

No. 89691-7
Court of Appeals Nos. 42890-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY MICHAEL GARCIA,

Petitioner.

PETITION FOR REVIEW OF PUBLISHED DECISION

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

FILED
DEC 20 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON *CEB*

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A. IDENTITY OF PETITIONER

John Michael Garcia, appellant below, petitions this Court to grant review of the published opinion of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2), (3) and (4), Petitioner seeks review of the published decision of the court of appeals, Division Two, in State v. Garcia, __ Wn. App. __, ____ P.3d __ (2013 WL 6008613), filed November 13, 2013,¹ in which Division Two affirmed Garcia's convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Where there is a stipulation pursuant to Old Chief v. United States, 519 U.S. 172, 136 L. Ed. 2d 474, 117 S. Ct. 644 (1997), did the trial court abuse its discretion and should review be granted under RAP 13.4(b)(4) where the court denied a motion for mistrial made after the jury was inadvertently informed of the highly prejudicial nature of a prior conviction?
2. In State v. Young, 129 Wn. App. 468, 119 P.3d 870 (2005), review denied, 157 Wn. App. 1011 (2006), Division One of the court of appeals held that, when there is inadvertent disclosure of details of a prior conviction despite an Old Chief stipulation, the trial court is required to give a specific curative instruction referring to the improper

¹A copy of the Opinion is filed herewith as Appendix A (hereinafter "App. A").

information, rather than just a general instruction to “disregard.”

Here, the trial court gave only a general instruction, and the court of appeals affirmed. Should review be granted under RAP 13.4(b)(2) to address this apparent conflict between the published decision in this case and Young?

3. Was counsel prejudicially ineffective in allowing the improper information to be admitted and in failing to adequately prepare or make an offer for an Old Chief stipulation?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Johnny Michael Garcia was convicted in a jury trial in Pierce County, Washington, of first-degree assault, first-degree unlawful possession of a firearm, and unlawful possession of methamphetamine. CP 7-8. The trial judge, the Honorable Frederick Fleming, imposed standard-range sentences totaling 378 months, with 60 months “flat time.” 8RP 83; CP 260-70. Garcia appealed and, on November 13, 2013, Division Two of the court of appeals affirmed the convictions in a published decision. See CP 273-83; App. A.

2. Overview of facts²

After a report of a shooting, officers went to a converted “garage shed” apartment and found a man named Philip Noel “kind of wandering back and forth” and acting “odd,” with blood on his hands. 1RP 70-72. At the garage apartment, an officer kicked open the partially-closed front door and officers then entered, finding Mark McCloud, who had been shot. 1RP 41. McCloud was not willing to say who had shot him and a woman who was there first gave a false name, later being identified as Tara McCloud-Shanta. 1RP 43, 52, 92, 2RP 102, 4RP 30.

Speculation arose as to who was involved and officers said they had been given information from the Puyallup Tribe that they thought a man named Johnny Garcia was involved. 3RP 50-51.

At trial, McCloud testified that he did not know what had happened or who had shot him. 5RP 34. An officer testified, however, that when the officer speculated to McCloud that the police had “heard that the reason the fight happened and subsequent shooting was because Tara had been assaulted,” McCloud confirmed it was “something like

²More detailed discussion of the facts relevant to each issue is contained in the argument section, *infra*. Further discussion of facts regarding the incident are contained in Appellant’s Opening Brief (“AOB”), at 3-14.

that.” 6RP 93-94. McCloud also said, “Gizmo always brings a gun to a fight” and that Garcia was “Gizmo.” 6RP 41, 94.

Garcia’s ex-girlfriend and the mother of his child, Sophia Ocasio-McDonald, testified that she had talked to Garcia about the shooting. 4RP 15-20. According to Ocasio-McDonald, who had been spurned by Garcia for McCloud-Shanta, Garcia admitted being confronted by McCloud and thinking McCloud was going to fight him, so he shot McCloud and then, when McCloud tried to grab the gun, fired two more shots. 4RP 23-26. Noel testified that saw McCloud and Garcia sort of face off, figured it was going to come to blows, heard McCloud say something like “nigga right here” and was sure that something was “going to go down.” 2RP 41. Noel also said the man who shot the gun was not aiming it at all. 2RP 41-44. Although he identified Garcia as the shooter, Noel admitted he had been told by police to make his “best guess” in picking a picture out of a montage and was unable to pick out Garcia as the shooter at trial. 8RP 86-92.

A neighbor who had heard a domestic dispute the day before at that same garage apartment identified Garcia at trial as the man she had seen leaving the apartment after that dispute. 6RP 11, 96-97. That neighbor had not been able to identify anyone from a montage she saw after the

incident, however, only able to narrow the choices down to two. 2RP 13, 6RP 12. McCloud-Shanta told police it was a man named Jonathon Redding who had assaulted her the day before the shooting, although an officer said that McCloud-Shanta “eventually” said “yes” when asked if Garcia had been involved. 7RP 32-39.

McCloud told at least one witness that he had been out looking for Garcia to beat him up. 6RP 70-71.

During a search incident to Garcia’s arrest, a small baggie of what later tested positive for methamphetamine was found. 3RP 88, 4RP 71.

3. Facts relevant to issues on review

On the first day of trial, the prosecutor amended the firearm charge to first-degree, stating that Garcia had a prior conviction for first-degree robbery which would support that charge. 1RP 5. Counsel told the court he did not think the amendment “prejudices us in any way,” admitting that he was “aware of what the charges would be[.]” 1RP 5.

