court here minimized the irregularity's impact by correcting it as soon as possible, and refused to discuss the remark with counsel in front of the jury. Moreover, in addition to the corrected instruction, the court specifically directed the jury to disregard the old instruction:

> During closing argument, the Court realized that instruction 20 concerning Count II, the charge of Unlawful Possession of a Firearm in the First Degree, *was the wrong instruction for this case.* You have now been given the correct instruction 20 concerning Count II. *You should disregard the previous instruction 20.* And, as I've indicated, I've given fresh copies of the Court's instructions to each member of the jury.

8RP 33 (emphasis added). The jury is presumed to follow the court's instructions. *See, e.g.*, ***State v. Stein***, 144 Wn.2d 236, 248, 27 P.3d 184 (2001).

Defendant relies on ***Young*** to argue the trial court failed to cure the error. Brief of Appellant at 26–29. Defendant's argument is based primarily on the following premises: (1) the error was so prejudicial that it could not be cured, (2) the trial court's instruction to disregard the old instruction was not specific enough, and (3) the jury was repeatedly exposed to the nature of defendant's prior conviction. *See* Brief of Appellant at 26–29. These arguments are addressed in turn.

The first premise fails because defendant cites no authority that has held the irregularity in this case is incurable. Additionally, as argued above, the irregularity here is dissimilar to the irregularity in ***Young*** because the jury never received information that defendant had actually been convicted of robbery in the first degree. Defendant does not identify anywhere in the record where the jury received any evidence linking defendant to his prior offense. From the jury's perspective, the inclusion

of "robbery" on the original jury instructions could have been a mere scrivener's error, which the trial court cured when it told the jury that it had distributed "the wrong instruction for this case." 8RP 33.

Defendant's second premise[6] fails because defendant repeatedly requested the trial court to refrain from focusing on the issue more than providing a corrected instruction, telling the jury that it misspoke, and directing the jury to disregard the old instruction. 8RP 24–25 ("[D]on't tell [the jury] the correction . . . . don't tell them what it was."). It was defendant who argued that "the chance of [the jury] remembering what changed is slim," and that the defense's recommended remedy was "the best we can do." 8RP 25. By correcting the old instruction, offering a curative instruction, and telling the jury that it had misspoken, the trial court avoided overemphasizing the error (and thus incurring prejudice), while still directing the jury to disregard the erroneous instruction. Although defendant relies on ***Young***, the trial court satisfied the factors that the ***Young*** court recommended as potential remedies for a similar irregularity. *See* ***Young***, 129 Wn. App. at 476–77 (recommending the court offer a corrective instruction and specifically direct the jury to disregard the error).

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[6] Defendant argues that "telling the jury to disregard the 'previous instruction' is not the same thing as telling them to disregard the fact that they heard that the defendant had a prior conviction for first-degree robbery, as serious and violent crime." Brief of Appellant at 29.

Finally, defendant's third premise is questionable because the record is ambiguous as to how many times the jury's attention was drawn to the original Instruction No. 20. Whether the court included the word "robbery" when it read its instructions to the jury is not clear from the record. *See* 8RP 22–24. Also, it is unclear precisely how long the jury saw the instruction on the overhead during the State's closing argument. The prosecutor stated that he "tried to sanitize it in the midst of the argument by using the other statutory language and then pulling it off the overhead *as quickly as I could* without looking too obvious about it." 8RP 22 (emphasis added). The transcript of the prosecutor's closing argument appears to verify his account of the events:

> The other crime, the second crime the defendant is charged with is Unlawful Possession of a Firearm and I'll put that instruction up, it is instruction number 20. You have a stipulation, I think it is Exhibit 91, that was admitted into evidence that's kind of the key thing here. To convict the defendant of Unlawful Possession of a Firearm in the First Degree; that he had a firearm in his possession or control, *that he has been convicted of a prior serious offense*, and that the possession or control of the firearm occurred in the State of Washington. You have the stipulation that says he was convicted of that prior serious offense.
>
> The final crime is the Unlawful Possession of a Controlled Substance . . . .

