SUPREME COURT NO. 89899-5
NO. 66709-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR A. CRUZ,

Petitioner.

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

The Honorable Douglas A. North, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Salvador A. Cruz, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Cruz seeks review of the Court of Appeals decision entered on December 23, 2013, a copy of which is attached hereto as an appendix.

C. ISSUE PRESENTED FOR REVIEW

Five days after trial testimony began in Cruz's multi-count sex offense trial, alleged victim D.G. climbed onto the roof of the downtown Seattle courthouse and threatened to commit suicide during a lunch recess. Police and negotiators responded, which caused a commotion around the courthouse. 7RP 64-66. The trial court informed the jury the incident was related to Cruz's trial. Should this Court accept review under RAP 13.4(b)(3) to determine whether the trial court violated Cruz's constitutional right to a fair trial when it denied his motion for a mistrial based on the trial irregularity?

D. STATEMENT OF THE CASE

The State charged Cruz with two counts each of first degree child rape against B.B. and J.C., two counts of third degree child rape against K.O., two counts of first degree child molestation against D.G., and one count of communicating with a minor for immoral purposes with O.J. CP 146-52. The charging period was November 1, 1993, to March 1, 1998. Id. Cruz represented himself at trial and examined all witnesses.

During trial, the court learned several jurors saw an incident involving a woman on the courthouse roof that related to Cruz's case. The court admonished the jurors to shield themselves from any information about the incident. 7RP 66-68. In response to the court's call for questions, the following exchange occurred:

> Juror: Just a comment. We knew that there was an incident at the courthouse, but we did not know it was related to this case.
>
> The Court: Okay. Yeah, well, it doesn't have any real bearing on the merits of the case, but it's certainly something that, you know, people might in some way relate to the case.

7RP 68.

When proceedings reconvened the following Monday, the prosecutor suggested the court question each juror individually to determine what he or she knew about the rooftop incident. 8RP 3-4. The

trial court agreed. 8RP 5, 7. Cruz objected, asking how the court could even consider continuing with the same jury. He said, "I don't want to continue, your Honor, with the same jury." 8RP 7-9. Cruz moved for a mistrial. 8RP 12. The court found the case law required it to question the jurors. 8RP 9-10.

Juror 1 said she learned nothing new over the weekend, but had already known by then that "there was an issue with someone on the roof and that that's what was being held up[.]" 8RP 17-18, 20.[1]

Juror 2 said someone checked a cell phone while everyone was in the jury room and found out "there was someone on the roof, and people outside saw the tape outside and that was about it. And we all came and talked in here, and that was the first that I had heard that it could be pertaining to our case." 8RP 22-23.

Juror 3 said he had heard someone was on the roof during the previous court day, but learned nothing new over the weekend. 8RP 26-27.

Juror 4 said during the previous court day she looked out the window and saw police tape. Someone with a laptop in the jury room said

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[1] Only jurors 9 and 10 were specifically identified by number. 8RP 48. Counsel assigned the other jurors numbers to correspond with the order in which they were individually called into the courtroom for questioning.

"there was an incident that had occurred." 8RP 29-30. She learned nothing more about the incident over the weekend.

Juror 5 also learned nothing from anyone outside the courthouse. When she left, she knew there was someone on top of the building. 8RP 33. The person had brown hair, was skinny, and wore jeans. 8RP 34. When the judge instructed the jury to stay away from the media, she "kind of assumed it was related to our trial." 8RP 33.

Juror 6 said some of the jurors were working on a puzzle in the jury room when someone with a computer said "there was something going on outside, but it seemed irrelevant so we just went on with what we were doing." 8RP 36. She learned nothing else about the matter. 8RP 36-38.

Juror 7 knew nothing other than what he had learned in court, which was that "a person associated with the case here in this building that was on the roof that we heard threatening to jump off." 8RP 41. Juror 7 said the jurors did not know the incident was related to Cruz's case until the court told them during its admonition to avoid all media. 8RP 42, 44.

This was the first time Cruz realized the judge told the jury the incident was related to his case. He asked the judge why they were questioning the jurors when the judge himself told them the matter was

case-related. 8RP 45. Cruz said it was not necessary for the court to disclose the information. 8RP 46. The court said it told the jury the matter was related to the case in order to explain why it needed to take special care to avoid all media. 8RP 45.

Juror 9 learned nothing new over the weekend. When she left the previous court day, she knew "there was a person on the roof of the courthouse." 8RP 49, 51-53.

Juror 10 knew nothing other than what the court had told them. RP 54-57.

Juror 11 said she was looking on her Facebook account in the jury room and saw a post stating that "someone was on top of the courthouse." 8RP 60-61. She learned nothing in addition to that. 8RP 61-63.

