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Supreme Court No. 102189-5
COA No. 57468-3-II

THE SUPREME COURT OF THE STATE OF
WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

ERNEST WEST JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KITSAP
COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

A. IDENTITY OF PETITIONER AND DECISION
BELOW..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE2

The court should accept review because the
prosecution violated an order in limine by eliciting
inadmissible evidence and then exploited it to show
guilt by propensity. 5

*a. ER 404(b) prohibits admission and use of
prior bad acts to infer propensity.5*

*b. The prosecution elicited and exploited prior
criminal conduct that the trial court ruled
inadmissible.8*

*c. The opinion conflicts with this Court’s
decision in Hopson. It misapplies the
Hopson factors to conclude the improper
evidence was unlikely to sway the jury. 15*

E. CONCLUSION 19

APPENDICES..... 21

TABLE OF AUTHORITIES

Cases

Old Chief v. United States,
519 U.S. 172, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997)
.....6

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, 230 P.3d 583 (2010)17

State v. Briejer,
172 Wn. App. 209, 289 P.3d 698 (2012)..... 18

State v. Everybodytalksabout,
145 Wn.2d 456, 39 P.3d 294 (2002)5

State v. Foxhoven,
161 Wn. 2d 168, 163 P.3d 786 (2007) 7

State v. Hopson,
113 Wn.2d 273, 778 P.2d 1014 (1989) passim

State v. Lough,
125 Wn.2d 847, 889 P.2d 487 (1995)6

State v. Mee,
168 Wn. App. 144, 275 P.3d 1192 (2012).....6

State v. Roswell,
165 Wn.2d 186, 196 P.3d 705 (2008)6, 7, 11

State v. Young,
129 Wn. App. 468, 119 P.3d 870 (2005)..... 16, 17

United States v. Bradley,
5 F.3d 1317 (9th Cir. 1993) 7

Washington Statutes

RCW 9A.52.025 10

A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Ernest West Jr. asks this Court to review the opinion of the Court of Appeals *State v. West J.R.*, No. 57468-3-II (Attached As Appendix 1-11).

B. ISSUES PRESENTED FOR REVIEW

The court excluded evidence that Mr. West was precluded from possessing a firearm. Nonetheless, the prosecutor presented such testimony to the jury. The jury heard this irrelevant, highly prejudicial evidence and it deprived Mr. West of his right to a fair trial. The prosecution then used the evidence to insinuate Mr. West unlawfully possessed a partially-assembled firearm inside an unoccupied home because of his general propensity for unlawful gun possession. The opinion of the Court of Appeals conflicts with the Supreme Court decision in *Hopson*, as it misapplies the

Hopson factors to deny Mr. West relief. This Court should grant review under RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

Mr. West was unhoused during the winter of 2021. He discovered a home in Brementon was unoccupied and entered to get respite from the elements. RP 321, 329. The home was rented by Forrest Findley, who had been on active duty for 11 months, leaving it empty. RP 321. No one came home, so Mr. West stayed for a few days. RP 324-26, 377.

Mr. West was asleep on the couch covered with a blanket when he awoke to someone standing over him. RP 324-26. Richard Sollom introduced himself. RP 326. Mr. Sollom, who owned the rental property, asked Mr. West why he was there and how he knew Mr. Findley. RP 327. Mr. West did not seem to know Mr. Findley or

have permission to stay there. RP 327. Mr. Sollom called police, who arrested Mr. West. RP 328.

The State charged Mr. West with residential burglary for entering and occupying the house without permission. CP 1-2; RP 22. To convict Mr. West of residential burglary the prosecution sought to prove he entered Mr. Findley's home with intent to commit a crime therein.

Before trial, the court granted Mr. West's request to prevent the prosecution from introducing evidence that Mr. West was prohibited from possessing a firearm. RP 70-71, 309. The trial court issued "an order prohibiting any mention of Mr. West legally not allowed to be in possession of a firearm." RP 309.

Despite the court's ruling, during its direct examination of Officer Beau Ayers, the prosecution elicited that Mr. West was prohibited from possessing a

firearm. RP 27, 308-09. Based on this clear violation of the pretrial ruling, Mr. West moved for a mistrial. RP 309. The trial court found the prosecution had violated the pretrial ruling but declined to declare a mistrial, and instead instructed the jury to disregard the question and answer. RP 27, 308-09, 311.