8RP 16 (emphasis added). Regardless, the trial court agreed that the instruction was not up long enough to make a difference, reasoning that

"how long we were up there, or it was up there, and we allowed a jury to look at it is *kind of quibbling to me*. Juries are made up of very capable people. And there's a stipulation in this record regarding a serious offense and I am satisfied that *what we're doing is appropriate, and again, does not warrant a new trial.*" 8RP 30 (emphasis added).

The trial court did not abuse its discretion when it denied defendant's motion for mistrial because it adequately remedied any alleged error. The irregularity did not prejudice the defendant such that "nothing short of a new trial" would ensure defendant a fair trial. ***Rodriquez***, 125 Wn.2d at 269. The court recognized the potential seriousness of the irregularity, remedying the error by collecting and correcting the original information, and issuing an instruction to disregard the original. The court repeatedly stated that it thought the irregularity could be remedied through this course of action. This Court should uphold the trial court's decision because the trial court was in the best position to determine whether defendant had received a fair trial.

2. DEFENDANT HAS FAILED TO DEMONSTRATE THAT COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT IT PREJUDICED HIS DEFENSE

To establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***,

466 U.S. 668, 687, 104 S. Ct. 2052 (1984); ***State v. Thomas***, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). "Surmounting ***Strickland***'s high bar is never an easy task." ***Padilla v. Kentucky***, __ U.S. __, 130 S. Ct. 1473, 1485 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. ***Strickland***, 466 U.S. at 687–88. There is a strong presumption that counsel's performance was not deficient. ***State v. McFarland***, 127 Wn.2d 322, 35, 899 P.2d 1251 (1995). The court reviews counsel's performance in the context of all of the circumstances. *Id.* at 334–35. Where counsel's acts or omissions are not a result of reasonable professional judgment, the court must determine whether counsel's performance "falls outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. "The constitution does not guarantee successful assistance of counsel." ***State v. Carpenter***, 52 Wn. App. 680, 685, 763 P.2d 455 (1988) (finding that a single mistake during trial does not *per se* render counsel's performance ineffective) (internal quotations omitted).

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. ***McFarland***, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have

had a *reasonable doubt respecting guilt*." ***Strickland***, 466 U.S. at 695 (emphasis added).

Defense counsel's performance in this case satisfied an objective standard of reasonableness because he took reasonable measures to prevent the jury from discovering the nature of defendant's prior conviction. When the State initially offered evidence regarding defendant's prior offense, defense counsel immediately requested a hearing outside the presence of the jury. 7RP 52–53. Defense counsel properly proposed and agreed to a stipulation before the jury reentered, and before any evidence pertaining to defendant's prior conviction of robbery was introduced. 7RP 52–56.

Later, defense counsel acted appropriately upon discovering that Instruction No. 20 inadvertently included the word "robbery." Once the error was discovered, defense counsel recommended several ideas to cure the mistake outside the presence of the jury, including the court's eventual remedy of collecting the instructions, correcting them, and issuing a statement to disregard the original instruction. 8RP 25. Defense counsel also moved for a mistrial when he discovered that two jurors had marked their original instructions. 8RP 26–27. Even though the court denied that motion, counsel's response to this irregularity was proper.

Defendant also fails to satisfy ***Strickland***'s prejudice prong because his counsel's performance did not affect the outcome of defendant's trial. Notwithstanding defense counsel's actions, the jury

never received any direct evidence that defendant had previously committed robbery. As argued above, the trial court denied defense counsel's motion for a mistrial because it determined the irregularity had not prejudiced defendant's right to a fair trial. 8RP 29–30. In light of the court's steps to cure the irregularity, defense counsel's performance did not prejudice the defense.

Defendant argues in part that his counsel's performance was deficient for failing to introduce the stipulation prior to trial, which "nearly resulted" in error. Brief of Appellant at 30. However, defendant fails to identify any standard or rule of conduct that requires defense counsel to stipulate to a prior offense before trial. ***Strickland***'s standard requires deficient performance and *actual* prejudice. 466 U.S. at 687. Performance that "nearly resulted" in error does not meet this standard.