Juror 12 she on the day of the incident, a fellow juror who had a computer announced in the jury room that "somebody wanted to jump off this building." 8RP 64, 67-68.

Juror 13 said she learned from a friend that a woman with long hair and tight jeans was on the roof of the courthouse and the street was closed off. 8RP 70-72.

Juror 14 was returning to the courthouse from lunch when she "saw people looking up[.]" 8RP 75-77. Once inside the jury room, someone

looking out the window noticed there was "police tape in the park[.]" 8RP 75. Then one of the jurors learned from an online news bulletin that a young, thin woman was on the roof. 8RP 75, 77. The juror did not know the incident had anything to do with Cruz's case until the judge told the jury before they left for the day. 8RP 77-78.

None of the jurors said the incident would bear on how they considered Cruz's case. Cruz reiterated his demand for a mistrial, contending it was clear the jury learned things about the incident from a computer source and the court informed the jury the incident was case-related. 8RP 81-85; CP 144-45. The prosecutor argued Cruz did not meet his burden to show the incident was "so prejudicial that nothing short of a new trial" would ensure fairness. 8RP 85-86. He maintained any inference of prejudice would be speculative. 8RP 88. The prosecutor asserted that a cautionary instruction, rather than a mistrial, was sufficient to remedy any perceived problem. 8RP 89. The trial court agreed with the prosecutor and denied Cruz's mistrial motion. 8RP 92-93.

On appeal, Cruz maintained the trial court violated his right to a fair trial by denying his motion for a mistrial. The Court of Appeals rejected the argument. Slip op. at 2-8. The Court concluded "the jurors'

limited knowledge of the rooftop incident was not significant enough to warrant a new trial for Cruz." Slip op. at 8.

E. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING CRUZ'S MOTION FOR A MISTRIAL.

A criminal defendant is guaranteed the right to a fair trial by article I, sections 3 and 22 of the Washington Constitution as well as the Sixth and Fourteenth amendments. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), affd., 152 Wn.2d 107 (2004). This right includes the right to an unbiased and unprejudiced jury. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). "[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it." State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), abrogated on other grounds, State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

a. The "irregularity" required a mistrial.

In Cruz's case, jurors saw and/or heard something they should not have. This is best described as a "trial irregularity." See, e.g., State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct in the form of a gesture simulating the pointing of a gun at a

witness); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (angry outburst from defendant's mother directed to the jury and judge); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (answer to improper question), cert. denied, 479 U.S. 995 (1986). Trial irregularities implicate the defendant's due process rights to a fair trial. They do not independently violate a defendant's constitutional rights or a statute or evidence rule." State v. Davenport, 100 Wn.2d 757, 761 n.1, 675 P.2d 1213 (1984).

The question is whether the incident so prejudiced the jury that the defendant was denied his right to a fair trial. State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). In resolving this question, this Court examines (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. Johnson, 124 Wn.2d at 76; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). An examination of the above criteria reveals such an abuse, and a resulting due process violation, in Cruz's case.

The trial irregularity was serious. By the time of its occurrence, the trial court had informed the venire of the charges. 3RP 24, 50. The jury

had heard direct and cross examination of Detective Thompson with respect to Cruz's alleged sexual abuse of F.P. and A.B., of F.P. herself, of Gail Backer, who counseled F.P. and A.B. for child sexual abuse, of a physician who examined and interviewed B.B. regarding a report of child sexual abuse, and of V.C. From that testimony, jurors learned several pre-teenage girls had accused Cruz of sexually abusing them in the mid- to late-1990s.

Among other things, Thompson testified to the birth dates of F.P. and A.B. 1RP 276-77. F.P. was 21 years old when she took the stand. 1RP 366. Through V.C., jurors learned J.C. was 23 at the time of trial and was a childhood friend of F.P. and A.B. 1RP 537, 546-47. Through the physician, jurors learned B.B. was 10 years old in 1998. 6RP 8-9, 12.

Jurors were thus aware that by the time of trial, the alleged victims were in their early 20s. They also knew, or at least some of them knew, that the person on the roof of the courthouse was a young woman. They also knew the police were outside the courthouse and had cordoned off the area with tape. These facts give rise to a reasonable inference that the woman was considering or had threatened suicide. Once the judge told the panel the woman was related to Cruz's trial, it was reasonable for the

jurors to infer she was also an alleged victim who was scheduled to testify against Cruz, or the family member of a victim.

A reasonable juror would likely conclude the woman had reached such a state of desperation at the thought of reliving Cruz's abuse on the witness stand that she would seriously consider ending her life rather than continuing with the trial. This conclusion would, of course, be devastating to Cruz's general denial defense. For these reasons, this unusual irregularity must be considered "serious."

