71823-1

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NO. 71823-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RODOLFO JEREZ-SOSA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NAMI KIM
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. When evaluating whether a trial irregularity created prejudice, a court looks at the following factors against the backdrop of all the evidence: (1) the seriousness of the irregularity; (2) whether it was cumulative of other evidence properly admitted; and (3) the effectiveness of a curative instruction. Jerez-Sosa asserted that he had been forced at gunpoint and under duress to commit the armed robbery of a taxi driver, and that he was particularly vulnerable to such coercion, having been the innocent victim of a shooting years earlier. In contrast, a former co-defendant testified that Jerez-Sosa had initially suggested robbing a liquor store because of his previous success at it. After defense counsel asked if he had pointed a gun at Jerez-Sosa with knowledge of his history of being shot, the co-defendant said, "[He was shot] [f]rom committing robberies, yes." Because the trial court concluded that these two statements would have been admitted anyway to rebut the duress defense, has Jerez-Sosa failed to show that he was so prejudiced that nothing short of a new trial can insure that he will be tried fairly?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant Rodolfo Jerez-Sosa by information with Robbery in the First Degree with a firearm enhancement. CP 1-2. The State alleged that he and Asuan Santos-Valdez robbed a taxi driver named Fasil Berhanu at gunpoint. CP 1-11. A jury found Jerez-Sosa guilty as charged. CP 31-32. The court imposed a standard range sentence of 66 months with a mandatory 60-month firearm enhancement. CP 89-93.

2. SUBSTANTIVE FACTS

a. Trial.

On the evening of September 7, 2012, taxi driver Fasil Berhanu drove his Yellow Cab to Safeco Field in Seattle. RP 68, 70.[1] Berhanu's cab was equipped with a camera above the front passenger seat. RP 69, 112; Ex. 8. Opening the cab door triggered the camera to start taking photographs, or "stills." RP 247-48; Ex. 1.[2] When Berhanu arrived at Safeco Field at 10:25 p.m., a "Spanish" male wearing a black jacket hailed the cab and entered the rear

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[1] The Verbatim Report of Proceedings consists of 11 volumes consecutively numbered, which will be referred to as RP, and a twelfth non-consecutively numbered volume (Opening Statements 1/6/14) referred to as 2RP.

[2] Exhibit 1 contains a short surveillance "video" consisting of 214 still photographs in digital form; when a photograph is opened, its number can be seen in the top viewfinder, allowing navigation through all 214 photographs.

right-side door. RP 70-71; Ex. 1, Still 1. This male was later identified as Asuan Santos-Valdez. RP 131; Ex. 1, Still 10. Santos-Valdez asked Berhanu to pick up his friend on the left side of the street and take them to Beacon Hill. RP 70-71.

After driving a minute or two, Berhanu stopped and picked up the friend, who was wearing a striped shirt. RP 72; Ex. 1, Still 43. This man was later identified as defendant Rodolfo Jerez-Sosa. RP 132, 327. Jerez-Sosa sat on the left while Santos-Valdez remained on the right. RP 71. During the ride, the two men spoke to each other in English and Spanish. RP 73, 81, 104. Jerez-Sosa then made a phone call in Spanish. RP 74, 104; Ex. 1, Still 76; Ex. 27. Berhanu felt neither alarm nor concern, noting that the men were speaking to each other in normal tones. RP 73.

When Berhanu arrived at the men's Beacon Hill destination, he heard the words, "Just give me the money." RP 78. Santos-Valdez pointed a gun at Berhanu and then punched Berhanu in the face with a gun. RP 78, 134; Ex. 1, Slide 112-14; Ex. 29-30. Scared and in pain, Berhanu did not resist. RP 78. He gave Santos-Valdez some cash. RP 83; Ex. 1, Still 147. Santos-Valdez then asked for Berhanu's wedding ring, watch and phones. RP 83-84. While Santos-Valdez remained in the back and said to "take everything,"

Jerez-Sosa opened the driver's side door and took Berhanu's wallet. RP 79-81. Jerez-Sosa then went to the front passenger seat and took Berhanu's bag containing his "for hire" license, GPS, and Good to Go pass. RP 79-81, 84-85; Ex. 1, Still 160, 172. Jerez-Sosa also took items from the center console and pulled out the wires connecting the radio and dispatch computer. RP 85-86, 113-15; Ex. 13. The two men then left together. RP 95.

