SUPREME COURT NO. 92239-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	COA:. No. 71823-1-I
Plaintiff/Respondent,	King County Cause No. 13-1-00758-1 SEA
v.	MOTION FOR DISCRETIONARY REVIEW
RODOLFO JEREZ-SOSA,	
Defendant/Petitioner,	

A. IDENTITY OF PETITIONER

Rodolfo Jerez-Sosa, the Petitioner, and pro se in the above entitled-case,[1] asks this Court to accept review of an Unpublished Opinion in the Court of Appeals Division One (COA)[2] who, on August 10, 2015, affirm, his conviction, Petitioner is timely filing his Petition of review in this Court.

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[1]Mr. Rodolfo Jerez-Sosa, ask this Court to please take notice of his pro se status and apply the less stringent standard to this action. See Meleng v. Cook, 490 U.S. 488, 493, 109 S.Ct. 1927, 104 L.Ed.2d 540 (1989)(citing Haines v. Kerner, 404 U.S. 519, 30 L.ED.2d 652, 92 S.Ct. 594 (1972)(Holding that pro se petitions must be held to less stringent standard than formal pleadings drafted by lawyers and should be liberally construed), rehrg denied, 405 U.S. 948, 30 L.Ed.2d 819, 92 S.Ct. 963 (1972); See also Sanders v. Ryder,

should not be considerated in the analysis. Unpublished Opinion at 8. Then the Court of Appeals concluded: "When Santos-Valdez resumed the stand, the prosecutor asked whether Santosvaldez had personal knowledge of Mr. Jerez-Sosa successfully robbing liquor stores and being shot in the neck during a robbery, or whether Jerez-Sosa had merely told Santos-Valdez these things. Santos-Valdez stated that his testimony was based only on what Jerez-Sosa had told him": "Consequently, the facts presented **appear** to have been sufficient evidence for any trier of facts to find petitioner guilty of first degree robbery while armed with fireram. (emphasis added). However, nowhere, did the Court of Appeals suggest that they had reviewed the trial court evidentiary ruling for abused of discretion. Because, Santos-Valdez was the (co-defendant) of Mr. Jerez-Sosa. Santos-Valdez was facing the originally charged with (24-counts) of robberies in the first degree, he was also facing at 55-years in prison. The Prosecutor's offered Santos-Valdez's a plea deal a 33-years, to testify against Mr. Jerez-Sosa's trial, Santos-Valdez also facing charged with a murder in second degree. Nowhere did the Court of Appeals suggest that they had reviewed the trial court record themself. They never named the evidence that purportedly supports that Santos-Valdez's testimony against Petitioner's for plea deals, nor did the Court of Appeals cite to any portions of the trial transcript. In fact, the Court of Appeals never stated that they **found** the credible Santos-Valdez's made fall testimony against Mr. Jerez-Sosa, for his plea deal; the Court of Appeals simply stated that the evidence "appear[s]" to be sufficient, based upon the State's Response Brief's, evidence efforts to overcome them. This Court consistently review a trial court evidentiary ruling for aubuse of discretion. See, State v. Finch, 137 Wash.2d 792, 810, 975 P.2d 967 (1999).

A trial court abused it discretion when it evidentiary ruling"'manifestly unreasonable, or exercised on untenable grounds, or for untenable reason" State v. Dowing, 151 Wash.2d 265, 272, 87 P.3d 1160 (2004)(quoting State v. Ex Rel Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)); State v. Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002) This Court consistent stated in (ER 404(b) rules provision following:

> "The court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introducted, (3) Determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against it prejudicial effect".

State v. Thang, 145 Wash.2d 630, 642, 41 P.3d 1159 (2002) (emphasis added).

Petitioner-Rodolfo Jerez-Sosa is claims that the trial court erred by did not conduct and ER 404(b) analysis on the record before admitting the bad acts evidence "said he got away with robbing a liquor store and was successful at it" See Op Page 7. The Court of Appeals unresonable to concluding that the bad acts occurred at trial court denied the motion for mistrial not prejudice Petitioner.

This Court had consistently held in (ER 404(b) See, State v. Piatle, 127 Wash.2d 628 648-49, 904 P.2d 245 (1995) cert denied 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1048 (1996) A trial court should resolve doubts as to admissibility of prior bad acts character evidence under ER 404(b) in favor of exclusion. State v. Thang 145 Wash.2d 630, 642 41 P.3d 1159 (2002) (citing State v. Smith 106 Wash.2d 772, 776, 725 P.2d 951 (1986)) If the trial court admits ER 404(b) evidence; "it must provide the jury with limiting instruction specifying the purpose of the evidence" State v. Foxhven, 161 Wash.2d 168, 175, 163 P.3d 786 (2007); State v. Gonderson, 181 Wn.2d 916 377 P.3d 1090 (Wash 2014).

This Court has jurisdiction over this matter pursuant to Rules of Appellate Procedure (RAP) 13.5A(a)(1); RAP 16.14(c); and authority to grant review under RAP 13.4(b); RAP 13.5A(b); as well as the discretion to grant review in the interest of justice, or to correct a fundamental miscarriage of justice.