The incident, while not "evidence" in the usual sense, nevertheless exposed jurors to extraneous information likely to trigger a passionate, emotional, and even visceral reaction of outrage against Cruz and compassion for his accusers. Its inherently powerful effect was not cumulative to any other evidence.

Nor was it susceptible to neutralization by a curative instruction. The trial court reminded jurors their decision must be based solely on the evidence presented in the courtroom rather than things happening outside "that may be related to this case at the courthouse today." 7RP 67-68. The court also pleaded with jurors to take a "news holiday" over the forthcoming weekend and to insulate themselves from curious family members and friends. 7RP 67, 69. Before breaking, the court did not

order the jury to disregard what it had heard about the rooftop incident, nor did it when court reconvened after the weekend ended.

Examination of two related cases shows the trial court abused its discretion by denying Cruz's mistrial motion. In State v. Swenson,[2] the State's visibly pregnant key witness was physically and emotionally unable to submit to continuous cross-examination that was critical to the defense. A brief outburst by two spectators occurred in response to defense counsel's attempts to cross-examine her. 62 Wn.2d at 272-76. The accused moved for a mistrial, which the trial court denied. 62 Wn.2d at 275.

Although recognizing the importance of empowering trial courts to maintain decorum and respond to irregularities in the courtroom, the Supreme Court concluded the trial court abused its discretion by failing to grant a mistrial. 62 Wn.2d at 277, 281. The Court held the cumulative effect of the incidents violated the defendant's due process rights. 62 Wn.2d at 281. The Court cautioned reviewing courts to remain vigilant despite the forgiving abuse of discretion standard of review:

> The oft-repeated declaration of the rules reserving to the trial court broad discretionary powers to conduct a trial, preserve

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[2] 62 Wn.2d 259, 382 P.2d 614 (1963), overruled on other grounds by State v. Land, 121 Wn.2d 494, 500-01 (1993).

> order and govern the order of proof, ought not be used as a refuge wherein courts of review hide from the exigencies of due process. The mere utterance of this rule of broad discretion without critical examination of the circumstances which invoke it will tend in time to erode the fundamentals of due process prescribed by the bill of rights.

62 Wn.2d at 278.

The result was different in State v. Gilcrist.[3] Gilcrist was jointly tried with a co-defendant. Their first witness requested a cup of water, which he then threw on several jurors. In addition, as Gilcrist's counsel presented closing argument, a bomb exploded outside the courtroom. The defendants moved unsuccessfully after each irregularity for a mistrial. Gilcrist, 91 Wn.2d at 611-12.

The trial court reasoned that granting the mistrial motion in response to the water-tossing incident would invite future courtroom misbehavior. The court instead gave a general curative instruction. 91 Wn.2d at 612. About the bombing incident, the trial court found that, while the jurors heard the explosion, they knew neither its cause nor its source. It also occurred near the end of a lengthy trial after the presentation of all evidence. 91 Wn.2d at 612-13. The Supreme Court

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[3] 91 Wn.2d 603, 611-12, 590 P.2d 809 (1979).

concluded the trial court did not abuse its discretion or violate the defendants' due process rights. 91 Wn.2d at 613.

The reasons relied on in Gilcrist do not exist in Cruz's case. Granting the motion would not have encouraged future comparable behavior. Nor would a reasonable juror believe the woman on the roof was acting on Cruz's behalf. Further, a reasonable juror would likely conclude Cruz was the cause of the woman's desperation, especially after the court stated the incident was related to Cruz's case. Finally, the incident occurred relatively early in Cruz's lengthy trial and well before the State rested its case.

An additional factor in determining whether an irregularity requires a mistrial is the timing of the court's curative instruction to disregard. In State v. Post,[4] a rape case, a detective improperly testified police became aware of Post after an individual called in and gave them Post's name, thereby expressing the caller's opinion that Post was the rapist. 118 Wn.2d at 619. After a prompt sidebar, the judge instructed jurors to disregard the detective's response. The court later denied Post's motion for mistrial. Id.

This Court affirmed, noting that both physical and eyewitness evidence linked Post with the complainant, and that the remark was

[4] 118 Wn.2d 596, 826 P.2d 172 (1992).

isolated. Importantly, the Court also found "the judge promptly instructed the jury to disregard the response rather than letting the objected-to statement dwell in the minds of the jury." Post, 118 Wn.2d at 620.