During the entire encounter, Berhanu never saw Santos-Valdez threaten, yell, or point a gun at Jerez-Sosa. RP 79, 98-99. Nor did Berhanu observe Jerez-Sosa cower or do anything to indicate that he was frightened of Santos-Valdez. RP 87-88. In contrast, Berhanu testified that the two men "look[ed] like they were working together." RP 87-88.

Bystander David Mitchell was heading home to Beacon Hill when he saw the Yellow Cab drive by and then stop about 100 feet away from him in the middle of the intersection at Beacon Avenue and South Bayview. RP 204-05, 211. Inside the cab he saw two Latino men, one in a black jacket and one in a striped shirt, beating and robbing the East Indian driver. RP 207-08. Mitchell called 911. RP 208. As he did so, the driver ran up to him while the two Latino men "took off running together" and "raced up" a nearby staircase.

RP 211-12. Mitchell remained to help the frightened cab driver, who was in pain with a black eye and swollen face. RP 94, 218-19; Ex. 2.

Mitchell did not see Santos-Valdez pull a gun on Jerez-Sosa or make any threatening gestures toward him, nor did Jerez-Sosa appear to be running away or cowering from Santos-Valdez. RP 216. Instead, Mitchell saw the men remain close to one another, about a foot or two apart, as they "ran towards the stairs together and ran up the stairs." RP 215, 217.

Seattle Police Officer Jacob Leenstra arrived within minutes. RP 217, 229. Ten minutes after the 911 call came in, officers began a canine track, which terminated at the top of the stairway. RP 230-32, 237. Leenstra testified at trial that the nearest light rail stop was about 2-4 blocks away from the site of the robbery. RP 239. The police did not find the robbery suspects that night. RP 238.

Five days after the robbery, Seattle Police Detective Michael Magan interviewed Santos-Valdez about his involvement in several other robberies and a homicide. RP 257-58. During the course of that interview, without prompting or promises of a deal by Magan, Santos-Valdez confessed to the homicide and multiples robberies, including the robbery of Berhanu that he had committed with Jerez-

Sosa. RP 258-59. Despite the lack of any plea offers, Santos-Valdez was "pretty forthcoming with information" and "very open." RP 270.

Santos-Valdez was later charged with murder in the first degree and four counts of robbery; he was threatened with firearm enhancements on the robbery counts, which would have resulted in a *de facto* life sentence. RP 148-50. Santos-Valdez eventually pleaded guilty to four counts of robbery in the first degree without enhancements and one count of murder in the second degree with a firearm enhancement, for which he would receive a 400-month prison sentence. RP 121. As part of his plea agreement, he agreed to testify in several cases, including the robbery of Berhanu. RP 122.

Jerez-Sosa gave notice of a duress defense for trial, utilizing an opinion by psychological expert Dr. Delton Young that he suffered from both Post-Traumatic Stress Disorder (PTSD) and an abnormal fear of guns based largely on having twice been shot as an innocent bystander.[3] CP 22; RP 16, 156-57. During a pretrial defense interview, defense counsel had asked Santos-Valdez if he knew

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[3] Defense counsel announced the duress defense in opening statement, saying that Jerez-Sosa would testify and "he will say that he was threatened. He will tell you that he has been shot in the past and the threat of being shot again was real and he was very, very scared." 2RP 12-13. Counsel said that Jerez-Sosa would acknowledge that he took part in the crime, "but he did so at the threat of violence." 2RP 14. Defense counsel also told the jury they would hear from Dr. Delton Young, who "will explain to you the impact of a gun being brandished on a person who had been shot twice in the past . . . what kind of profound impact that would have." 2RP 15-16.

whether Jerez-Sosa had committed prior robberies. CP 345. Santos-Valdez had responded: "From my understanding, Sosa have commi . . . have shot people before and ***he also got shot doing the robberies***." Id. (emphasis added). He added:

> [Jerez-Sosa] have [sic] robbed a lot of people, too, not with me, though . . . he will also tell me about when he got shot, you know, ***he went to rob some Mexicans or something and they was already waiting for him and they shot him in the neck*** and he had shot in the, in the, and then he find a person [unintelligible] and shot them in the ass . . .