After several days of trial, however, when the prosecutor started to show an officer “a series of exhibits” and asking if the officer was “aware of what Mr. Garcia’s criminal history was,” counsel objected. 7RP 51. The prosecutor responded by referring to “Count II,” which was the firearm offense. 7RP 51. Counsel said he was at a “loss” as to where the

prosecution was “going” but the court overruled, after which the prosecutor again turned to documents, including one which was the “Information” and another which was the “Probable Cause statement” for the prior conviction. 7RP 51-52.

Counsel objected and a moment later, with the jury out, counsel expressed surprise, saying that he had thought the prosecution would “just use a certified copy of the J&S for the serious offense.” 7RP 51-53. Counsel then apparently thought it was up to the court to “do a stipulation,” although the court said it was up to counsel and the prosecutor conceded that it was up to the defendant alone. 7RP 51-54. An Old Chief stipulation was entered into and read but later, in discussing the jury instructions, neither party nor the court noticed any error in the instructions for the unlawful possession. See 8RP 3, 76-80.

In closing argument, however, when talking about Instruction 20, the “to convict” instruction for that count, the prosecutor “put that instruction up,” apparently projecting it for jurors to see on a screen. 8RP 16. After the prosecutor was through with initial closing, counsel for Garcia began his closing but was interrupted by the prosecutor asking, “[y]our Honor, can we have a brief hearing outside the presence.” 8RP 21. The jury was excused and the following exchange then occurred:

[PROSECUTOR]: From now on when we review instructions I don't think I want to look at them on the overhead. Did the Court notice the problem with the to convict on the Unlawful Possession of a Firearm with a Deadly Weapon?

THE COURT: Says Robbery.

[PROSECUTOR]: 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. The prosecutor said he had "tried to sanitize it in the midst of the argument" by using other language and "pulling it off the overhead as quickly as I could without looking too obvious about it." 8RP 22.

At that point, counsel admitted that he "didn't catch this either."

8RP 22. The court said it had noticed the issue but "it was during the time I was reading it, and I had already given a copy to the jury." 8RP 22.

Counsel said, "obviously, the record shows that we read it wrong to them."

8RP 22. The court confirmed that the improper instruction, containing the specific information about the nature of the prior conviction, had been read to the jury, as well. 8RP 24.

After some discussion, the parties agreed to have the court tell jurors there was a corrected instruction but not specify the correction. 8RP

25. Counsel agreed, saying, “I think the chance of them remembering what changed is slim” and “[i]t’s the best we can do.” 8RP 25.

When the parties returned after a short recess, however, new information had come to light. 8RP 26. When the improper instruction was being pulled from jury packets, counsel had found at least two sets where the respective jurors had already marked the improper language with emphasis. 8RP 26. In one, the juror had underlined the word “robbery,” while in the other, a juror had “starred” the sentence. 8RP 26; see CP 203-16. As a result, counsel said, only a mistrial would be sufficient to cure the prejudice caused to Garcia by the disclosure of the specific nature of the prior serious offense. 8RP 27.

The prosecutor conceded that the two marked juror packets had included specific emphasis on the improper instruction. 8RP 27. Despite this fact, which he called “unfortunate,” the prosecutor argued that there was not “substantial prejudice” to Garcia. 8RP 27. The prosecutor said he would agree to a limiting instruction, although he admitted that giving such an instruction “adds additional emphasis” to the improper evidence. 8RP 27.

The court said it would “take responsibility” for the error and that someone “looking at this, obviously, will make a decision whether or not a

mistrial should have been granted.” 8RP 29. The judge also said that he did not think the issue “rises to” that level, denying the motion for a mistrial and instead giving an oral instruction to which counsel now objected, which told the jury:

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.

CP 217; see 8RP 29.

E. ARGUMENT

WHERE AN OLD CHIEF STIPULATION HAS BEEN ENTERED, IS IT AN ABUSE OF DISCRETION TO DENY A MISTRIAL IF THE JURY IS INFORMED OF THE NATURE OF THE PRIOR CONVICTION AND TO ISSUE ONLY A GENERAL INSTRUCTION TO DISREGARD?

This Court should grant review of the published decision of the court of appeals in this case, under RAP 13.4(b)(2), (3) and (4).

When there has been a trial irregularity, the reviewing court determines whether the trial court’s refusal to grant a motion for mistrial was an abuse of discretion by looking at:

(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.

Young, 129 Wn. App. at 472-73. Reversal is required if there is “a

‘substantial likelihood’ the prejudice” from a trial irregularity could have “affected the jury’s verdict.” See State v. Grieff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citation omitted).

Here, in affirming, the court of appeals recognized that the errors in repeatedly exposing the jury to the improper information went directly to the state’s burden of proving the essential element of the first-degree firearm offense that Garcia had a prior “serious” offense. App. A at 3-10. The court also noted that an Old Chief stipulation was entered and that each juror was mistakenly exposed to the “to-convict” which specifically referred to the prior as a first-degree robbery at least three times during the crucial period. App. A at 3-5, 9-10. Further, the court noted that two jurors had specifically marked the “robbery” language in the erroneous instruction. App. A at 7-8. The court was persuaded, however, that the instruction was somehow not as prejudicial as in other cases because that instruction did not “affirmatively state that Garcia had in fact been convicted” of a prior robbery. App. A at 9-10.