In contrast with Post, the trial court allowed the jury in Cruz's case to dwell on the irregularity over a four-day holiday weekend. The court did remind the jury before it broke for the weekend that "we have to decide this case based purely on the evidence produced here in court, not on anything that's going on outside of court anywhere." 7RP 67. But that was before the court told jurors the rooftop incident was related to Cruz's case. And at no point did the court instruct jurors to disregard the incident. Finally, the incident cannot be dismissed as an "isolated" one likely to be overshadowed by the other evidence.

In Bourgeois, on the other hand, this Court concluded a curative instruction sufficiently cured any prejudice resulting from a spectator who had glared at and made a hand gesture as if pointing a gun at a State's witness. Bourgeois, 133 Wn.2d at 397-398, 408. In so finding, this Court focused on the fact most jurors were apparently unaware of either incident before rendering their verdicts. Id. at 408-10. The opposite is true here. Every juror learned the rooftop incident was related to Cruz's trial.

For all these reasons, the trial court abused its discretion by denying Cruz's motion for mistrial and proceeding with the same jury.

b. The court's denial deprived Cruz of his due process right to a fair trial.

Where a due process violation stemming from jury exposure to extraneous material is alleged, actual prejudice to the defendant need not be shown if a probability of prejudice is demonstrated. State v. Hicks, 41 Wn. App. 303, 312, 704 P.2d 1206 (1985); see State v. Stiltner, 80 Wn.2d 47, 54, 491 P.2d 1043 (1971) (regarding denial of motion for change of venue, which is also reviewed for an abuse of discretion, Court observes "a denial of due process in cases involving the publicity of criminal matters may be found even without an affirmative showing of actual prejudice. Indeed, where the circumstances involve a probability that prejudice will result, it is to be deemed inherently lacking in due process.").

The probability of prejudice is evident in Cruz's case. By the time jurors learned the rooftop incident was related to the case, they had seen Cruz exhaustively cross-examine F.P. and V.C., and had learned about allegations of sexual abuse by several child accusers. The young woman's desperate act, considered within the context of the evidence already presented, as well as opening statements, would lead a reasonable juror to

believe the woman was a complainant or a relative of a complainant who could not bear the thought of reliving the trauma allegedly caused by Cruz's acts. This Court should reverse his convictions.

F. CONCLUSION

Cruz respectfully requests that review be granted because the Court of Appeals decision involves a significant constitutional question. RAP 13.4(b)(3).

DATED this 22nd day of January, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SALVADOR ALEMAN CRUZ, Appellant.	)	No. 66709-2-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: December 23, 2013

BECKER, J. — A jury convicted Salvador Cruz of four counts of first degree child rape, two counts of third degree child rape, and one count of communication with a minor for immoral purposes. The trial court dismissed two other counts during trial after jurors learned that a woman related to Cruz's case had climbed onto the courthouse roof in an incident that garnered media attention. Cruz moved unsuccessfully for a mistrial. He argues the trial court erred by denying him a new trial and by admitting evidence of prior sex offenses. Finding no error, we affirm the convictions.

In 1997 and 1998, several young girls accused Cruz of sexually abusing them in separate incidents that occurred between November 1993 and March 1998. In 1998, Cruz left the United States. When he attempted to re-enter the country in November 2008, he was detained and charged. As a result of the delay, the girls were in their twenties by the time they testified against him at trial in 2010.

Cruz represented himself with the aid of interpreters and standby counsel. The jury found Cruz guilty of multiple counts of child rape and one count of communication

with a minor for immoral purposes, and found six aggravating factors. The court imposed an exceptional sentence of 636 months, or 53 years. This appeal followed.

MOTION FOR A MISTRIAL

Cruz contends the court erred by denying his motion for a mistrial after the occurrence of a serious trial irregularity—the rooftop incident.

On Thursday, November 4, 2010, after five days of testimony, one of the victims went through an unlocked door during a lunch recess and climbed onto the roof of the King County courthouse, where she considered suicide. She had not yet testified or appeared in court. Police and negotiators responded to the incident and cordoned off the area. The trial court learned that some jurors had seen on their media devices that there was an incident occurring at the courthouse.

The trial court gathered the jurors and had the prosecutor and Cruz's standby counsel on speaker phone as the court addressed the incident. Cruz was not present. The court instructed the jurors to "take a news holiday" and avoid any information about the incident:

> I think I understand that some of you have seen on your electronic media that there's been a story about - - relating to this case in the courthouse today. I want to remind you that we have to decide this case based purely on the evidence produced here in court, not on anything that's going on outside of court anywhere, and so it's really important that you not get caught up in any news stories that may be related to this case at the courthouse today.
>
> And so I want you to please take a news holiday this weekend.