Defendant also argues that his counsel performed ineffectively by failing to object to the State's proposed instructions. Brief of Appellant at 30. Counsel's failure to object does not appear to be a strategic act or omission. While perhaps counsel should have objected to the instruction when the court reviewed the proposed jury instructions, counsel's failure to do so does not *per se* render defendant's trial unfair. *See* ***Carpenter***, 52 Wn. App. 685. In these situations, the court must determine whether counsel's actions fell outside the "wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. The inclusion of "robbery" on Instruction No. 20 was inadvertent—a mistake overlooked not only by

defense counsel, but by the court and the prosecutor as well. That each of these parties failed to catch the error demonstrates that trials are still subject to mistakes and irregularities, even if conducted by competent individuals acting under prevailing professional norms. When the irregularity became an issue, defense counsel responded appropriately.

Defendant fails to demonstrate how his counsel's performance failed to satisfy an objective standard or reasonableness in light of the trial irregularity at issue in this case. Neither does defendant show that his counsel's performance undermined the outcome of his trial. The trial court determined that the irregularity—regardless of counsel's actions—did not have an impact on defendant's fair trial. This Court should deny defendant's claim of ineffective assistance of counsel.

3. DEFENDANT WAIVED HIS RIGHT TO CHALLENGE ALLEGED GANG EVIDENCE FROM TRIAL BECAUSE HE FAILED TO PRESERVE THE ISSUE BELOW

A party must object and make a record in trial in order to preserve an error for review. ER 103(a). This Court may refuse to review any claim which was not raised to the trial court if the defendant does not demonstrate that it was a manifest error of constitutional magnitude. RAP 2.5(a); *see also* ***State v. Elmore***, 154 Wn. App. 885, 897, 228 P.2d 760 (2010). "'Manifest error' requires a showing of actual and identifiable

prejudice to the defendant's constitutional rights at trial." *Id.* (citing ***State v. Kirkman***, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)).

Defendant challenges four isolated statements made at trial:[7] a patrol officer who testified that he currently worked "with the gang unit,"4RP 6, a K-9 officer who testified that he met with "gang unit officers regarding the operation they were involved with," 6RP 63, a detective who testified that the victim had said defendant "always brings a gun to the fight," 6RP 94, and a tribal officer who testified that the shooting occurred at a "known gang hangout." 1RP 77.

Defendant, however, did not object to any of these statements at trial. Thus, in order to raise this issue for the first time on appeal, defendant must demonstrate that the statements constitute a manifest error that affected a constitutional right. ***Elmore***, 154 Wn. App. at 897. Defendant makes no such showing here.

The statements in question did not have a prejudicial impact on defendant's right to a fair trial. None of the statements, whether viewed in isolation or together, implied that defendant was a member of a gang, or that the crime in question was gang related. For example, when considering the context of the officers' statements about the gang unit, it is apparent the answers came in response to a simple question about what

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[7] Defendant briefly states that the State exploited this evidence in closing argument, but fails to assign error to the prosecutor's statement, or include any argument on the issue. Brief of Appellant at 30.

their current duties were as officers for Tacoma:

> [Prosecutor]: What sort of assignments have you had during your time with Tacoma Police Department?
>
> [Patrol officer]: Other than patrol, I've done marine services unit, dive rescue unit, and currently with the gang unit.

4RP 6.

> [Prosecutor]: Were you working on the evening of April 27th going into the morning of April 28th, 2011?
>
> [K-9 officer]: I was working my general K-9 duties. I was requested to meet with our gang unit officers regarding the operation they were involved with.

6RP 63. In neither situation did the prosecutor seek to elicit some improper evidence that defendant belonged to a gang. Fifteen officers testified throughout the trial—with responsibilities ranging from the patrol unit to the homicide unit. Defendant assigns error to two of these statements only because the officers mentioned that they worked with the gang unit. Nothing was prejudicial about their responses. This is likely why defense counsel did not object.