But Division Two itself conceded that, “arguably,” the instruction “did at least imply” that Garcia had previously been convicted of a prior robbery. BOR at 9-10. The court simply assumed that the jury *could have* believed that the instruction referring to the robbery was an error and *could*

have disregarded the implication. Id.

In making its decision, the court of appeals effectively ignored the highly prejudicial nature of prior crime evidence. Especially where, as here, the defendant is being accused of a violent crime like first-degree assault, the spectre of a prior conviction for a violent crime for robbery is not only irrelevant but also extremely corrosive to the ability of the jury to decide the case on evidence alone. As the U.S. Supreme Court held in Old Chief, there is “no question” “that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant.” Old Chief, 519 U.S. at 185. Such prejudice, the Court held, “will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning.” 519 U.S. at 185. Prejudice was especially obvious, said the Court, if the prior conviction was for a crime involving a gun or one similar to the pending charges. Id. But it was also present in cases, for example, where a prior conviction was for assault and current convictions involved use of a gun. Id.³

³While the Old Chief Court noted that it was theoretically possible that the nature of a prior offense could carry less prejudice, the examples it found were limited to prior convictions for an offense “so far removed” from the current charges as to be unlikely to engender any prejudice or an extremely old conviction for a “relatively minor felony.” Old Chief, 519 U.S. at 185-87.

The decision in Old Chief reflects the same conclusion that courts in this state have also expressed about the extreme prejudice prior crime evidence has in a criminal case. Here, it has long been “recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case.” State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Further, it is well-known that “[t]he danger of prior conviction evidence is its tendency to shift the jury’s focus from the merits of the charge to the defendant’s general propensity for criminality.” State v. Jones, 101 Wn.2d 113, 120, 677 P.3d 131 (1984), overruled in part and on other grounds by, State v. Brown, 111 Wn.2d 124, 157, 761 P.2d 588 (1988); see also, State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998) (“[e]vidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial”).

In this case, even though the parties agreed to a stipulation in order to avoid the prejudicial admission of the details of the prior conviction, the jury was nevertheless repeatedly given that information. First in the reading of the instructions by the judge, then projected on an overhead for a time, and also in the packets of instructions jurors had been given, jurors were told the nature of the prior conviction was “Robbery in the First Degree.” And this was only after the back-and-forth in front of the jury

where the prosecution was clearly trying to get in evidence of the nature of the prior conviction and counsel was trying to keep it out, prior to the entry of the Old Chief stipulation.

The court of appeals recognized that the error here was a serious trial irregularity which could have materially affected the outcome of the trial. App. A at 9-10. And it acknowledged the similarity between this case and Young. App. A at 9-10. But it then effectively failed to follow Young.

In Young, there was a single inadvertent disclosure of the nature of the prior conviction and that alone “created prejudice so substantial that it could be cured by nothing short of a new trial.” 129 Wn. App. at 473. Citing Old Chief and Johnson, the Court noted that evidence of the specifics of a prior conviction used to simply prove legal status caused “unfair prejudice” which “was significant,” because it raised a serious risk that the jury would declare guilt on the current charges “based upon an emotional response” to the prior conviction, rather than making “a rational decision based on the evidence.” Young, 129 Wn. App. at 474, quoting, Johnson, 90 Wn. App. at 63. Put another way, “revealing a defendant’s prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant’s propensity to

commit the crime charged.” Young, 129 Wn. App. at 475. Indeed, the prejudice caused by such evidence was so obvious and strong that the Young Court said it could not really be questioned, especially when violent felonies were involved:

No one can seriously dispute that disclosure that an accused has been previously been convicted of second degree assault is not a serious irregularity that is inherently prejudicial. Here, like the prior conviction, . . . two of the current charges, are also violent felonies - murder and first degree assault. . . Disclosure of this prejudicial information to the jury was inherently prejudicial.

129 Wn. App. at 475.

Here, Division Two found that the error was “cured” by the general instruction to “disregard.” But in Young, the Court rejected the idea that the introduction of the nature of the prior conviction into the trial could be cured by a general instruction that the charging document was not “proof of the crimes charged.” Young, 129 Wn. App. at 476-77. While juries are presumed to follow instructions, the Young Court held, the instruction given had failed to “expressly direct the jury to disregard” the offending evidence. As a result, the Court concluded, “even if one assumes that any instruction could have cured this trial irregularity,” because the jury was never told to disregard the specific evidence, the general instruction could not “cure” or “ameliorate the inherent prejudice of disclosure.” 129 Wn.

App. at 477-78. The jury was instead “left with the knowledge that Young was previously convicted of. . . a violent crime” before it even heard the state’s case on the current charges of violent crime. Id. However inadvertent, the prejudice remained and reversal was required. Id.

Just as in Young, in this case, Garcia had a prior conviction which was relevant only to prove his legal status as prohibited from possessing a firearm. Also just as in Young, that prior conviction was for a violent crime and the defendant was accused of a current, violent crime. And just as in Young, the fact that the error was “inadvertent” does not erase the prejudice it engendered.