One juror remarked that jurors had not known the incident was related to

the case:

> JUROR: Just a comment. We knew that there was an incident at the courthouse, but we did not know it was related to this case.
>
> THE COURT: Okay. Yeah, well, it doesn't really have any bearing on the merits of the case, but it's certainly something that, you know, people might in some way relate to the case.

The court urged jurors to avoid speaking with anyone about the case and the courthouse incident as they went home for the weekend.

On the following Monday, the prosecutor suggested the trial court question each juror individually to determine what he or she knew about the incident. The trial court agreed. Outside the presence of the jury, the State then moved to dismiss the two counts of child molestation involving the young woman who had gone on the courthouse roof. The court granted the motion. Cruz moved for a mistrial. He asked how the court could consider continuing with the same jury.

The trial court and the parties questioned each juror separately to determine what information each juror had about the incident, whether each had avoided all media reports as the court had ordered, and whether each juror felt he or she could be fair and decide the case solely on the evidence presented at trial. At most, some jurors knew that a young woman had climbed on the roof of the courthouse, and that the person or the incident was somehow related to Cruz's case.

Cruz asked the trial judge why they were questioning jurors when the judge himself told them the matter was related to his case. The judge said he told the jury the matter was related to the case in order to explain why jurors

needed to take special care to avoid all media.

When questioned, each juror said the incident would have no bearing on how he or she considered Cruz's case. The trial court denied Cruz's motion for a mistrial, finding no prejudice to his right to a fair trial.

When trial resumed, the court reminded the jurors to focus only on the evidence presented at trial:

> Just a couple of things I want to remind you of. There may be more media coverage of things related to this trial. I want to remind you, please, don't read anything about it, either in the paper or on the Internet, don't listen to any reports on the radio or the TV or whatever. I want to remind you the case needs to be decided just on the evidence that's admitted here in the courtroom.

On November 30, 2010, the trial court followed up by asking if "any of you read anything or found out anything that would make you unable to be fair and impartial?" The trial court asked two more times whether jurors had seen any media coverage that would affect their ability to be fair and impartial. No juror answered in the affirmative. The court then asked the jurors to contact the bailiff if any issue arose in this regard. The jurors did not contact the bailiff, and no further issue about the rooftop incident arose as the trial proceeded. The young woman involved did not testify.

It was a trial irregularity, not a trial error, for jurors to learn that the incident involving a young woman on the courthouse roof was somehow related to the case they were hearing. When a trial irregularity occurs, a new trial is warranted only when the defendant has been so prejudiced that nothing short of a new trial can ensure the defendant will be treated fairly. State v. Bourgeois, 133 Wn.2d

389, 406, 945 P.2d 1120 (1997); State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). The granting or denial of a new trial is a matter primarily within the discretion of the trial court, and the decision will not be disturbed unless there is a clear abuse of discretion. Bourgeois, 133 Wn.2d at 406. "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" Bourgeois, 133 Wn.2d at 406, quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989). In determining the effect of an irregularity, we examine "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

There is no doubt that it was a serious irregularity for the jury to learn such a dramatic event was related to the trial, and the trial court treated it as such by repeatedly instructing the jury to decide the case solely on the evidence presented at trial. The primary issue is whether the irregularity prejudiced Cruz to the extent of making his trial unfair. A defendant must show "'more than a possibility of prejudice.'" Bourgeois, 133 Wn.2d at 406, quoting State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

Before the incident, jurors had already heard from several witnesses, including a police detective, a counselor, a physician, one of the victims, and the mother of two of the victims. From this testimony, jurors could glean that the alleged victims were now in their early twenties. They knew that Cruz himself

was conducting cross-examination of the witnesses. Two jurors knew that the person on the courthouse roof was a young woman. Two other jurors speculated that the person wanted to jump off the roof. In telling jurors to avoid all information about the incident, the trial court confirmed for them that it was related to Cruz's case.

Cruz argues jurors could put this information together and infer that the young woman on the roof was someone scheduled to testify against Cruz, either an accuser or a family member of one of the accusers. He contends a juror would likely draw the further inference that the young woman had reached such a state of desperation at the thought of reliving the abuse that she would seriously consider suicide rather than face Cruz from the witness stand. According to Cruz, such an inference would be devastating to his case because of the likelihood that it would "trigger a passionate, emotional, and even visceral reaction of outrage against Cruz and compassion for his accusers." App. Br. at 24.