Similarly, the tribal officer's statement that the shooting occurred at a known gang hangout was an unsolicited, isolated statement that did not link defendant to gang-related activity:

> [Prosecutor]: After you had contact with the fire department, what did you do next?
>
> [Tribal officer]: Well, because they said the shots came from 32nd and Roosevelt, I knew that there was a garage

> behind the house at 2218 East 32nd that's a known gang hangout. I went down 34th and went down the alley heading westbound towards Roosevelt and I saw a Tacoma officer standing outside the garage converted to an apartment.
>
> Q: Did you observe a Tacoma Police Officer exiting the courtroom earlier this afternoon?
>
> A. When I arrived today I asked if he was the officer that I'd seen, but other than that I didn't recognize him.

1RP 77–78. The statement did not imply defendant was a member of a gang or that the shooting was gang related, but rather a remark that simply related why the officer was familiar with the area. The prosecutor did not draw attention to the statement, nor did the defense by objecting to it.

Defendant also argues that the detective's testimony—that Mark stated, "Gizmo always brings a gun to a fight," during an interview—was improperly admitted as bad character or propensity evidence. Brief of Appellant at 23. But the context of this testimony reveals that it was not improper, and that it was neither solicited by the prosecution nor objected to by the defense.

The detective testified after Mark, who previously took the stand and denied telling detectives that he knew defendant or that defendant had shot him. 5RP 36–39. To impeach Mark, the State asked questions pertaining to the detective's interview with Mark. 6RP 92–95. The detective testified that Mark was hesitant to participate in the interview

because he feared for his and his family's safety. 6RP 92–93. The prosecutor continued:

> [Prosecutor]: Did you just end the interview or questioning at that point in time?
>
> [Detective]: No, we talked to him some more and tried to convince him that it's the right thing to do. . . . And, again, he was very reluctant to talk. So, initially, it was just tell us what happened. He wouldn't talk. So we started to ask him direct questions. And detective Chittick asked him if it was – if the fight and the shooting was about the incident with Tara and his reply was, something like that.
>
> [Prosecutor]: Is that literally the words he used, something like that?
>
> [Detective]: Yes. I then talked to him, Marcus, for a few minutes, explained that it is probably in the best interest for himself and for Tara and for the Puyallup Tribe to tell us what happened. And I said it's in the best interest of the safety of Tara, Marcus, and other Tribal members that he tell us what happened so that we can get this person into custody and arrest them, prosecute them. He, again, stated that he didn't want to, he feared for his safety. I simply asked him a direct question, I said, did Gizmo shoot you. Gizmo is the street name of Johnny Garcia, and he stated, yes. We went on to ask him a few more questions and he made the comment, Gizmo always brings a gun to a fight. He went on to acknowledge that they knew each other very well they'd been roommates for a while, I think there was also a little guilt over that, that's also why he didn't want to tell us what happened.

6RP 93–94. The now challenged testimony came as an unsolicited narrative response to the prosecutor's yes-or-no question. Moreover,

defendant did not object to the testimony, thereby failing to preserve the issue for review.

The record shows that defendant's decision not to object was part of his trial strategy. Part of the State's theory, as demonstrated above, was that Mark refused to identify the defendant as the shooter out of fear of retaliation. Defendant attempted to undermine that theory by arguing that if Mark *really* feared retaliation, then he would not have told detectives who the shooter was, regardless of whether he was in or out of court. For example, during the detective's cross-examination, defense counsel asked:

> [Defense counsel]: You said that Marcus, we have been calling him Marcus or Mark, so you know who I'm talking about, Mr. McCloud –
>
> [Detective]: Yes.
>
> Q. – was concerned about retaliation so he didn't want to say who shot him, is that correct?
>
> A. Correct.
>
> Q. But then he gave you the name of Gizmo?
>
> A. No. Well, I asked him specifically, did Gizmo shoot you.
>
> *Q. Isn't that exactly what he said he didn't want to give you because of retaliation?*
>
> A. He said he didn't want to say anything about it. I asked him a direct question, he answered.
>
> *Q. Can you explain to us is there something you did to overcome his fear?*

A. Well, like I said, before I asked him the question, I started talking to him about stepping forward for his safety, for Tara's safety, and the Tribe safety in talking to us. I understand he didn't want to make a statement, but sometimes for some people there is a difference between making a statement and simply answering yes or no, from my experience. I asked him a yes or no question.