Further, the court of appeals decision ignores the fact that the offending instruction was not just read but projected as an image and viewed by jurors in writing. Studies have shown that visual images such as that used here have much greater impact on a jury, and that “juries remember 85 percent of what they see as opposed to only 15 percent of what they hear.” Chaterjee, *Admitting Computer Animations: More Caution and a New Approach Are Needed*, 62 Def. Counsl. J. 36, 44 (1995). And such images are “more memorable for jurors and will be more readily recalled” during deliberations than information transmitted orally. Caldwell, et. Al., *The Art and Architecture of Closing Argument*,

76 Tul. L. Rev. 961, 1042-44 (2002).

In addition, as in Young, the error here was not “cured.” The “curative” instruction here only told the jury they had received the wrong instruction and should disregard it. But 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, a serious and violent crime. In addition, here, as in Young, the jury was not instructed that it was not to use the evidence of the prior conviction for any purpose other than proving legal status. See CP 218-50. And while it was given a limiting instruction on the alleged assault which occurred the day before the shooting and regarding “uncharged allegations,” those instructions only exacerbated the prejudice here because they were *not* focused on the prior robbery. While jurors are presumed to follow instructions given, they cannot be expected to limit their use of improper information if they are not told to do so - especially when they are told to do so with some evidence but not the improper evidence in question.

Indeed, it is questionable whether instruction *could* in any way “cure” the prejudice already caused. As the prosecutor himself admitted in this case, specific instruction to disregard that Garcia had a prior

conviction for first-degree robbery would have had the effect of emphasizing the improper information in the jury's minds. 8RP 27.

The trial court should have granted a mistrial, and Division Two erred in affirming. This Court should grant review not only to address whether the appellate and trial courts erred in evaluating the actual nature of the prejudice to Mr. Garcia's constitutional rights to a fair trial admission of this highly inflammatory evidence had but also Division Two's decision that a generalized instruction to disregard was sufficient is in conflict with the decision of Division One in Young that more specific, focused instruction is required, if indeed these errors could have been cured.

Finally, review should be granted under RAP 13.4(b)(3), because Division Two erred in its conclusions about counsel's ineffectiveness. Both the state and federal constitution guarantee Garcia the right to effective assistance of appointed counsel. See Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel is ineffective despite a strong presumption of effectiveness if counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049

(1999).

Here, counsel first failed to propose an Old Chief stipulation prior to trial, which nearly resulted in the improper, prejudicial nature of the prior being presented to the jury until such a stipulation was reached. Then, counsel failed to notice that the proposed jury instruction *specifically included* that prejudicial information - not only when it was proposed but when it was then read by the court, given to the jury and projected by the prosecutor. Those failures led to the jury being given the very information that counsel recognized was so prejudicial it should have been excluded. On remand, new counsel should be appointed in order to ensure that this time Garcia is given the effective assistance of counsel to which he was entitled. Division Two simply held that it need not address the issue of ineffectiveness of counsel because it was not ordering remand. App. At at 16. On review, this Court should not only hold that the prejudicial errors were not “cured” but also that counsel was ineffective in handling the issue.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the published decision of Division Two of the court of appeals in this case

DATED this 13th day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel by efileing at the Division Two portal upload at pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Johnny Garcia, DOC 772467, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 13th day of December, 2013.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY MICHAEL GARCIA,

Appellant.

No. 42890-3-II

PUBLISHED OPINION

MAXA, J. — Johnny Garcia appeals his convictions for first degree assault, first degree unlawful possession of a firearm, and unlawful possession of a controlled substance. At trial, he stipulated that he had committed a “serious offense” for purposes of the unlawful possession of a firearm charge to prevent the State from introducing evidence of his prior first degree robbery conviction. However, the jury instructions inadvertently included an instruction stating that the jury had to find that Garcia committed first degree robbery in order to convict on the first degree unlawful possession of a firearm charge. The trial court replaced the erroneous instruction and instructed the jury to disregard it. The trial court then denied Garcia’s motion for a mistrial. On appeal, Garcia argues that (1) the trial court abused its discretion in denying his mistrial motion, (2) the trial court improperly admitted “gang” evidence and the cumulative effect of this evidence and the erroneous instruction deprived him of his right to a fair trial, and (3) on remand we should appoint different counsel because trial counsel was ineffective.

We hold that the trial court did not abuse its discretion when it denied Garcia's mistrial motion because the jury's temporary exposure to the improper instruction was not such a serious trial irregularity that it could not be cured by an instruction to disregard. We also hold that Garcia's gang evidence and cumulative error claims fail because he failed to preserve for review his challenge to the gang evidence. And because we do not remand, we do not address Garcia's request to appoint new trial counsel. Accordingly, we affirm Garcia's convictions.

FACTS

On April 23, 2011, Mark McCloud, his cousin Tara McCloud Shanta, and his friend Phillip Noel were in the garage behind a friend's house. Garcia arrived at the garage and argued with Shanta. McCloud and Garcia also began to argue. Garcia shot McCloud in the abdomen and arm, and then fled.

Shortly after the shooting, Noel identified Garcia from a photo montage. Tacoma Police Department officers later located Garcia and arrested him. During a search incident to arrest, the officers discovered methamphetamine in Garcia's pants pocket. The State charged Garcia with first degree assault under RCW 9A.36.011(1)(a), first degree unlawful possession of a firearm under RCW 9.41.040(1)(a), and unlawful possession of methamphetamine under RCW 69.50.4013(1).