On appeal, Mr. West challenged the decision to deny him a new trial on the basis that all the factors in *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) weighed in favor of a mistrial. Mr. West argued the jury heard from his arresting officer that Mr. West had a proclivity for illegal firearm possession and it suggested to the jury Mr. West was guilty of residential burglary by an inference of his propensity to commit crimes. This incurably tainted the proceedings by leading the jury to determine his guilt on an impermissible basis. The Court of Appeals rejected Mr.

West's argument because it believed the improper evidence was unlikely to sway the jury. App. 9. Mr. West seeks review of the opinion of the Court of Appeals.

D. ARGUMENT

The court should accept review because the prosecution violated an order in limine by eliciting inadmissible evidence and then exploited it to show guilt by propensity.

- a. ER 404(b) prohibits admission and use of prior bad acts to infer propensity.*

ER 404(b) prohibits admission of prior bad acts to infer propensity, and ER 403 prohibits admission of evidence that is substantially more prejudicial than probative.

Evidence of a person's character offered to prove the person acted in conformity with that character is forbidden. ER 404(b); *State v. Everybodytalksabout*,

145 Wn.2d 456, 465-66, 39 P.3d 294 (2002); *State v. Mee*, 168 Wn. App. 144, 153-54, 275 P.3d 1192 (2012).

Evidence of prior acts can only properly be introduced for other purposes, such as proving motive, intent, and identity. ER 404(b). ER 404(b) is not designed “to deprive the State of relevant evidence necessary to establish an essential element of its case,” but rather to prevent the State from suggesting that a defendant is guilty because he is a criminal-type person likely to commit the crime charged. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487, 490 (1995).

Evidence of prior convictions is inherently prejudicial. *Old Chief v. United States*, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L.Ed.2d 574 (1997); *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705, 710 (2008). “If an element of the crime is a prior conviction of the very same type of crime, there is a particular danger

that a jury may believe that the defendant has some propensity to commit that type of crime.” *Roswell*, 165 Wn.2d at 198. Furthermore, evidence of bad character and other acts incites the “deep tendency of human nature to punish” a defendant simply because they are a bad person or a “criminal-type” deserving of conviction. *State v. Foxhoven*, 161 Wn. 2d 168, 175, 163 P.3d 786 (2007). When jurors hear of prior unlawful conduct not charged, they may “feel that the defendant should be punished somehow, for a broad swath of general criminal wrongdoing.” *United States v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993). This is exactly what happened here. The prosecutor elicited from the arresting officer that Mr. West had done something that caused him to be prohibited from possession firearms, in violation of the court’s ruling excluding this propensity evidence.

b. *The prosecution elicited and exploited prior criminal conduct that the trial court ruled inadmissible.*

Understanding the prejudice of telling the jury the accused cannot legally possess a firearm because it leads to an impermissible inference that he is a bad person, a criminal-type deserving of punishment, the trial properly excluded any mention that Mr. West was prohibited from possessing a firearm. RP 308-09.

Despite that clear order, the prosecution intentionally elicited from Officer Ayers that Mr. West possessed a firearm although he was not legally allowed to do so.

RP 307-08.

Q. Detective, did he volunteer information about the firearm immediately?

A. No, he did not.

Q. Did it appear that he was hesitant to discuss the firearm?

A. Yes.

Q. What led you to believe that he wasn't eager to discuss the firearm?

A. After he did disclose, I asked him if he was supposed to be in possession or obtain a firearm and he said no.

RP 307-08.

Mr. West immediately moved for a mistrial, arguing the jury heard highly prejudicial testimony that Mr. West cannot possess a firearm, and no sort of limiting instruction could cure that prejudice. RP 308.

The court found that the prosecution violated the pretrial order by eliciting this evidence from Officer Ayers but declined to grant a mistrial. RP 311.

Although it acknowledged this prior act evidence was improper and unduly prejudicial, it did not grant a mistrial and only instructed the jury to disregard the prior question and answer and resumed trial. RP 310.