B. DECISION OF COURT OF APPEALS APPLIED AN INCORRECT STANDARD OF REVIEW

Immediately before discussing Jerez-Sosa's prejudice admitting the bad act evidence, See Mr. Rodolfo-Sosa Opening Brief Page 27-30. The the Court of Appeals factual finding are entitled to a presumption of correctness. The Court of Appeals noted that "[t]he statutory presumption also applies to the factual finding of the trial court. See Unpublished Opinion. Page 7-8. The Court of Appeals than disposed the "bad acts evidence" sufficiency of the evidence claim as follows:

> [C]certain evidence has been admitted in this case for only a limited purpose. During his testimony, Mr. Santos-Valdez referred to an alleged statement by the Defendant, Mr. Jerez-Sosa, that he, the Defendant, had successfully robbed a liquor store. Mr Santos-Valdez also stated that the Defendant told him that he was allegedly shot in the neck during the commission of a prior robbery.
>
> If you find these statements credible, you may consider them only for the purpose of assessing the Defendant's state of mind on September 7th 2012, and for no other purpose. You may not consider these statements for their truth, that is, whether or not the Defendant committed other robberies. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Unpublished Opinion at 7-8. (emphasis added). The Court of Appeals then rejected Rodolfo-Sosa's argument that inconsistent or circumstantial evidence

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[1]Continue, 342 F.3d 991, 999 (9th Cir. 2003); cert denied, 541 U.S. 956, 124 S.Ct. 1661, 158 L.Ed.2d 394 (2004); Peterson v. Lambert, 319 F.3d 1153, 1159 (9th Cir. 2003).

[2]A copy of the Unpublished Opinion from the Court of Appeals Division One is attached as Appendix A, and incorporated herein by reference.

The Court of Appeals's discussion precisely tracks the methodology that Supreme Court must apply to factual findings that are entitled to a presumption of correctness: the court first determines what findings were made by the trial court, and then decides whether the petitioner had met his burden of overcoming the presumption by "convining evidence". See ER 404(b) This approach is erroneous, however, when reviewing a claim of "bad acts evidence" admitted.

ER 404(b) specifically excludes claim of bad acts of the evidence from the presumption of correctness, and directs this Court to review the record itself. Deference to the trial court is preserved through the Thang standard itself, which requires this Court to resolve conflict inferences.

Here is present case, Mr. Jerez-Sosa's the trial court did not conduct and ER 404(b) analysis on the record before admitting the bad acts character evidence was prejudice to Mr. JerezSosa. In addition, even when the Court of Appeals got the facts right, it reached unreasonable inferences from them. The court found the evidence sufficient to support Mr. Jerez-Sosa conviction in part because, co-defendant Santos-Valdez's testified, of prior bad acts character evidence, "said Jerez-Sosa got away with robbing a liquor store and was successful at it", in the court's view, consistent with guilt. The Court noted that Mr. Jerez-Sosa was shot, the scare in the Mr. Jerez-Sosa's neck while "committing robberies". The Court of Appeals appearance did not address the prior bad acts character evidence issue, and mention nothing the defense counsel failure to objection that Santos-Valdez "violated the pretrial agreement by bring up [an ER 404(b) accusation of prior misconduct" and moved for a mistrial. The trial court error by not analysis ER 404(b) and the Court of Appeals failure to correct. Thus, is violated Mr.

Jerez-Sosa's State and Federal Constitutional for a fair trial, and fundamental prejudice outcome of his conviction. If the jury would not hear the prior bad acts character evidence admitted into evidence, Mr. Jerez-Sosa's "had prior committed robbing a liquor store", the jury very well may not found him guilty of the robberied. Then the verdict outcome would have been difference in this case.

C. ISSUES PRESENTED FOR REVIEW

This Court had consistent held that a trial court should resolve doubts as admissibility of prior bad act character evidence under ER 404 (b) in favor of exclusion. See State v. Thang, 145 Wash.2d 630, 642 41 P.3d 1159 (2002) citing State v. Smith, 106 Wash.2d 772, 776, 725 P.2d 951 (1986), the trial court failure to preceding this Court and the Court of Appeals fail to correct the err, therefore, is violated Mr. Jerez-Sosa's State and Federal Constitutional right a fair trial.

D. STATEMENT OF THE CASE

Around 10:30 p.m on September 7, 2012, Yellow Cab driver Fasil Berhanu drove to Safeco Field after a Seattle Mariners game had just ended. Two men, later idetified as Asuan Santos-Valdez and Rodolfo Jerez-Sosa, hailed his cab. Santos-Valdez to Berhanu to drive to Beacon Hill.

When Berhau reached the intersection of Beacon Avenue South and 13th Avenue South, Santos-Valdez told Berhaun to turn left and park. After he stopped, Santos-Valdez told Berhanu, "just give me everything, .. whatever you have". When Berhanu turned around, Santos-Valdez said, "Just give me the money". Santos-Valdez then hit Berhanu in the face with a gun, breaking his cheekbone. Berhanu gave Santos-Valdez his wedding ring, his watch, and some cash.