At trial, part of the State's burden on the firearm charge was to prove that Garcia previously had been convicted of a "serious offense." To satisfy this burden, the State sought to admit Garcia's judgment and sentence for a prior first degree robbery conviction. Garcia objected and offered to stipulate that he had committed a serious offense without revealing that the offense was first degree robbery. The trial court accepted the stipulation and instructed the jury:

This is a stipulation of the parties. The parties have agreed that the following evidence will be presented to you: As of April 23rd, 2011, the defendant, Johnny Michael Garcia, had previously been convicted of a crime that is a serious offense and that makes him ineligible to possess a firearm as is required to be proven beyond a reasonable doubt by the State of Washington as an element of Count II, Unlawful Possession of a Firearm in the First Degree. This is evidence that you will evaluate and weigh with all the other evidence.

7 Report of Proceedings (RP) at 62-63.

During trial, three witnesses mentioned the word "gang." A Puyallup Tribal Police Department officer said that when he was dispatched in response to Noel's 911 call, he "knew that there was a garage behind the house at 2218 East 32nd that's a known gang hangout." 1 RP at 77. A Tacoma Police Department officer who arrived at the scene of Garcia's arrest testified that he was a part of "[t]he gang unit." 4 RP at 7. Another Tacoma Police Department officer testified that on the evening of Garcia's arrest, he "was requested to meet with our gang unit officers regarding the operation they were involved with." 6 RP at 63. And during closing argument, the State told the jury that Garcia "pull[ed] out a gun and d[id] the gangster shoot." 8 RP at 9.

Before closing argument, the trial court asked counsel if there were any objections to the jury instructions. Neither the State nor defense counsel objected to the proposed instructions, and the trial court distributed copies of its instructions to the jury. The trial court then read the instructions. Instruction 20, the "to convict" instruction for the first degree unlawful possession of a firearm charge, read as follows:

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 the possession or control of the firearm occurred in the State of Washington.

Clerk's Papers (CP) at 202 (emphasis added). Apparently neither the trial court nor counsel had noticed that the instruction specifically referenced first degree robbery as a "serious offense" despite Garcia's stipulation.¹

During closing argument, the State projected an image of instruction 20 for the jury to view. Despite what the instruction stated, the State did not mention robbery and told the jury that it needed to find that Garcia had "been convicted of a prior serious offense." 8 RP at 16.

After finishing closing argument, the State informed the trial court that instruction 20 was incorrect and asked that the court amend it to state "a serious offense" instead of "Robbery in the First Degree." 8 RP at 21-22. The State also told the trial court that it had noticed the incorrect instruction and had tried to "sanitize [the mistake] 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." 8 RP at 22. Defense counsel said that he "didn't catch this either." 8 RP at 22. The parties agreed to replace the jury's copy of instruction 20 with the proper instruction.

The trial court also determined that it had read the incorrect version of this instruction to the jury. Accordingly, the parties agreed that in addition to providing the jury with a corrected copy of the instruction, the trial court would read the proper instruction to the jury and inform the jury that it "misspoke" the first time it read the instruction. 8 RP at 25.

¹ The State explained that the version of instruction 20 submitted to the trial court had been drafted before Garcia stipulated that he had been convicted of a serious offense. The State did not amend the instruction after the trial court accepted the stipulation, and defense counsel did not object to the instruction as the State originally submitted it.

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When the trial court collected the incorrect copies of instruction 20 from the jury, it noticed that one juror had placed a star next to "Robbery" and another juror had underlined "Robbery" and placed a question mark next to that portion of the instruction. Garcia then moved for a mistrial. Garcia noted that the State also had projected the incorrect instruction "for several minutes," to which the State responded,

I don't know that we actually had several minutes. Basically, I looked up, saw the error, [and] as soon as I saw that I tried to engage the jury with eye contact to divert them away from it and tried as gracefully as possible to remove that from the overhead. But it certainly was on the overhead long enough to look up and see the robbery words on the instruction.

8 RP at 29-30. The trial court denied the mistrial motion.

The trial court gave the jury corrected copies of instruction 20, reread the correct version of the instruction to the jury, and stated,

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.

8 RP at 33.

The jury convicted Garcia on all counts, and he appeals.

ANALYSIS

I. MISTRIAL MOTION

Garcia stipulated that he had been convicted of a "serious offense" in order to prevent the jury from hearing evidence that he had been convicted of first degree robbery. Nevertheless, the jury temporarily was exposed to an instruction stating that in order to convict, it had to find that Garcia was convicted of first degree robbery. Garcia argues that the trial court abused its discretion in denying his mistrial motion based on this improper instruction. We disagree.

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Temporarily exposing the jury to an improper jury instruction was not such a serious irregularity that it could not be cured with a limiting instruction, and the trial court instructed the jury to disregard the instruction because it was the wrong instruction for this case.

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). Our Supreme Court has stated that abuse of discretion will be found for a denial of a mistrial only when “ ‘no reasonable judge would have reached the same conclusion.’ ” *Emery*, 174 Wn.2d at 765 (internal quotation marks omitted) (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). A trial court's denial of a mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict. *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). A mistrial should be ordered “ ‘only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.’ ” *Rodriguez*, 146 Wn.2d at 270 (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)).