Id. (emphasis added).[4]

Accordingly, defense counsel made a motion in limine requesting a "strong admonition from the State" to its witness forbidding mention of these details, and an ER 404(b) analysis by the court if the State intended to bring out such testimony during its case-in-chief. RP 14-17. The State responded that while it would be premature to offer such evidence "until a duress defense is actually formally offered or introduced to a jury," the evidence would likely come in at some point because "this is one of the few cases where I think there could be a significant rebuttal case":

> . . . [T]he issues that I think have come up in the interview is simply there's a theory that Mr. Jerez-Sosa was afraid of

[4] Although defense counsel initially stated that he had no knowledge that his client had told Santos-Valdez about getting shot while committing robberies, counsel later acknowledged that he was "fully aware" of these allegations prior to his cross-examination of Santos-Valdez. RP 158-59.

> Asuan Santos-Valdez and that's why he committed this robbery and he would not have done so had he not been afraid of him.
> . . .
>
> [A]t this point, ***if the case does proceed as planned, we anticipate that some of that evidence will come in in order to rebut the duress defense and this theory that Mr. Jerez-Sosa is afraid of Asuan Santos-Valdez***.

RP 16-17 (emphasis added).

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

RP 17.

Before taking the stand, both the trial court and the prosecutor admonished Santos-Valdez not to discuss any conversations about other crimes until given leave to do so by the court. RP 119-20. During direct examination, Santos-Valdez testified that he had been friends with Jerez-Sosa and two other men named Orestes Duanes-Gonzalez and Lazaro Valle-Matos since age 16. RP 124-25. All the men except Valle-Matos shared a foster mother, Lillian Booth. RP 125-26.

Santos-Valdez explained that on September 7, the four men were driving around "pretty much looking for a victim and somebody to rob money. We was all broke." RP 124. He then continued:

> [W]e actually came up with a plan first. We wanted to – I'm kind of confused here, because I don't know if I supposed to say this, but we was actually going to rob something different.
> Q: Okay.
> A: Site. We was going to --
> MR. FELKER: Objection.
> THE COURT: Overruled.
> THE WITNESS: Okay. [Jerez-Sosa] wanted to rob the liquor store and I didn't agree. He said that he got away with robbing liquor stores before and was successful at it, but --
> MR. FELKER: Objection.
> THE WITNESS: -- I didn't want to do it.
> THE COURT: Overruled.
> THE WITNESS: We end up not doing it. So somebody mentioned in the van the taxi. Since it wasn't a busy day, the Mariners was playing, so it's pretty busy, they got money. So we all agree and we come up -- we come up with a plan that me and [Jerez-Sosa] was going to be dropped off in downtown Seattle by the Safeco Field.

RP 126-27.

Santos-Valdez described how he and Jerez-Sosa decided to take the cab to the Lago Vista Apartments in Beacon Hill, where there was a dark street with stairs nearby "so we could actually . . . rob the taxi cab there, take his keys, his phones, whatever, and then run towards the stairs, which really dark [sic]. He wouldn't . . . .have been able to see what way we went." RP 128, 130-31. The plan was that during the ride, Jerez-Sosa "was going to call [the others] . . . make

sure they were there." RP 128. Santos-Valdez testified that he never threatened Jerez-Sosa in any way to commit the crime. RP 146.

The two men followed the plan, with Jerez-Sosa speaking on the phone to Duanes-Gonzales and Valle-Matos in Spanish so the cab driver couldn't understand. RP 129-30, 132-33. After Jerez-Sosa confirmed that the other two were waiting in the getaway car, Santos-Valdez pointed his gun at the driver. RP 134; Ex. 29-30. The plan was for Jerez-Sosa to get out of the car, block the door, and get the keys out in case the driver tried to run. RP 134-35. Santos-Valdez denied ever pointing his gun at Jerez-Sosa, who had explicitly agreed with the plan and "already knew what we had to do," and even took it upon himself to break the radios used to contact dispatch and cover the camera with the sun visor. RP 131, 137-38.