Santos-Valdez told Jerez-Sosa to "[t]ake everything". Jerez-Sosa took

Berhanu's wallet, two cell phones, and a bag containing Berhanu's for-hire license and Good to Go! toll pass from the front passenger seat. Jerez-Sosa also took Berhanu's key an sunglasses from the center console, pulled out the wires connecting the radio and dispatch computer, and obscured the cab's security camera with the sun visor...

Bystander David Mithcell saw Berhanu "being robbed or being beaten up" by Santos-Valdez. Mithcell called 911.

The State charged Santos-Valdez and Jerez-Sosa with robbery in the first degree. Santos-Valdez entered into a plea agreement. As part of the agreement, Santos-Valdez agreed to testify against Jerez-Sosa. The State amended the information to charge Jerez-Sosa with robbery in the first degree while armed with a firearm. Jerez-Sosa notified the State that he intended to assert a duress defense based on the testimony of forensic psychologist Dr. Delton Young that Jerez-Sos suffered from post-traumatic stress disorder (PTSD).

Before trial, Jerez-Sosa moved to excluded evidence of prior bad acts under ER 404(b). defense counsel stated that "in our interview of Mr. Santos-Valdez, ... he mentioned a number of times purported criminal behavior that my client had participated in prior to these allegation that we're here for today". The prosecutor agreed he would not elicit the testimony "until a duress defense is actually formally offered or introduced to a jury. Mr. Jerez-Sosa herein incorperated reference to the Court of Appeals Unpublished Opinion facts.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court accepts review from an Unpblished Opinion a petition where a decision of the Court of Appeals with a decision of this Court or other

decision of the Court of Appeals or if a significant question of law arises under either the State and Federal Constitution; or where the petition involves an issue of substantial public interest that calls for resolution by this Court. RAP 13.(b)(applying the considerations set forth in RAP 13.4(b)).

1. The Other Robbery Evidence Was a Serious Trial Irregularity.

First, the state argues Santos-Valdez's testimony was not a serious trial irregularity, because the court's ruling prohibiting testimony about prior had acts was not an absolute prohibition on such testimony. Brief of Respondent at 29. But the state is minimizing the strictness of the court's ruling. The court had ruled there would be no mention of any ER 404(b) evidence in the state's case-in-chief. RP 17. In advance of Santos-Valdez's testimony, the court admonished him not to mention other alleged crimes. RP 119-120.

This admosishm came well after opening statement. RP 119-120. Thus, the fact Mr. Jerez-Sosa advanced a duress defense in opening does not lessen the strictness of the court's ruling. Santos-Valdez's testimony violated the court's ruing to steer clear of other crimes and therefore constituted a serious trial irregularity.

Second, the state argues that the court's ultimate determination that at the evidence could have been admitted during rebuttal renders the irregularity one of timing, rather than admissibility. Brief of Response at 30. Regardless of the court's ultimate ruling, however, Jerez-Sosa maintains the evidence was not admissible under ER 404(b), because the state never proved the statements were made, and because any probative value of

the evidence was far outweighed by its prejudicial effect. See Jerez-Sosa's Opening Brief at 23-30.

Moreover, Jerez-Sosa disputes the state's attempt to characterize Santos-Valdez's testimony as unintentional. State's Brief of Response at 30. He was specifically instructed not to talk about "other robberies" by the prosecutor. RP 119-120. Alleging Jerez-Sosa robbed a liquor store and was shot while committing other robberies is talking about "other robberies". The record show Santo-Valdez intentionally interjected inadmissible evidence in violation of the court's ruling.

Third, the state attempts to distinguish the seriousness of the irregularity from that in Escalona, cited in Jerez-Sosa's Opening Brief. at 24-25, 29-30; State v. Escalona, 49 Wn. App 251, 742 P.2d 190 (1987). As argued in the opening brief, the circumstances here are analogous to those in Escalona, where the court held evidence of a prior stabbing was extremely prejudicial in the state's case against Escalona for stabbing someone.

But contrary to the state's argument State's Response Brief at 31, the properly admitted evidence against Jerez-Sosa was similarly thin as that in Escalona, Significantly, Berhanu's testimonay did not rebut Jerez-Sosa's claim of duress. On the contary, Berhanu testified Santos-Valdez was the one with the gun and the one who punched him in the eye. RP 78. Berhanu also testified Santos-Valdez directed Jerez-Sosa to "[t]ake everything". RP 81. Accordingly, this evidence supported Jerez-Sosa's duress defense.

And while Berhanu also testified he did not see or hear Santos-Valdez threaten Jerez-Sosa, Berhanu was scared and in shock. RP 100, 211, 218. Thus, it is possible his perception of the circumstances was skewed or that he

missed subtle details.

The state also attempts to downplay the seriousness of the irregularity by pointing to the Facebook photos depicting Jerez-Sosa with "other robbery participants cavorting with a gun". State's Response Brief at 32. At the outset, it should be noted that the only evidence admitted to indicate Valle-Matos and Oreste Duanes-Gonzalez participated in the robbery was the word of Santos-Valdez. Second, the picture did not include Santos-Valdez. RP 296. Thus, it did not rebut Jerez-Sosa's testimony that he was merely acquainted with Santos-Valdez and acting under duress the night of the robbery.