B. *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.’ ” *Emery*, 174 Wn.2d at 765 (quoting *Hopson*, 113 Wn.2d at 284). These factors are considered with deference to the trial court, *State v. Perez-Valdez*, 172 Wn.2d 808, 818, 265 P.3d 853 (2011), because the trial court is in the best position to discern prejudice. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

1. Seriousness of the Irregularity

The first *Hopson* factor is the seriousness of the irregularity. 113 Wn.2d at 284. The question is whether the irregularity was “serious enough to materially affect the outcome of the trial.” *Hopson*, 113 Wn.2d at 286.

a. *Old Chief* Rule

The starting point in assessing the irregularity in this case is the United States Supreme Court’s decision in *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). In *Old Chief*, the defendant offered to stipulate to a qualifying conviction, but over his objection the trial court allowed the State to present evidence that the conviction was for an assault that had caused serious bodily injury and that the defendant had been sentenced to five years in prison. 519 U.S. at 174-77. The Court held that if a defendant stipulates that he has a prior felony conviction for purposes of an unlawful possession of firearm charge, the trial court cannot allow the State to introduce into evidence the details of the conviction and punishment. *Old Chief*, 519 U.S. at 191-92. The Court reasoned that there is “no question” that “evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant.” *Old Chief*, 519 U.S. at 185.

We relied on *Old Chief* in *State v. Johnson*, 90 Wn. App. 54, 950 P.2d 981 (1998). We held that the trial court abused its discretion when it failed to accept a stipulation that the defendant had been convicted of a serious offense for the purposes of a first degree unlawful possession of a firearm charge and instead allowed evidence of the defendant’s prior rape conviction. *Johnson*, 90 Wn. App. at 63. We reasoned,

Johnson’s proffered stipulation, along with an appropriate jury instruction, would have proved conclusively that Johnson was a felon. Thus, the probative value of the conviction, as compared to the stipulation, was negligible. The unfair

prejudice was significant, i.e., there was a significant risk that the jury would declare guilt on the two assault charges based upon an emotional response to the rape conviction rather than make a rational decision based upon the evidence.

Johnson, 90 Wn. App. at 63.

Both *Old Chief* and *Johnson* held that when a defendant offers to stipulate that he committed a prior offense for the sole purpose of proving legal status, the trial court must accept the stipulation if the name or nature of the offense raises a risk of a verdict tainted by improper considerations. *Old Chief*, 519 U.S. at 191-92; *Johnson*, 90 Wn. App. at 63. Garcia's stipulation that he had been convicted of a serious offense triggered application of this rule, and precluded mention that his prior serious offense was for first degree robbery. As a result, there is no dispute that giving a jury instruction suggesting that Garcia had been convicted of first degree robbery was an irregularity that was "serious enough to materially affect the outcome of the trial." *Hopson*, 113 Wn.2d at 286.

b. *Young* Analysis

Division One of this court addressed a similar situation in *State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005). *Young* was charged with aggravated first degree murder, first degree assault, and first degree unlawful possession of a firearm. *Young*, 129 Wn. App. at 470-71. As in this case, the State was required to prove that the defendant had previously been convicted of a serious offense as one of the elements of the unlawful possession of a firearm charge. *Young*, 129 Wn. App. at 474. *Young* had a previous second degree assault conviction, but the parties stipulated that the nature of this prior offense would not be presented to the jury. *Young*, 129 Wn. App. at 472. Nevertheless, when reading the charges, the trial court told the jury that the defendant had been convicted " 'of a serious offense . . . to wit: Second Degree Assault.' "

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Young, 129 Wn. App. at 471 (alteration in original). Significantly, the trial court never told the jury to disregard the disclosure. *Young*, 129 Wn. App. at 476.

Division One reversed the trial court's denial of *Young*'s mistrial motion, holding that informing the jury of the assault conviction was "a serious irregularity that is inherently prejudicial" because that conviction and two of the defendant's current charges were for violent offenses. *Young*, 129 Wn. App. at 476. Applying the reasoning in *Old Chief* and *Johnson* to a mistrial motion, the court stated,

When the sole purpose of the evidence is to prove the element of the prior conviction, revealing a defendant's prior offense is prejudicial in that it raises the risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged. This risk is especially great when the prior offense is similar to the current charged offense.

No one can seriously dispute that disclosure that an accused has been previously convicted of second degree assault is not a serious irregularity that is inherently prejudicial. Here, like the prior conviction for second degree assault, two of the current charges, are also violent felonies—murder and first degree assault.

Young, 129 Wn. App. at 475-76 (footnotes omitted). The court also noted that although the errors in *Old Chief* and *Johnson* related to the admission of evidence and not a statement from the court, there was no distinction between the prejudice engendered in the two contexts. *Young*, 129 Wn. App. at 476.

c. Effect of Erroneous Instruction

The facts here are somewhat similar to those in *Young*. To prove the charge of first degree unlawful possession of a firearm, the State had to prove that Garcia had been convicted of a serious offense. RCW 9.41.040(1)(a). Although the parties stipulated that Garcia had been convicted of a serious offense, the trial court mistakenly instructed the jury that it had to find that Garcia had been convicted of first degree robbery. The jury was exposed to the erroneous

instruction on three occasions: (1) when the trial court read the incorrect instruction to the jury, (2) when the trial court provided the jury with incorrect copies of the instruction, and (3) when the State projected the incorrect instruction for the jury to view during closing argument.

Further, two jurors had noted the robbery reference on their copies of the incorrect instruction.