This evidence was not relevant for any purpose other than showing Mr. West was a bad person, a criminal-type with a violent character, or a general

propensity for crime, who acted in conformity with that character by “taking a partially assembled gun out of that drawer, finding a backpack, and slipping it into that backpack. That’s what the burglary is about, not the other things he did.” RP 419.

Not only was this evidence unduly prejudicial, it was not probative of any element of residential burglary.

A person is guilty of residential burglary if, “with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025.

To convict Mr. West of residential burglary, the jury would have to believe he entered Mr. Findley’s home intending to steal a partially-assembled gun he did not know existed before he discovered it hidden inside a drawer of the bedstand. The prosecution and

the court understood the particular danger that a jury may believe Mr. West has a specific propensity for unlawfully possess firearm, propensity for violence, or a general propensity for crime. *Roswell*, 165 Wn.2d at 198.

However, the instruction to disregard did not cure the taint, as the jury was not told it was forbidden from inferring Mr. West had a general propensity for crime, or for unlawful possession of a firearm from the evidence they heard.

The jury was left to speculate about whether Mr. West had prior criminal convictions—most likely felonies. Worse, the jury was left to infer Mr. West had a general propensity for committing crimes—specifically, propensity for unlawful gun possession. The trial court itself understood the prejudice posed by this evidence and offered a vague instruction in the

hopes it could cure it, but the prosecutor emphasized the forbidden propensity inference to secure a conviction: “I’m really only asking you to look at what happened with the gun.” RP 418. The prosecution said it was “almost begging” the jury take a look at what happened to the gun:

I’m asking you to take a look at the conduct of going into a drawer in a place you’re not supposed to be, *taking a partially assembled gun out of that drawer, finding a backpack, and slipping it into that backpack. That’s what the burglary is about, not the other things he did.*

What the State is *almost begging you to look at is what happened with the gun.*

I’m not hedging and asking you to look at all these other things because I don’t think those really matter, and I don’t think those are really important for a burglary charge.

RP 419 (emphasis added); see also RP 430-31 (State’s closing rebuttal highlighting again for the jury the same argument about the partially-assembled gun.)

Mr. West did not know the partially-assembled gun existed before he found it inside a drawer. In fact, the testimony about the partially-assembled gun only proves Mr. West entered Mr. Findley's home intending to steal a partially-assembled firearm through a forbidden inference: because of Mr. West's general propensity for crime, or his specific propensity for unlawful gun possession he must have entered Mr. Findley's home looking to find a firearm as was his propensity to do.

To convict Mr. West of residential burglary the prosecution was required to show Mr. West intended to commit a crime therein. The only evidence of this intent was Mr. Findley's testimony that he found his gun in a black bag rather than in his nightstand where he normally kept it. RP 357.

To bolster this weak evidence of intent, the state elicited testimony Mr. West could not legally possess a firearm. RP 307-08, 418-19. Put differently, the jury heard Mr. West had a general propensity for criminal activity, and more specifically, a propensity for illegal gun possession. There was no other logical way a jury could view this evidence and Mr. Findley's testimony and fail to draw the forbidden propensity inference. RP 307-08, 418-19. The jury may have credited Mr. West's theory of defense that he merely moved the gun from the bedstand to the black bag to secure it, for his own safety upon the homeowner's return. RP 307-08. The evidence Mr. West could not legally possess a firearm, simply bolstered the prosecution's case by implying Mr. West had a specific propensity for unlawful gun possession.

- c. *The opinion conflicts with this Court's decision in Hopson. It misapplies the Hopson factors to conclude the improper evidence was unlikely to sway the jury.*

A trial court should grant a mistrial when “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” *Hopson*, 113 Wn.2d at 284. (citations and internal quotation marks omitted)). In considering whether a mistrial was warranted, appellate courts consider (1) the seriousness of the irregularity triggering the request for a mistrial, (2) whether the irregularity involved cumulative evidence, thus reducing the need for a mistrial, and (3) whether the trial court gave the jury a proper curative instruction to disregard the irregularity. *Id.*

The Supreme Court has held that “in certain situations curative instructions cannot remove the prejudicial effect of evidence of other crimes.” *Hopson*,

113 Wn.2d at 285. Factors to consider include the similarity of the other crimes to the present charge, the number of crimes, and whether there was overwhelming evidence of guilt. *Id.* As the Court of Appeals has recognized, the risk of revealing evidence of other crimes is that “it raises the risk that the verdict will be improperly based on considerations of the defendant’s propensity to commit the crime charged. The risk is especially great when the prior offense is similar to the current charged offense.” *State v. Young*, 129 Wn. App. 468, 475, 119 P.3d 870 (2005) (citations omitted).