Fourth, the state attempts to distinguish the seriousness of the irregularity from that in Miles, cited in Jerez-Sosa's Opening Brief,[3] by arguing the offending testimony in that case would have been inadmissible under any circumstances; whereas, the state claims, the evidence in Jerz-Sosa's case was admissible to rebut his duress defense. State's Response Brief at 32. However, Jerez-Sosa disputes the "other robbery" evidence was admissible to rebut his duress defense. Jerez-Soa's Opening brief at 26-30. Evidence of a defendant's prior bad act actually occurred and that it's potential for prejudice is outweighed by its relevancy. State v. Fuller, 169 Wn.App. 797, 282 P.3d 126 (2012). The state failed on both counts here.

Fifth, the state attempts to distinguish the seriousness of the irregularity from that in Wilburn, cited Jerez-Sosa's Opening Brief,[4] on grounds the outcome turned largely on the credibility of Wilburn and the

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[3] Petitioner's Opening brief at 25; Stat v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968).

[4] Petitioner's Opening Bried at 25; State v. Wilburn 51 Wn. App 827, 755 P.2d 842 (1988).

victim; whereas the state claims, the outcome here did not turn on the credibility of Jerez-Sosa and Santos-Valdez. State's response brief at 33.

Again, however, the state is mistaken. Berhanu's testimony could be viewed as supporting Jerez-Sosa's testimony he was merely acting as directed by Santos-Valdez. To convict, the jury therefore had to believe Santos-Valdez. Under the circumstances, his accusations Jerez-Sosa said he robbed a liquor store and was shot while committing other robberies had to have weighed into the jury's evaluation of the men's relative credibility. Thus, the severity of the irregularity was extremely prejudice Jerez-Sosa.

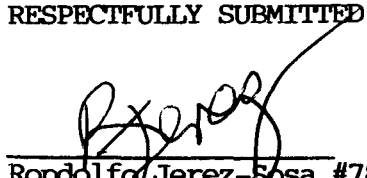
As explained above, this case meets the criteria for review under RAP 13.4(b). Because, the Court of Appeals erred by failing to consider and apply the State v. Thang, factors when deciding Mr. Jerez-Sosa's case, an issue that may reoccur in future case, this Court should grant review and set forth the proper standard for the lower courts to follow.

F. CONCLUSION

Because the State and Federal Constitutional were violated Mr. Jerez-Sosa's claim, the lower court erred by failing address the prior bad acts characterize evidence. Mr. Jerez-Sosa respectfully ask this Court should exercise its discretion and either accept and reversed, or accept review and remand to the trial court for a new trial.

DATED in this 22nd day of September, 2015.

RESPECTFULLY SUBMITTED



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APPENDIX A.

STATE V. RODOLFO JEREZ-SOSA, King County Superior Court No. 13-1-00758-1.

UNPUBLISHED OPINION OF THE COURT OF APPEALS DIVISION ONE NO. 71823-1-I.

APPENDIX A.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,	)	No. 71823-1-I
v.	)	UNPUBLISHED OPINION
RODOLFO JEREZ-SOSA, Appellant.	)	FILED: August 10, 2015

SCHINDLER, J. — A jury convicted Rodolfo Jerez-Sosa of robbery in the first degree while armed with a firearm. Jerez-Sosa seeks reversal, arguing the trial court erred in denying his motion for a mistrial. We disagree, and affirm.

FACTS

Around 10:30 p.m. on September 7, 2012, Yellow Cab driver Fasil Berhanu drove to Safeco Field after a Seattle Mariners game had just ended. Two men, later identified as Asuan Santos-Valdez and Rodolfo Jerez-Sosa, hailed his cab. Santos-Valdez told Berhanu to drive to Beacon Hill.

When Berhanu reached the intersection of Beacon Avenue South and 13th Avenue South, Santos-Valdez told Berhanu to turn left and park. After he stopped, Santos-Valdez told Berhanu, "Just give me everything, . . . whatever you have." When Berhanu turned around, Santos-Valdez said, "Just give me the money." Santos-Valdez

then hit Berhanu in the face with a gun, breaking his cheekbone. Berhanu gave Santos-Valdez his wedding ring, his watch, and some cash.

Santos-Valdez told Jerez-Sosa to "[t]ake everything." Jerez-Sosa took Berhanu's wallet, two cell phones, and a bag containing Berhanu's for-hire license and Good To Go! toll pass from the front passenger seat. Jerez-Sosa also took Berhanu's keys an sunglasses from the center console, pulled out the wires connecting the radio and dispatch computer, and obscured the cab's security camera with the sun visor.

Bystander David Mitchell saw Berhanu "being robbed or being beaten up" by Jerez-Sosa and Santos-Valdez. Mitchell called 911.

The State charged Jerez-Sosa and Santos-Valdez with robbery in the first degree. Santos-Valdez entered into a plea agreement. As part of the agreement, Santos-Valdez agreed to testify against Jerez-Sosa. The State amended the information to charge Jerez-Sosa with robbery in the first degree while armed with a firearm. Jerez-Sosa notified the State that he intended to assert a duress defense based on the testimony of forensic psychologist Dr. Delton Young that Jerez-Sosa suffered from post-traumatic stress disorder (PTSD).