However, the irregularity in this case is less serious than that in *Young* and the cases on which it relies. Most significantly, there was no direct evidence linking Garcia to the first degree robbery in the incorrect instruction. In *Young*, the trial court read the charges against the defendant directly from the information which expressly stated that the defendant had been convicted of second degree assault. 129 Wn. App. 471. Similarly, in both *Old Chief* and *Johnson*, the trial court allowed the actual convictions into evidence. *Old Chief*, 519 U.S. at 177; *Johnson*, 90 Wn. App. at 60. In those cases, the jury explicitly was told that the defendant had been convicted of specific crimes.

By contrast, the improper instruction in this case told the jury that in order to convict Garcia of first degree unlawful firearm possession, it had to *find* that he previously had been convicted of first degree robbery. The instruction did not affirmatively state that Garcia had in fact been convicted of that crime. And because of the stipulation, the State had not submitted any evidence that Garcia had been convicted of robbery. The absence of any direct connection between Garcia and a first degree robbery conviction mitigated the effect of the erroneous instruction.

Arguably, the instruction did at least imply that Garcia had been convicted of second degree robbery. But because the instruction did not state that Garcia actually had been convicted of robbery and there was no evidence provided at trial of any robbery conviction, the jury reasonably could have believed that the trial court mistakenly included an instruction unrelated

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to Garcia's case. This is especially true in light of the trial court's express instruction telling the jury that the original instruction was the "wrong instruction for this case." 8 RP at 33.

Garcia emphasizes that one juror placed a star next to "Robbery" and another underlined "Robbery" and placed a question mark next to that portion of the incorrect instruction 20. However, these marks do not compel a conclusion that this instruction prejudiced the jury. The jurors simply may have been confused because there had been no evidence or argument presented at trial indicating that Garcia had been convicted of robbery.

Because there was no direct connection between Garcia and the crime referenced in the erroneous instruction, we hold that the jury's exposure to the first degree robbery reference was less serious than the type of irregularities that trigger a mistrial.

2. Cumulative Evidence

The second *Hopson* factor is whether the trial irregularity involved cumulative evidence. If the evidence was cumulative, a mistrial may not be necessary. 113 Wn.2d at 284. Here, there was no evidence other than the erroneously admitted jury instruction that Garcia had been convicted of first degree robbery. As a result, this factor does not provide meaningful support for either the trial court's denial of a mistrial or Garcia's challenge to that ruling on appeal.

3. Curative Instruction

The third *Hopson* factor is whether the trial court properly instructed the jury to disregard the irregularity. 113 Wn.2d at 284. Our Supreme Court has restated this factor as "'whether the irregularity could be cured by an instruction.'" *Perez-Valdez*, 172 Wn.2d at 818 (quoting *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992)). In other words, depending on the seriousness of the irregularity and whether the information provided to the jury was cumulative, a proper instruction may or may not be sufficient to avoid a mistrial.

The absence of a curative instruction was significant in *Young*. In that case, the trial court did not specifically address the unintentional disclosure with the jury and never told the jury to disregard the disclosure. *Young*, 129 Wn. App. at 476. Instead, the court merely gave a standard instruction telling the jury not to consider the contents of the information as proof of the crimes charged. *Young*, 129 Wn. App. at 476-77. The court found this instruction insufficient, stating,

While it is presumed that juries follow the instructions of the court, an instruction that fails to expressly direct the jury to disregard evidence, particularly where, as here, the instruction does not directly address the specific evidence at issue, cannot logically be said to remove the prejudicial impression created by revelation of identical other acts.

Young, 129 Wn. App. at 477.

Here, the trial court took immediate steps to remedy the irregularity. After the State brought the improper jury instruction to the trial court's attention, the trial court removed the incorrect instruction from the jury's instruction packets and replaced it with the correct version. The trial court then reread the correct version of the instruction. Finally, the trial court instructed the jury:

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.

8 RP at 33 (emphasis added). This instruction was effective. The trial court not only directed the jury to disregard the incorrect instruction, but also implied that the incorrect instruction did not even relate to Garcia's case.

Nevertheless, Garcia argues that the trial court should have specifically referenced first degree robbery in the curative instruction to disregard. In *Young*, the appellate court disapproved

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of a generic instruction to the jury not to consider the information's contents as proof of the crimes charged. 129 Wn. App. at 477. The court contrasted the trial court's deficient curative instruction in that case with that in *Hopson*, in which the trial court specifically instructed the jury to disregard an improper witness statement. *Young*, 129 Wn. App. at 477 (citing *Hopson*, 113 Wn.2d at 284).

We do not interpret *Young* as requiring a "proper" instruction to specifically mention details of the prior conviction. In many cases, specifically mentioning the prior conviction would have the effect of reemphasizing the irregularity and causing more prejudice to the defendant. In fact, here the parties agreed that specifically telling the jury to disregard the "robbery" portion of the instruction would have drawn unnecessary attention to the error.

Accordingly, we hold that the trial court's response to the irregularity and the instruction to disregard it was proper.