The C●A opinion purports to apply *Hopson* to the facts of this case and concludes all the factors weighed against granting Mr. West a new trial. App. 9. The C●A further reasoned the challenged portion of testimony was not discussed in front of the jury and

the court minimized its impact by moving the trial along, therefore Mr. West was not prejudiced by it. App. 9. This is incorrect.

Correctly, applying the *Hopson* test, the testimony that Mr. West was prohibited from possessing a firearm was a serious irregularity, particularly because Mr. West's residential burglary charge reduced to whether he intended to unlawfully take a firearm from Mr. Findley's bedstand. See *Young*, 129 Wn. App. at 476. Further, the testimony was not cumulative, satisfying the second prong of the *Hopson* test. *Id.* The only other evidence, the prosecution presented on whether Mr. West intended to steal a firearm was Mr. Findley's testimony.

There is no way to know what value the jury placed upon that improper evidence; a new trial is necessary. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d

664, 673, 230 P.3d 583 (2010). A mistrial is the only remedy to cure the taint of this evidence. First, the jury heard Mr. West committed a crime by moving Mr. Findley's partially-assembled firearm into a bag on the bed. Second, the evidence left the jury to speculate as to the reason Mr. West was prohibited from possessing a firearm. The jury was free to speculate Mr. West had a long history of criminal convictions. Third, from the prohibition on firearm possession, the jury was free to speculate about Mr. West's dangerousness. Fourth, and worse still, the jury was left free to infer Mr. West was guilty of the present residential burglary charge because he entered Mr. Findley's home intending to unlawfully possess a partially-assembled gun—he did not know existed before he saw it in a drawer—as was his propensity to do. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

The COA opinion correctly concluded the evidence was not cumulative but incorrectly concluded that the irregularity could be cured by an instruction because it believed the inadmissible evidence was unlikely to sway the jury. App. 9. This Court should accept review and reverse the residential burglary conviction.

E. CONCLUSION

Mr. West Jr. respectfully requests this Court to accept review of the COA opinion that misapplied this Court's articulation of the *Hopson* factors. RAP 13.4(b)(1).

This brief complies with RAP 18.7 and contains
2,988 words.

DATED this 13th day of July 2023.

Respectfully submitted,



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APPENDICES

June 21, 2023 Court of Appeals
Decision.....1-11

June 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ERNEST LEE WEST, JR.,

Appellant.

No. 57468-3-II

UNPUBLISHED OPINION

VELJACIC, J. — Ernest Lee West Jr. appeals his conviction and sentence for residential burglary. West argues that he is entitled to a new trial because the trial court abused its discretion in denying his motion for a mistrial. West also argues that he is entitled to resentencing because the trial court abused its discretion in denying his request for an exceptional sentence below the standard range.

We hold that the trial court did not abuse its discretion in denying West’s motion for a mistrial. We also hold that the trial court did not abuse its discretion in denying West’s request for an exceptional sentence. Accordingly, we affirm West’s conviction and sentence for residential burglary.

FACTS

I. THE UNDERLYING INCIDENT

On January 10, 2021, Richard Sollom visited one of his rental properties in downtown Bremerton because his tenant, Forrest Findley, had been out of the country on naval deployment for an extended period of time. Sollom did not expect to see anybody at the home during the visit.

Sollom entered the home and noticed that things were different despite visiting three days prior. He noticed food on the kitchen counter and wrappers of some kind thrown about the area. When he went to the bedroom, he found “the closet door had been open[ed], and stuff rifled through and stuff [placed] on the bed.” Report of Proceedings (RP) at 325.