What Cruz refers to as the "logical and foreseeable inferential path" is too speculative to demonstrate prejudice sufficient to warrant a new trial. Bourgeois illustrates the heaviness of the defendant's burden. Bourgeois, a teenager, was charged with a retaliation killing. Bourgeois, 133 Wn.2d at 393. A major theme in the State's case was how fearful the witnesses were to testify against Bourgeois. One of the witnesses, Debra Steward, testified that she had been threatened. Bourgeois, 133 Wn.2d at 395. After the trial, the court learned that

at least two jurors had seen teenage boys in the courtroom glaring at Steward when she was testifying, and one juror had seen a gesture made toward Steward as if the spectator were firing a gun. Bourgeois, 133 Wn.2d at 397-98. Bourgeois moved, unsuccessfully, for a new trial.

Our Supreme Court agreed that the gun-mimicking gesture was a "fairly serious" irregularity, especially in light of the trial court's erroneous admission of testimony that witnesses were fearful. Bourgeois, 133 Wn.2d at 409. "Because fear and retaliation were such central themes in the State's case, the gesture arguably reinforced the impression that the defendant and his friends were the type of people that harm those who testify against them. In that sense it may have reinforced the State's theory that Bourgeois had a motive to commit the charged offenses." Bourgeois, 133 Wn.2d at 409. Even so, the court concluded the misconduct was not "so significant that the defendant will have been treated unfairly unless granted a new trial." Bourgeois, 133 Wn.2d at 409. This was the case even though the jury had not been specifically instructed to disregard the spectator misconduct, as it did not come to the court's attention until after the verdict.

Here, the irregularity had less potential for prejudice than the threatening gesture in Bourgeois. The incident did not occur inside the courtroom. Unlike in Bourgeois, what jurors knew about the incident did not have a direct connection to the evidence against the defendant. Unlike in Bourgeois, the incident did not serve to reinforce central themes of fear and retaliation or to bolster improperly

admitted testimony.

Cruz's argument for a mistrial depends not only on a speculative "inferential path," but also on an erroneous assumption that jurors would be unable to disregard the incident. As in Bourgeois, the jury was instructed to consider only the testimony and evidence admitted at trial. "We assume that the jury followed this instruction and therefore disregarded extraneous matters." Bourgeois, 133 Wn.2d at 409, citing State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). And unlike in Bourgeois, the trial court instructed jurors to ignore news media reports about the rooftop incident and repeatedly questioned them to ensure that they had not heard or seen anything that would affect their ability to render a fair and impartial verdict.

Because the potential prejudice of a courtroom spectator's threatening gesture was not judged significant enough to warrant a new trial in Bourgeois, we conclude the jurors' limited knowledge of the rooftop incident was not significant enough to warrant a new trial for Cruz. Cruz fails to carry his heavy burden to show that "'no reasonable judge would have reached the same conclusion.'" Bourgeois, 133 Wn.2d at 406, quoting Sofie, 112 Wn.2d at 667.

EVIDENCE OF PRIOR SEX OFFENSES

Next, Cruz contends the trial court improperly admitted evidence of his prior sexual offenses against two sisters, AB and FP. These two young women were the first to make disclosures of sexual abuse by Cruz.

In 1997, Cruz was charged with first degree rape of a child and first

degree child molestation in connection with acts involving AB and FP. He pleaded guilty to one count of the lesser charge of communicating with a minor for immoral purposes as part of a plea agreement. The plea agreement was accepted, and the charges involving these two girls were resolved before Cruz left the country in 1998.

In the present case, the trial court allowed AB and FP to testify about Cruz's sexual abuse of them, finding that the evidence of these prior acts was admissible under RCW 10.58.090 and ER 404(b).

The State correctly concedes that the trial court erred by relying on RCW 10.58.090 for admitting the evidence. That statute was later invalidated as a violation of the separation of powers doctrine. State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). However, this court may affirm the trial court on any correct ground. Gresham, 173 Wn.2d at 419. The trial court admitted the evidence about Cruz's sexual abuse of the two sisters on the alternative basis that it established a common scheme or plan under ER 404(b). As the court did with respect to one defendant in Gresham, we affirm the trial court on this basis.

Provided the trial court has interpreted a rule of evidence correctly, this court reviews the trial court's determination to admit or exclude evidence for abuse of discretion. Gresham, 173 Wn.2d at 419.

Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Where "the issue is whether a crime occurred, the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative," and prior bad acts may be admitted to show a plan or design if they satisfy a substantial threshold. State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). For a court to admit evidence of prior bad acts to prove a common scheme or plan, the acts must be: (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. DeVincentis, 150 Wn.2d at 17; State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

"Random similarities are not enough," but there is no requirement that the similarities in the evidence "be atypical or unique to the way the crime is usually committed." DeVincentis, 150 Wn.2d at 13, 18, abrogating State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998), review denied, 137 Wn.2d 1024 (1999), and State v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000). Rather, "the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." DeVincentis, 150 Wn.2d at 13; see also Lough, 125 Wn.2d at 856, 889 P.2d 487.