Q. Was it your belief from your training and experience that the person he was worried about the retaliation was the person who shot him?

A. That was my opinion, yes.

Q. Thank you.

6RP 97–98 (emphasis added). Defendant reiterated this point during closing argument:

> The other theory that the State has presented throughout this trial that seems difficult when you think it through – and sometimes these sort of theories that are presented to you, maybe it's like a lot of things in life, sounds good at the time until you think it through, which is probably why we use 12 people in the criminal system and why you get time to think about it – *is they kept hitting on this fear of retaliation.* And without saying so, of course, what they were suggesting was that witnesses were afraid of Mr. Garcia and so they didn't want to talk. But here's the problem, and I asked every one of these witnesses whenever this was suggested by the State that there was a fear of retaliation, I said, but then they gave you that name. Yeah, they gave us one.
>
> So it seems to me the State can't have it both ways, *You can't say that a witness was afraid of retaliation but he gave us that name. You know, which is it.* Are they afraid of Mr. Garcia or are they afraid of someone else because how

> do you track that through. It's a fear of Mr. Garcia, but what name did he give you. They gave us Gizmo, gave us Mr. Garcia.
>
> That's also another theory that if you spend time thinking about it, how is that fear of retaliation. Here we are months down the line, the witnesses come in the courtroom, and if you think some reason that they're afraid of him now and just don't want to point to him, of course, you're free to do that, ...

8RP 49–50 (emphasis added). Defendant did not object to the detective's testimony as "bad character" or "propensity" evidence because defendant wanted to show the jury that if Mark was so afraid of the shooter, then he would not have actually identified the shooter to the detectives. Defendant's failure to object was thus merely part of his trial strategy.

Even if defendant's failure to object was not part of his trial strategy, the detective's testimony was otherwise admissible. First, the statement could be admissible as impeachment evidence. Under ER 607, the State may impeach its own witnesses. Here, Mark denied telling detectives anything about the shooter. 5RP 36–39. To impeach Mark, the State asked the detective about what Mark had said during the interview. 6RP 92–95.

The evidence could also be admissible under the hearsay exception ER 803(a)(3)—then existing mental or emotional condition. The testimony showed that Mark was hesitant to identify defendant as the shooter because at the time he feared retaliation. It is evident from the

questioning above that Mark initially refused to speak to detectives because of this fear.

Whether the evidence was proper or not, defendant waived his right to challenge the testimony above because he did not preserve the issue below. Furthermore, because he does not show any *actual* or identifiable prejudice, defendant cannot raise this issue for the first time on appeal. ***Elmore***, 154 Wn. App. at 897.

4. DEFENDANT FAILED TO DEMONSTRATE THAT HE IS ENTITLED TO A NEW TRIAL FOR CUMULATIVE ERROR BECAUSE HE DOES NOT SHOW THAT ANY PREJUDICIAL ERRORS OCCURRED BELOW

The cumulative error doctrine is reserved for "severe trial errors" that do not warrant a reversal alone, but deny the defendant a fair trial when combined. ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). When determining whether the errors denied defendant a fair trial, the court only considers prejudicial errors. *See* ***State v. Stevens***, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Defendant fails to demonstrate that any of the alleged errors were prejudicial below. Additionally, none of the alleged errors—even if

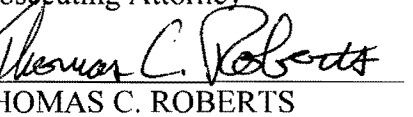
combined—constitute "severe trial errors" that warrant the exceptional remedy of reversal. This Court should deny defendant's claim of cumulative error.

D. CONCLUSION.

This Court should uphold the trial court's denial of defendant's motion for mistrial. The Court should give deference to the trial court's findings that the instructional irregularity was not so serious or prejudicial that it necessitated a mistrial. The trial court cured any alleged prejudice by expressly instructing the jury to disregard the irregularity. This Court should also deny defendant's claims of ineffective assistance of counsel and cumulative error because defendant has failed to demonstrate that any of the alleged errors prejudiced the defense, such that the only remedy is reversal.

DATED: September 13, 2012.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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WSB # 17442

Kiel Willmore
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.13.12 — [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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