Sollom walked out to the living room and discovered West sleeping underneath a blanket on the couch. West woke up and introduced himself. West told Sollom that he had permission from his friend to be in the home. However, West could not identify the friend. After this brief interaction, Sollom walked outside and called the police.

At about 9:30 A.M., Alexander George, an officer for the Bremerton Police Department, arrived on the scene. Sollom and West were standing in front of the residence. George detained West and placed him in the back of the patrol vehicle.

Detective Beau Ayers arrived on the scene shortly thereafter. After *Miranda*¹ warnings, Ayers asked West if he had permission to be in the home. West replied that he did because “the forest people provided him a green vacant form.” RP at 302. Ayers eventually understood West’s reference to the “forest people” to mean the name “Forrest Findley”—Sollom’s tenant—because his investigation revealed that name ascribed to multiple forms, documents, and papers found in opened dressers. West also told Ayers that he had been staying at the home for several days by this time.

Ayers asked West where he could find the vacant form. West replied that the document could be found in a black bag in the bedroom. West told Ayers that “there may be some of his items or his belongings in the backpack as well as a firearm.” RP at 303. The firearm was not

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

functional because it appeared to be missing the firing pin. West told Ayers that he found the firearm in one of the dressers and placed it in the bag for safety.

During the investigation, Ayers also observed a partially opened window with a palm print on it. West admitted to Ayers that the palm print was his and that he entered the residence through that window. When Ayers asked West why he did not enter through the front door, West could not provide a reason.

On January 11, the State charged West with one count of burglary in the second degree. On May 3, 2022, the State amended the information and charged West with one count of residential burglary.

II. THE TRIAL

On May 4, the case proceeded to a jury trial.

A. Pretrial Order

Prior to trial, West moved “[f]or an order prohibiting any mention of Mr. West legally not [being] allowed to be in possession of a firearm.” RP at 309. The trial court granted the motion.

B. Ayers’s Testimony and Mistrial Motion

Ayers was the first witness in the trial. On redirect, the State elicited the following testimony from Ayers:

Q. Detective, did [West] volunteer information about the firearm immediately?

A. No, he did not.

Q. Did it appear that he was hesitant to discuss the firearm?

A. Yes.

Q. What led you to believe that he wasn’t eager to discuss the firearm?

A. After he did disclose, I asked him if he was supposed to be in possession or obtain a firearm and he said no.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

[THE STATE]: Nothing further, Your Honor.

[DEFENSE COUNSEL]: Your Honor, I'd ask to be heard outside the presence of the jury.

RP at 307-08. The court excused the jurors from the courtroom.

West moved for a mistrial. West argued that Ayers's testimony relating to West's right to possess a firearm was highly prejudicial and that a limiting instruction could not remedy the prejudice.

The State argued that it "didn't try to elicit anything about the illegality of possessing the firearm" with its line of questioning and that it "forgot to admonish [the] Detective not to mention any kind of [Department of Corrections] DOC supervision status." RP at 308. The State also argued that that a curative instruction could remedy any resulting prejudice because the jury did not hear anything about West's conviction status, DOC supervision status, or prison release.

The trial court found that the State violated the pretrial order discussed above, but did not believe that there has been enough for a mistrial in this case. Accordingly, the court denied the motion.

The court then provided the following curative instruction to the jury: "Ladies and gentlemen, you are to disregard the last question as asked of this witness as well as the answer that was provided by this witness. The testimony that was provided is not to be used for any purpose in your deliberations." RP at 317.

C. Testimony (Continued)

Findley testified that the only individuals with permission to enter the home were Sollom, Tiffany Gaul (his girlfriend), and maybe his brother. He was not aware of his brother authorizing anyone else to enter the home.

Findley also testified that he owned the black bag and normally kept it in the closet. The firearm was a gift from his brother and he was in the process of building it. He usually stores the firearm in his nightstand. He has never stored the firearm in his black bag.

Gaul similarly testified that Findley usually keeps the firearm “in the nightstand on his side of the bed.” RP at 363. She was not aware that he kept the firearm anywhere else, including the black bag.²

D. Closing Arguments

During closing argument, the State argued that West was guilty of residential burglary because he entered and remained unlawfully, and intended to commit theft of Findley’s partially assembled firearm. More specifically, the State argued that it proved West’s intent to deprive Findley of the firearm based on his actions in moving the firearm from the nightstand and “slipping” it into the black bag. RP at 419.