Cruz attempts to distinguish DeVincentis by arguing that the evidence there showed a shrewd plan to convince girls they were safe and to induce them to engage in sexual intercourse without the use of threats or force. In contrast, Cruz argues, his conduct was crude, impulsive, and forceful. But just as the

similarities in the evidence do not have to show a unique or atypical method of committing the crime, neither does the evidence have to show a gradual desensitizing and grooming of young girls. Cruz was not a groomer; rather, he was an intimidator who convinced young girls he would hurt or kill them and their families if they disclosed the abuse.

Only one of the alleged victims was 14 when she met Cruz; the others were ages 4 to 11. Through one pair of sisters, Cruz met their friends, another pair of sisters. Cruz followed a pattern of ingratiating himself with the mothers of these young girls, who did not have fathers or other guardian figures available and able to help keep an eye on them. Initially, he managed to come across to both the adults and the girls as gentlemanly. Later, once he had gained the opportunity to be alone with the girl, the threats began.

Through the 14-year-old girl, Cruz met her younger sister and that sister's friend and classmate, OJ. With the exception of OJ, who disclosed the one and only time she had contact with Cruz, all the girls believed his threats of physical harm or death and were very reluctant to reveal the abuse, even after Cruz was no longer around.

This court has recognized that evidence of prior bad acts is especially probative in cases of child sexual abuse because of "(1) the secrecy in which the acts occur, (2) the vulnerability of the victims, (3) the lack of physical proof of the crime, (4) the degree of public opprobrium associated with the accusation, (5) the unwillingness of victims to testify, and (6) the jury's general ability to assess the

credibility of child witnesses." State v. Baker, 89 Wn. App. 726, 736, 950 P.2d 486 (1997), review denied, 135 Wn.2d 1011 (1998). In Baker, the evidence was sufficient to establish a common scheme or plan where the defendant allowed young girls at a slumber party to sleep with him and then touched them while they slept. See also State v. Krause, 82 Wn. App. 688, 696, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997). In Krause, the defendant's scheme was to gain access to young boys through his relationships with his girl friends and by playing games with the children and taking them on outings; he molested them once they were isolated. Cruz similarly established a pattern that was manifest in his conduct with AB and FP as well as with the girls whose accusations formed the basis of his current convictions.

We conclude the trial court did not abuse its discretion when it admitted evidence of Cruz's abuse of sisters AB and FP under the common scheme or plan exception to ER 404(b).

Jury Instruction

The trial court gave a limiting instruction pertaining to the evidence of Cruz's acts against sisters AB and FP, as proposed by the State:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any

act, conduct, or offense not charged in the Information.

Instruction 7.

Cruz contends the instruction was an unconstitutional comment on the evidence and misleading. Cruz did not object to the giving of this instruction. Nevertheless, a claim that a jury instruction constitutes an impermissible comment on the evidence may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). This court reviews a jury instruction de novo, within the context of the jury instructions as a whole. Levy, 156 Wn.2d at 721.

Cruz contends that instruction 7 should have used the word "alleged," as in the "defendant's *alleged* commission" of a prior offense. Without that modifying term, he argues, the instruction conveyed to jurors that the trial court believed the testimony of sisters AB and FP. For this argument, Cruz relies primarily on Dewey.

Dewey was a date rape case in which the defendant claimed the intercourse was consensual. Dewey, 93 Wn. App. at 52. The trial court permitted the State to present testimony by another woman concerning a previous incident and gave a limiting instruction both before and after she testified. Before the woman testified, the court directed the jury to consider the "incident" only for the limited purposes the court specified. The second time, the court instructed the jury that evidence had been introduced "'on the subject of the *rape* of [the other woman] in June of 1994, for the limited purpose of showing if . . . .'" Dewey, 93

Wn. App. at 58. The reviewing court concluded that in the jury's mind, the previous incident could be a "rape" only if the previous victim's testimony were to be believed, and thus the instruction allowed the jury to infer that the judge accepted that testimony as true. Dewey, 93 Wn. App. at 59.

The instruction in Dewey characterized the previous act as a rape in no uncertain terms, whereas instruction 7 in this case merely referred to the testimony of the two sisters as "evidence" of a prior offense. Instruction 7 did not need to contain the word "alleged" to avoid being a comment on the evidence. It did not convey an opinion that the prior offense had been committed. Rather, instruction 7 conveyed a straightforward message about how the jury was to consider the evidence: it could be "considered for its bearing on any matter to which it is relevant," but on its own, the evidence was "not sufficient to prove the defendant guilty" of the crimes for which he was on trial.