Before trial, Jerez-Sosa moved to exclude evidence of prior bad acts under ER 404(b). Defense counsel stated that "in our interview of Mr. Santos-Valdez, . . . he mentioned a number of times purported criminal behavior that my client had participated in prior to these allegations that we're here for today." The prosecutor agreed he would not elicit the testimony "until a duress defense is actually formally offered or introduced to a jury." The prosecutor stated, "[I]f the case does proceed as planned, we anticipate that some of that evidence will come in in order to rebut the duress defense and this

theory that Mr. Jerez-Sosa is afraid of Asuan Santos-Valdez." The trial court ruled:

> [A]t least in its case in chief, the State's witnesses will not refer to any [ER] 404(b) material with respect to Mr. Jerez-Sosa.
>
> If during the trial the State believes that it may be admissible under 404(b), let's discuss that outside the presence of the jury. But at least at this point, until we get to rebuttal, there should be no surprises in terms of witnesses talking about 404(b) material.

Defense counsel addressed the duress defense during opening statement. Defense counsel told the jury that "Mr. Jerez-Sosa will testify in this case and he will say that he was threatened. He will tell you that he has been shot in the past and the threat of being shot again was real and he was very, very scared." Defense counsel told the jury that Dr. Young "will explain to you the impact of a gun being brandished on a person who had been shot twice in the past."

A number of witnesses testified during the six-day trial, including Berhanu, Santos-Valdez, Mitchell, a Seattle Police Department detective, a video specialist to authenticate the security camera video from the cab, and Dr. Young.

Berhanu testified that Santos-Valdez and Jerez-Sosa spoke to each other in a "normal tone" of voice during the cab ride. Berhanu did not hear Santos-Valdez raise his voice or make any threats to Jerez-Sosa, nor did he see Santos-Valdez point a gun at Jerez-Sosa. Berhanu testified that Jerez-Sosa did not appear scared or frightened. Berhanu said they were "working together."

Mitchell testified that Jerez-Sosa and Santos-Valdez "took off running together" and "raced up" a nearby staircase. Mitchell stated that as Jerez-Sosa and Santos-Valdez ran off, the two men were "a foot or two" apart and appeared to be together. Mitchell also testified Santos-Valdez did not point a gun or make any threatening gestures at Jerez-Sosa.

Before Santos-Valdez took the stand, the prosecutor told Santos-Valdez that he would not ask "about other robberies or other crimes that Mr. Jerez-Sosa is allegedly involved in." The prosecutor instructed Santos-Valdez to "not volunteer that information or tell that information to the jury," and to ask the judge if he had "any questions or concerns about something I've asked." Santos-Valdez stated that he understood. The trial court also told Santos-Valdez, "So no mention of other alleged crimes that Mr. Jerez-Sosa was involved with unless we take up that matter outside the presence of the jury and I tell you specifically that you can say something about those other areas, okay?"

During direct examination, Santos-Valdez testified he had been friends with Jerez-Sosa, Oreste Duanes-Gonzales, Lazaro Valle-Matos, and "Jorge" since they were teenagers living in the same foster home. Santos-Valdez said that on the day of the robbery, the five men were driving around "pretty much looking for a victim and somebody to rob money." Santos-Valdez explained, "We was looking for a victim to rob since — first of all, the gun was not even — it didn't even belong to me, it belonged to them, and we was going to — the plan — well, we actually came up with a plan first."

In response to Santos-Valdez's testimony, "We wanted to — I'm kind of confused here, because I don't know if I [am] supposed to say this, but we was actually going to rob something different," the prosecutor said, "Okay." Santos-Valdez testified, "We was going to —" and defense counsel objected. The trial court overruled the objection. Santos-Valdez then testified, "Okay. [Jerez-Sosa] wanted to rob the liquor store and I didn't agree. He said that he got away with robbing liquor stores before and was

successful at it, but —."[1] Defense counsel objected as Santos-Valdez said, "— I didn't want to do it." The trial court again overruled the objection. Santos-Valdez said, "We end[ed] up not doing it." Santos-Valdez testified the men "came up with a plan" to go to Safeco Field.

> So somebody mentioned in the van the taxi. Since it wasn't a busy day, the Mariners was playing, so it's pretty busy, they got money. So we all agree and we come up — we come up with a plan that me and him was going to be dropped off in downtown Seattle by the Safeco Field [by] Lazaro and Oreste and Jorge.

Santos-Valdez described how he and Jerez-Sosa planned to take a cab from Safeco Field to the Lago Vista Apartments in Beacon Hill where there was a dark street with stairs nearby.

> There's stairs, so we could actually rob them, rob the taxi cab there, take his keys, his phones, whatever, and then run towards the stairs, which [are] really dark. He wouldn't — he couldn't — he wouldn't have been able to see what way we went.