West did not dispute that he entered or remained unlawfully in the residence such that he would be guilty of criminal trespass in the first degree. Instead, West argued that the State failed to prove that he intended to commit a crime therein because the evidence established that he placed the firearm in the bag for “safekeeping purposes.” RP at 423.

III. JUDGMENT AND SENTENCE

The jury found West guilty of residential burglary. At sentencing, West asked the court to impose an exceptional sentence below the standard range under RCW 9.94A.535(1)(e). Despite being found competent, West argued that his capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired

² George testified that he might have left the firearm on the bed after examining it during his investigation.

because his current and previous competency evaluations clearly established a history of mental illness. West’s counsel also expressed that she struggled to understand West’s decision making as it related to the plea offers made to him by the State.

The trial court denied West’s request for an exceptional sentence. The court reasoned: “I don’t believe that there is significant or sufficient enough record for establishing a departure downward under [RCW 9.94A.535(1)(e)]. I don’t think that’s available to me.” RP at 456.

Accordingly, the court sentenced West to 63 months of confinement, which is the bottom end of the standard range. West appeals his conviction and sentence.

ANALYSIS

I. MOTION FOR A MISTRIAL

West argues that the trial court abused its discretion in denying his motion for a mistrial because Ayers’s errant testimony was a serious trial irregularity, not cumulative, and could not be remedied by a curative instruction. We disagree.

A. Standard of Review

We review a trial court’s denial of a mistrial for abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). “[W]e find abuse only ‘when no reasonable judge would have reached the same conclusion.’” *Id.* (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

“A mistrial should be granted 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. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). We will overturn a trial court’s decision denying a motion for a mistrial “only when there is a substantial likelihood that the prejudice affected the verdict.” *Id.* “Thus, when a trial irregularity occurs, the court must decide its prejudicial effect.” *Id.*

B. The *Hopson* Factors

“We examine three factors—the *Hopson* factors—when determining whether an irregularity warrants a mistrial: ‘(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.’” *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013) (quoting *Emery*, 174 Wn.2d at 765). These factors are considered with deference to the trial court because the trial court is in the best position to discern any prejudice. *Garcia*, 177 Wn. App. at 776-77.

“The first *Hopson* factor is the seriousness of the irregularity.” *Id.* at 777. “[A] violation of a pretrial order is a serious irregularity . . . [The] intentional introduction of inadmissible evidence relating to criminal history is more serious than an unintentional interjection of inadmissible testimony.” *Gamble*, 168 Wn.2d at 178 (internal citation omitted). But ultimately, “[t]he question is whether the irregularity was ‘serious enough to materially affect the outcome of the trial.’” *Garcia*, 177 Wn. App. at 777 (quoting *Hopson*, 113 Wn.2d at 286). In *Hopson*, the Supreme Court held that the trial irregularity at issue was not serious enough to materially affect the outcome of the trial because the challenged testimony revealed “no information concerning the nature or number of prior convictions” and because “the jury had overwhelming evidence favoring conviction.” 113 Wn.2d at 286.

“The second *Hopson* factor is whether the trial irregularity involved cumulative evidence. If the evidence was cumulative, a mistrial may not be necessary.” *Garcia*, 177 Wn. App. at 781.

“The third *Hopson* factor is whether the trial court properly instructed the jury to disregard the irregularity.” *Id.* “Our Supreme Court has restated this factor as ‘whether the irregularity could be cured by an instruction.’” *Id.* (internal quotation marks omitted) (quoting *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011)). As a general rule, “[w]e presume that juries

follow the instructions and consider only evidence that is properly before them.” *Perez-Valdez*, 172 Wn.2d at 818-19.