C. Consideration of *Hopson* Factors – Effect on Verdict

The *Hopson* factors are designed to guide determination of the ultimate question in the review of the denial of a mistrial motion: whether there is a substantial likelihood that the error affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. Application of these factors requires a balancing approach; they cannot be viewed in isolation from each other. The seriousness of the irregularity (which possibly could be reduced if the evidence was cumulative) must be weighed against the likelihood that the trial court's limiting instruction will eliminate any prejudice. As the court noted in *Hopson*, "in certain situations curative instructions cannot remove the prejudicial effect of evidence of other crimes." 113 Wn.2d at 284. On the other hand, for less serious irregularities a proper instruction may provide an effective cure. We must decide whether, based on the seriousness of the irregularity and whether the information

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provided to the jury was cumulative, the irregularity was “so inherently prejudicial that it rendered the curative instruction ineffective and necessitated a new trial.” *Perez-Valdez*, 172 Wn.2d at 819.

We cannot say that there is a substantial likelihood that the irregularity here affected the jury’s verdict. As discussed above, the absence of any connection between Garcia and first degree robbery suggests that the irregularity in this case is on the less serious end of the spectrum – certainly less serious than in *Young*, *Old Chief*, and *Johnson*. And the trial court provided an effective instruction that not only told the jurors to disregard the incorrect instruction but also encouraged them to believe that the reference to robbery did not even involve Garcia’s case. We presume that the jury followed the trial court’s instructions. *State v Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

We also are cognizant that application of the *Hopson* factors must occur in the context of deference to the trial court, who “ ‘having seen and heard the proceedings, is in a better position to evaluate and adjudge than can we from a cold, printed record.’ ” *Perez-Valdez*, 172 Wn.2d at 819 (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). The record here does not support a conclusion that no reasonable judge would have denied the mistrial motion. *Emery*, 174 Wn.2d at 765.

Finally, application of the *Hopson* factors means that not every irregularity in trial – even a relatively serious one – triggers a mistrial. Our Supreme Court has noted that “ ‘[a] defendant is entitled to a fair trial but not a perfect one.’ ” *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012) (internal quotation marks omitted) (quoting *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1515, 36 L. Ed. 2d 208 (1973)), *cert. denied*, No. 12-9685, 2013 WL 1490614 (U.S.

Wash. Oct. 7, 2013).² Garcia received a fair trial despite the jury's temporary exposure to the incorrect instruction.

We hold that exposing the jury to the incorrect instruction was not so serious that the trial court's instruction could not cure any potential prejudice, and that the trial court's instruction to disregard the incorrect instruction was effective in limiting any prejudice to Garcia.

Accordingly, we hold that the trial court did not abuse its discretion when it denied Garcia's mistrial motion.

II. "GANG EVIDENCE"

Garcia argues that the cumulative effect of the erroneous jury instruction and prejudicial "gang evidence" deprived him of a fair trial and requires reversal. We disagree.

At trial, a tribal police officer testified that the place where Garcia was shot was a "known gang hangout." 1 RP at 77. Two other police officers referenced a "gang unit." 4 RP at 7; 6 RP at 63. And during closing argument, the State told the jury that Garcia "pull[ed] out a gun and d[id] the gangster shoot, boom, boom, boom." 8 RP at 9.

Garcia argues that the presentation of gang evidence was highly prejudicial and should not have been allowed at trial. However, he did not object to any of this testimony or argument below. Under RAP 2.5(a), we generally will not review claims raised for the first time on appeal, unless the party claiming the error can show the presence of an exception to that rule, such as a manifest error affecting a constitutional right. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Garcia asserts only an evidentiary issue related to the admission of gang evidence and does not assert any constitutional error. *See State v. Gresham*, 173 Wn.2d 405,

² *See also State v. Paumier*, 176 Wn.2d 29, 44, 288 P.3d 1126 (2012) (Wiggins, J., dissenting) (the court's "task is not to determine whether the defendant received a trial completely free of defects, but to determine whether the defendant received a fair trial") (emphasis omitted).

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433, 269 P.3d 207 (2012) (evidentiary errors under ER 404(b) are not constitutional errors). And he does not provide argument or legal authority supporting our review on any other ground we could address for the first time on appeal under RAP 2.5(a). Because Garcia has failed to preserve this issue for review, we need not consider whether the trial court should have excluded this evidence.

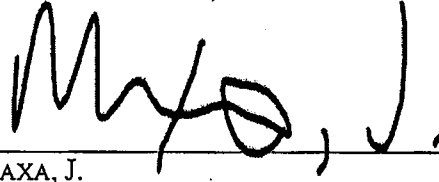
Further, admission of the gang evidence cannot be the basis for a cumulative error argument. Even where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the defendant a fair trial. *Davis*, 175 Wn.2d at 345. Because we hold that Garcia failed to preserve the alleged error regarding gang evidence, this doctrine does not apply. *See State v. Embry*, 171 Wn. App. 714, 766, 287 P.3d 648 (2012) (failure to preserve claimed errors for appeal precluded defendant's cumulative error claim based on alleged unpreserved errors), *review denied*, 177 Wn.2d 1005 (2013).

III. APPOINTMENT OF NEW COUNSEL

Garcia argues that "on remand, new counsel should be appointed based on counsel's ineffectiveness" for failing to offer to stipulate to the serious offense before trial and for failing to object to the improper jury instruction. Br. of Appellant at 29. Because we do not remand, we need not address this argument.

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We affirm Garcia's convictions.

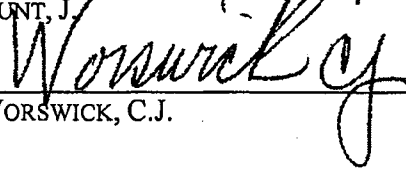


MAXA, J.

We concur:



HUNT, J.



WORSWICK, C.J.