According to Santos-Valdez, Jerez-Sosa agreed to the plan and never indicated any reluctance to commit the robbery. Santos-Valdez testified that during the cab ride, Jerez-Sosa called Duanes-Gonzales and Valle-Matos to confirm they were waiting in the getaway car. Jerez-Sosa spoke in Spanish so that Berhanu would not understand what he was saying. As Santos-Valdez pointed the gun at Berhanu, Jerez-Sosa got out of the back seat and went to the driver's side to "block the door so the guy wouldn't be spooked and just run out of there." Santos-Valdez testified that Jerez-Sosa "took the keys out of the car, he broke the radio, the things that you use to — what it's called, the walkie-talkie or whatever, he broked [sic] it." Santos-Valdez said Jerez-Sosa "on his

[1] Emphasis added.

own . . . blocked the camera with that sun thing. . . . It was something that he seen on his own and he covered." Jerez-Sosa and Santos-Valdez then fled "together." Santos-Valdez denied ever pointing a gun at Jerez-Sosa or threatening him in any way.

Defense counsel cross-examined Santos-Valdez about the testimony that he did not point the gun at Jerez-Sosa:

> Q And isn't it true, Mr. Santos-Valdez, that you pointed that gun at my client?
> A That's not true.
> Q Okay. You knew my client had been shot in the past; right? He's got a mark on his neck where he's been shot.
> A From committing robberies, yes.
> Q You knew that he had been shot and you knew that he would be frightened of you when you pulled that gun?
> A That's — that's a —
> Q It's a yes or no, yes or no?
> A That's not [the] truth.
> Q Thank you. Isn't it true that on September 7th, 2002, (sic) that you pulled a gun on my client and you forced him to participate in this robbery?
> A That's not [the] truth.[2]

After defense counsel concluded cross-examination, the prosecutor asked to "address a potential issue of opening the door outside the presence of the jury." During the recess, the prosecutor stated:

> One of the questions asked of Mr. Santos-Valdez was whether he was aware of the Defendant being shot in the neck. . . . The response from Mr. Santos-Valdez was that the Defendant got shot committing a robbery. Obviously that was not something we intended to elicit, but I think it was an appropriate response.

The prosecutor argued that "a key part of Dr. Young's opinion in this case is that, because the Defendant was shot in the neck, that he has a heightened sensitivity to firearms and a heightened sense of alarm," and sought approval to ask Santos-Valdez

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[2] Emphasis added.

further questions about his knowledge of Jerez-Sosa being shot.

Defense counsel argued Santos-Valdez "violated the pretrial agreement by bringing up [an ER] 404(b) accusation of prior misconduct" and moved for a mistrial. The trial court stated that "the way things stand right now, I would be inclined to grant the mistrial motion," but recessed to allow parties to submit briefing.

> Well, I'm inclined to grant the mistrial based on the significant prejudice that I think would be caused by the jury knowing that [Jerez-Sosa] had committed prior robberies. I can't think of anything more prejudicial.
>
> However, the only reason not to do it right now is if this type of testimony would come out anyway when Dr. Young testifies. . . .
>
> And so if this type of testimony were to come out anyway, then perhaps it's not as prejudicial as it appears at this time.

The following day, the trial court heard argument on the mistrial motion. Defense counsel asserted Santos-Valdez violated the trial court's order when he testified Jerez-Sosa "said he got away with robbing a liquor store and was successful at it," and when Santos-Valdez testified Jerez-Sosa was shot while "committing robberies." The prosecutor argued both statements were admissible to rebut the claim of duress. The trial court denied the motion for mistrial without prejudice, finding that it was difficult to assess the seriousness of the irregularity until the end of trial.

Nonetheless, the trial court decided to give a curative instruction to the jury. When the trial reconvened, the trial court instructed the jury as follows:

> [C]ertain evidence has been admitted in this case for only a limited purpose. During his testimony, Mr. Santos-Valdez referred to an alleged statement by the Defendant, Mr. Jerez-Sosa, that he, the Defendant, had successfully robbed a liquor store. Mr. Santos-Valdez also stated that the Defendant told him that he was allegedly shot in the neck during the commission of a prior robbery.
>
> If you find these statements credible, you may consider them only for the purpose of assessing the Defendant's state of mind on September 7th, 2012, and for no other purpose. You may not consider these statements for their truth, that is, whether or not the Defendant committed

other robberies. Any discussion of the evidence during your deliberations must be consistent with this limitation.

When Santos-Valdez resumed the stand, the prosecutor asked whether Santos-Valdez had personal knowledge of Jerez-Sosa successfully robbing liquor stores and being shot in the neck during a robbery, or whether Jerez-Sosa had merely told Santos-Valdez these things. Santos-Valdez stated that his testimony was based only on what Jerez-Sosa had told him.

Q . . . . In your previous testimony, you said that the Defendant told you that he wanted to rob a liquor store because he had been successful in the past; correct?
A That's correct.
Q But you have no firsthand knowledge of this. This is only what the Defendant told you; correct?
A That's correct.
Q In your previous testimony, you also said the Defendant was shot in the neck while committing robberies; correct?
A That's correct.
Q But again, you have no firsthand knowledge of this. This is only what the Defendant told you; correct?
A That's correct.