C. The Trial Court Did Not Abuse Its Discretion

Here, the first *Hopson* factor weighs against a mistrial because Ayers’s testimony—while a serious trial irregularity because it introduced highly prejudicial character evidence and involved the violation of a pretrial order—was not serious enough to materially affect the outcome of the trial. Ayers only testified that “After [West] did disclose, I asked him if he was supposed to be in possession or obtain a firearm and he said no.” RP at 308. Like *Hopson*, and contrary to West’s contention otherwise, this statement revealed no information concerning the nature or number of his prior convictions.³ 113 Wn.2d at 284-86. Additionally, like *Hopson*, the jury had overwhelming evidence of guilt. *Id.* at 286. West conceded to entering and remaining in the home unlawfully. The evidence also showed a strong inference from which the jury could conclude beyond a reasonable doubt that West intended to commit theft (the crime in the residence required to amount to burglary) because he moved Findley’s firearm from the nightstand and into the black bag.

West contends this evidence of intent is “weak,” but in doing so, he omits mentioning that the bag also contained his belongings. Br. of Appellant at 19-20; Reply Br. of Appellant at 3. He also omits mentioning that Findley and Gaul both testified that the firearm is ordinarily placed in the nightstand and that Findley testified that he has never placed the firearm in the bag. Thus, this evidence gave rise to the inference of intent—not the fact that West had a propensity for criminal activity based on Ayers’s improper testimony. Accordingly, in the context of the entire record and

³ For this reason, West’s reliance on *State v. Young*, 129 Wn .App. 468, 119 P.3d 870 (2005), is misplaced.

with deference to the trial court's finding, we conclude that Ayers's statement is unlikely to have swayed the jury.

The second *Hopson* factor weighs in favor of a mistrial. Ayers's testimony was not cumulative of other evidence in the record because no other witness testified to West not being allowed to possess a firearm.

The third *Hopson* factor weighs against a mistrial. Contrary to West's contention, the error was remedied when the trial court specifically instructed the jury to disregard Ayers's last answer and also instructed that such testimony is not to be used for any purpose in deliberations. The challenged portion of Ayers's testimony was not discussed in front of the jury, and the court "minimized its impact by moving the trial along." *Hopson*, 113 Wn.2d at 287. "We presume that juries follow the instructions and consider only evidence that is properly before them." *Perez-Valdez*, 172 Wn.2d at 818-19.

Because the *Hopson* factors weigh against a mistrial, we conclude that the trial court did not abuse its discretion in denying West's motion for a mistrial. Accordingly, we affirm West's conviction for residential burglary.

II. EXCEPTIONAL SENTENCE

West argues that the trial court abused its discretion because "it failed to recognize it could depart from the standard range based on [his] mental [health] condition." Br. of Appellant at 23. We disagree.

A. Legal Principles

"Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range unless it finds substantial and compelling reasons to justify a departure." *State v. Smith*, 82 Wn. App. 153, 160-61, 916 P.2d 960 (1996). The trial court "may impose an

exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1). It is a mitigating circumstance if a “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

When a defendant requests an exceptional sentence, our “review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). “A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Id.* But a court that considered the facts of a case and found no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. *Id.*

B. The Trial Court Did Not Abuse Its Discretion

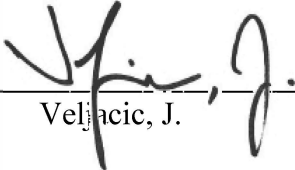
Here, West mischaracterizes the record by contending that “the court erroneously believed it could not issue a downward departure based on [his] psychosis and schizoaffective disorder.” Br. of Appellant at 28. The record demonstrates that the court was aware that it had the ability to depart from the standard range based on West’s history of mental illness. However, after considering West’s arguments and the competency evaluations, the court concluded that there was not a sufficient enough record for an exceptional downward sentence under RCW 9.94A.535(1)(e). Thus, the court exercised its discretion by considering the facts and concluding that no basis for an exceptional sentence existed.

West does not show that the trial court abused its discretion when it declined to impose the exceptional sentence. Accordingly, we affirm West’s standard range sentence.

CONCLUSION

We affirm West's conviction and sentence for residential burglary.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

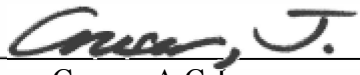


Veljacic, J.

We concur:



Lee, J.



Cruser, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57468-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Randall Sutton
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[KCPA@co.kitsap.wa.us]
Kitsap County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

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