The trial court's first instruction to the jury cautioned jurors against interpreting anything the judge said as an expression of personal opinion:

> It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

Instruction 1. To the extent that a strained reading of instruction 7 might suggest an opinion that evidence is equivalent to a finding of guilt, we are confident that instruction 1 would have dissuaded the jury from adopting such an interpretation.

Cruz also contends instruction 7 was misleading because the instruction

referred to the offenses of "sexual assault or child molestation," rather than the lesser offense of communication with a minor for immoral purposes to which Cruz pleaded guilty. But Cruz did not object to instruction 7 on the basis that it was misleading. Nonconstitutional claims regarding jury instructions are waived if a defendant fails to object. RAP 2.5; State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

Moreover, as the State correctly points out, it was not a conviction the State sought to introduce at trial, but the evidence of the acts involving sisters AB and FP, for the purpose of showing a common scheme or plan. Here, the evidence supports the inference that Cruz sexually assaulted and molested the sisters in a markedly similar manner to his other victims, regardless of what lesser conviction he was able to negotiate at the time.

CHILD HEARSAY

Cruz contends the trial court erred in finding the earlier statements of sisters AB and FP and their friend, JC, sufficiently reliable to be admitted under the child hearsay statute. A statement by a child under age 10 describing sexual contact is admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1). A court's decision to admit child hearsay statements is reversible when the court abuses its discretion in weighing the factors articulated in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995). Cruz argues the court

failed to consider each Ryan factor, failed to find each factor was substantially satisfied, and failed to consider several of the factors.

The Ryan factors are nonexclusive and nonessential. State v. Karpenski, 94 Wn. App. 80, 108, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). "It is clear that not every factor listed in *Ryan* needs to be satisfied before a court will find a child's hearsay statements reliable" under the statute, and that the reliability factors need only be substantially met. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). The court here did not enter written findings, but its oral ruling shows it adequately considered the Ryan factors. Cruz can point to nothing in the record that shows the statements in question were unreliable. We conclude the trial court did not abuse its discretion in admitting the child hearsay testimony.

DNA COLLECTION FEE

Cruz contends the sentencing court lacked authority to impose a $100 DNA (deoxyribonucleic acid) collection fee because he committed the sexual offenses before the effective date of the statute the trial court relied on, former RCW 43.43.7541 (2008).

Unlike a previous version of the statute, which made imposition of the fee dependent on the date of the offense, the statute in effect when Cruz was sentenced required the court to impose the DNA collection fee for every sentence. LAWS OF 2008, ch. 97, § 3. This version of the statute took effect on

June 12, 2008. Cruz was convicted on December 8, 2010, and sentenced on January 21, 2011. Because his sentence was imposed after the statute went into effect, he is subject to the $100 DNA collection fee.

COMMUNITY CUSTODY CONDITION

As a condition of community custody, the sentencing court ordered that Cruz "be required to submit to random searches of his person, residence or computer by the Department of Corrections." Cruz argues the court exceeded its statutory authority because this condition is not crime-related.

As a monitoring tool, the random search is authorized by former RCW 9.94A.120(9)(b)(vi) (1998), in effect at the time Cruz committed some of his sex crimes. The statute provided that unless specifically waived, the sentencing court "shall include the following conditions . . . The offender shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the department." Monitoring tools ordered to check compliance with other conditions are not "crime related prohibitions." See State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998) (holding court had authority to order polygraph testing for purpose of monitoring compliance with other conditions of community placement), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The court did not lack authority to impose this condition.

STATEMENTS OF ADDITIONAL GROUNDS

Cruz filed multiple statements of additional grounds pursuant to RAP 10.10. The rule permits filing of "a" pro se statement of additional grounds. This court accepted one statement filed in February 2013 that was professionally translated. In it, Cruz raises a host of issues, including ineffective assistance of counsel (for the time he was represented by appointed counsel), double jeopardy violations, prosecutorial misconduct, speedy trial violations, and violations by the State of its duty to disclose material information. Because Cruz's arguments are unclear and do not adequately inform the court of the nature and occurrence of the alleged errors, they do not merit further review. State v. Alvarado, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

We also received from Cruz in May 2013 a handwritten statement, which we have considered as a supplement. In it, Cruz appears to be arguing that the trial court erred by denying his motion for a mistrial after the rooftop incident. This issue was adequately covered by appellate counsel and does not warrant further review.

Affirmed.

Becker, J.

WE CONCUR:

Leach, C.J.

Cox, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. SALVADOR CRUZ, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 66709-2-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SALVADOR CRUZ
DOC NO. 769590
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF JANUARY, 2014.

x Patrick Mayovsky