The trial court admitted into evidence a CD[3] containing 214 still images from the cab's security camera. The images show Jerez-Sosa making a phone call, Santos-Valdez pointing a gun at Berhanu, and Jerez-Sosa entering the front seat of the cab. At no time during the footage does Santos-Valdez point the gun at Jerez-Sosa.

At the end of the State's case, Jerez-Sosa renewed his motion for a mistrial. The trial court denied the motion "without prejudice to your raising the issue in the event of a conviction."

Jerez-Sosa testified that on the day of the robbery, he had been working as a

[3] Compact disc.

mechanic in Tacoma when he began experiencing pain in his neck. Jerez-Sosa said that he went to Safeco Field to buy Percocet because "[t]here are people who sell drugs" there. Jerez-Sosa said he saw Santos-Valdez at Safeco Field and knew he sold drugs. Jerez-Sosa testified he had met Santos-Valdez once before "but he was never my friend. And I never lived with him." Jerez-Sosa denied telling Santos-Valdez that he had ever robbed a liquor store or been shot while committing a robbery. Jerez-Sosa denied planning the robbery with Santos-Valdez.

Jerez-Sosa testified that after Santos-Valdez told him they could get drugs on Beacon Hill, they decided to hail a cab. Jerez-Sosa said that when the cab driver parked on Beacon Hill, Santos-Valdez pulled out a gun. According to Jerez-Sosa, Santos-Valdez told the driver to give him his wallet and money and then hit the driver with the gun. Jerez-Sosa testified that Santos-Valdez then pointed the gun at him and said, "And you watch the front. Check, check the front."

Jerez-Sosa testified he had been shot by strangers on two occasions, once in the neck and once in the foot, while walking around in the Central District of Seattle. Jerez-Sosa stated he had nightmares about being shot, and being around guns made him scared and apprehensive. Jerez-Sosa testified he was afraid he would be shot if he did not do what Santos-Valdez said. "When he pointed the gun at me, I had this feeling inside like when one knows that death is coming." Jerez-Sosa testified he grabbed a bag from the front seat of the cab and gave it to Santos-Valdez. Jerez-Sosa testified that he ran away from Santos-Valdez toward the light rail station where he got on a southbound train.

During cross-examination, the State introduced photographs from Valle-Matos'

Facebook page taken in 2012. The photographs show Jerez-Sosa, Valle-Matos, and Duanes-Gonzalez posing and smiling with a gun. Jerez-Sosa admitted knowing that Valle-Matos had a gun and that he was having a good time when the photographs were taken.

Dr. Young testified that he interviewed Jerez-Sosa and his stepmother, reviewed the charging document and the police reports, and administered two psychological tests. Jerez-Sosa told Dr. Young that he was "shot at random by a stranger" on two separate occasions in 2008. Dr. Young testified that in his opinion, Jerez-Sosa developed PTSD as a result of being shot and was suffering from PTSD at the time of the robbery. Dr. Young testified that individuals suffering from PTSD "tend to be jumpy and to have an exaggerated startle reflex if something startles them," and are "wary and vigilant about what's going on around them that they fear might hurt them." Dr. Young testified, in pertinent part:

> For an individual with post-traumatic stress disorder, particular [sic] PTSD stemming from being shot, he would probably be more reactive and more fearful than he would have been without the PTSD. . . . I believe that PTSD renders him more vulnerable to that kind of terrifying moment.

But Dr. Young admitted that if Jerez-Sosa "lied to me or fabricated a story, then — then that line of reasoning would be invalid."

The jury convicted Jerez-Sosa of robbery in the first degree. The jury returned a special verdict finding that Jerez-Sosa was armed with a firearm at the time of the crime.

Defense counsel renewed the motion for a mistrial. The trial court initially granted the motion. The court expressed concern about the jury's ability to distinguish between statements admitted for their truth and statements admitted for the purpose of

showing Jerez-Sosa's state of mind at the time of the crime.

However, on reconsideration, the trial court denied the motion for a mistrial. The court concluded the statement that Jerez-Sosa told Santos-Valdez that he had previously robbed a liquor store would have been admitted "to show that this was not a — there was no duress, but that Mr. Jerez-Sosa was a willing participant." As to the statement that Jerez-Sosa told Santos-Valdez he was shot while committing robberies, the trial court concluded that "if the Defense had not raised this issue, having been shot in the neck, we might have a different situation. But this was a critical part of the Defense argument." The trial court ruled the statement would have been admissible to rebut Jerez-Sosa's claim that Santos-Valdez knowingly capitalized on the vulnerability of someone who had previously been shot, or to impeach Dr. Young, who based his PTSD diagnosis on Jerez-Sosa's claim that he was shot as an innocent bystander. The trial court ruled the testimony was probative and not outweighed by its potential for prejudice. Jerez-Sosa appeals.

ANALYSIS

Jerez-Sosa argues the court erred in denying the motion for a mistrial. We review a trial court's decision to deny a motion for mistrial for abuse of discretion. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

A trial court has broad discretion to rule on irregularities during the course of a trial. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Determining whether an irregularity during trial is so prejudicial as to warrant a mistrial depends on (1) the

seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and (3) whether the irregularity could be cured by an instruction. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011).

The trial court is in the best position to determine if a trial irregularity caused prejudice. Perez-Valdez, 172 Wn.2d at 819. A mistrial should be granted "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). We will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

Jerez-Sosa contends the statements were a serious irregularity because the testimony violated the trial court's order in limine. The trial court's order prohibited witnesses from referring to any ER 404(b) misconduct "with respect to Mr. Jerez-Sosa." ER 404(b) applies to prior misconduct offered as substantive evidence. State v. Wilson, 60 Wn. App. 887, 891, 808 P.2d 754 (1991). Santos-Valdez did not testify that Jerez-Sosa actually committed other robberies or that he had been shot during a robbery. Instead, Santos-Valdez testified Jerez-Sosa told him about the prior robberies and the shooting. Santos-Valdez made clear that he had no firsthand knowledge about what Jerez-Sosa told him.

While Santos-Valdez's testimony was not cumulative, the statements were admissible to rebut the defense of duress. Jerez-Sosa claimed he agreed to rob Berhanu because Santos-Valdez pointed a gun at him. Evidence that Jerez-Sosa told Santos-Valdez he had previously robbed a liquor store was relevant to rebut Jerez-

Sosa's claim that he would not have participated in the robbery except under duress. Dr. Young testified that his opinion that Jerez-Sosa acted under duress would be "invalid" if Jerez-Sosa "lied to me or fabricated a story." Evidence that Jerez-Sosa told Santos-Valdez he was shot while committing a robbery cast doubt on Dr. Young's opinion that Jerez-Sosa was vulnerable to duress because of his PTSD.

Finally, the trial court instructed the jury that they could consider Santos-Valdez's statements only for the purpose of assessing Jerez-Sosa's "state of mind" and not for their truth. We presume the jury follows the instructions of the court. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). The case Jerez-Sosa relies on, State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), is distinguishable.

In Escalona, the State charged the defendant with second degree assault with a knife. Escalona, 49 Wn. App. at 252. The trial court granted a defense motion to exclude any mention of the defendant's prior conviction for the same crime. Escalona, 49 Wn. App. at 252. At trial, the victim testified that on the day of the assault, he was nervous because the defendant " 'already has a record and had stabbed someone.' " Escalona, 49 Wn. App. at 253. This court held the trial court erred in denying the defendant's request for a mistrial because of "the seriousness of the irregularity . . . combined with the weakness of the State's case and the logical relevance of the statement." Escalona, 49 Wn. App. at 256.

Here, unlike Escalona, there was no evidence that Jerez-Sosa had previously been convicted of robbery. And unlike in Escalona, here, the evidence was admissible to rebut the claim of duress. Further, unlike Escalona, there was no "paucity of credible evidence" supporting the conviction. Escalona, 49 Wn. App. at 255-56. Berhanu

testified that Jerez-Sosa demanded his wallet, took his cell phones, and took his bag, and that Jerez-Sosa and Santos-Valdez appeared to be working together. Berhanu also testified Santos-Valdez did not threaten Jerez-Sosa. The security camera footage corroborated Berhanu's testimony. The fact that Jerez-Sosa disabled the cab's radio and security camera also contradicts his claim that he took items from Berhanu only because Santos-Valdez forced him to do so. Mitchell also testified that Jerez-Sosa and Santos-Valdez appeared to be working together. The record supports the decision that Santos-Valdez's testimony did not amount to a serious trial irregularity that was so prejudicial as to deny Jerez-Sosa a fair trial.

We conclude the trial court did not abuse its discretion in denying the motion for a mistrial, and affirm the jury conviction.

WE CONCUR:

SUPREME COURT NO. 92239-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	COA:. No. 71823-1-I
Plaintiff/Respondent,	King County Cause No. 13-1-00758-1 SEA
v.	CERTIFICATF SERVICE BY MAIL
RODOLFO JEREZ-SOSA,	
Defendant/Petitioner,	

I, Rodolfo Jerez-Sosa, the Petitioner declaration herein, and the petitioner in the above entitled-case, declare that on the 22nd day of September, 2015, I deposed the following:

1. This Declaration of service by mail;
2. Motion for Discretionary Review;
3. Appendix A

And a copy thereof, in the internal (Legal Mail) system of the Washington Department of Correction, at Coyote Ridge Correction Center 1301 N. Ephrata Ave., P.O. Box, 769 Connell, WA 99326. And made arrangement for first class [X] United States Postage prepaid address to:

Original to:

The Supreme Court of Washington
Temple of Justice, P.O. Box, 40929
Olympia, WA 98504-0929

Copy to:

King County Prosecuting Attorney Office
King Co Pros/App Unit Supervisor
W-554 King County Courthouse
516 Third Ave., Seattle, WA 98104.

I, certify under penalty of perjury that the foregoing is true and correct, to my knowledge and belief.[1]

DATED in this 22nd day of September, 2015, at Connell, Washington.

Rodolfo Jerez-Sosa DOC#788450
Petitioner Pro Se
Coyote Ridge Correction Center
P.O. Box, 769 Connell, WA 99326.

[1] Submitted the pleading to the address herein. This Notice complies with the mail box rule under GR 3.1, Defendant.