For his part, Santos-Valdez struck the driver in the face and took his phones, cash, watch, ring, and wallet. RP 136. Santos-Valdez and Jerez-Sosa then ran up the stairs to the van where Duanes-Gonzalez and Valle-Matos were waiting. RP 139. Once inside the van, the four men split the cash and gave the ring to Duanes-Gonzalez to pawn. RP 142.

During cross-examination, defense counsel engaged in the following inquiry with Santos-Valdez:

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

RP 152-53 (emphasis added). Counsel did not object to Santos-Valdez's answers.

During a recess, the State asked for leave to question Santos-Valdez further about his knowledge of Jerez-Sosa's neck wound because "a key part of Dr. Young's opinion in this case is that, because the Defendant was shot in the neck, that he has a heightened sensitivity to firearms and a heightened sense of alarm, which would contribute to their duress defense." RP 156. These details would impeach Dr. Young's testimony because Jerez-Sosa had told Dr. Young "that he got shot by a stranger in a store . . . basically an innocent shooting, which he had no culpability. So I

think that distinction does matter and it certainly calls into question the account of events that he gave to Dr. Young." RP 157.

Defense counsel denied opening the door, responding, "If anything, I should be moving for a mistrial." RP 157. The prosecutor asked the court to reserve on that motion, pursuant to the State's earlier indication that the comments about prior robberies would likely be admitted in rebuttal anyway: "[O]ne of the linchpins of that duress defense is going to be that the Defendant was shot . . . as an innocent bystander." RP 159.

The trial court articulated its misgivings about the prejudicial effect of the statements but expressed a desire to reserve its ruling because "[i]f this type of testimony were to come out anyway, then perhaps it's not as prejudicial as it seems." RP 161. The trial court further stated that it should have sustained the objection to Jerez-Sosa's alleged comments to Santos-Valdez about his prior success at robbing convenience stores. RP 162. The State responded that "a lot of the doors were going to get opened by the claim of duress in this case . . . if anything, what it is is it's premature." RP 162.

After requesting briefing, the court heard extensive argument on the motion for mistrial. RP 174-90; CP 24-30, 323-32. The State emphasized the reduced chance of prejudice because neither

comment had been offered for the truth of the matter asserted. RP 178. The first statement was not offered to establish Jerez-Sosa's actual success robbing liquor stores but as evidence of his state of mind, i.e., to show that he was an enthusiastic participant in planning the robbery rather than a victim of duress: "[W]hether he'd done that and whether he's successful in the past is not really the point . . . [the statement] cuts directly against their claim that [Jerez-Sosa] didn't want to do this. What it shows is that he's a keen participant in the crime." CP 323-32; RP 178.

Nor, the State asserted, was the second comment made to establish that Jerez-Sosa had actually been shot during the course of the robbery: "[W]hether it's braggadocio of whether it's boastfulness or whether it's true, either way that impacts the relationship that Mr. Santos-Valdez has with the Defendant and . . . the duress defense and cuts against this theory that this man is afraid of Asuan Santos-Valdez." RP 182.

Moreover, the State argued that defense counsel's questions had been designed to convey that Santos-Valdez had *knowingly exploited* Jerez-Sosa's past trauma as an innocent victim of gunfire in order to compel him to commit the Berhanu robbery: "What [was] the purpose of asking that question . . . other than to bolster and

establish a duress defense?" CP 323-32; RP 177. The State would eventually have been allowed to rebut these implications by eliciting what Jerez-Sosa had told Santos-Valdez about how he had gotten shot, and also to countervail the basis for Dr. Young's opinion that Jerez-Sosa suffered from PTSD and an extreme fear of guns. CP 323-32; RP 176-78, 180-82.

The court denied the motion for mistrial without prejudice and gave leave to defense counsel to raise it at the conclusion of trial or in the event of a conviction. Citing three factors (seriousness, cumulativeness, and effectiveness of a curative instruction) used to evaluate trial irregularities in State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010), the court ruled:

> ***[I]t is difficult to assess, first of all, seriousness without the Court viewing the entire case in context. If there were no other opportunity for any prior 404(b) evidence to come in, then it might make sense for the Court to say that it's futile to continue with the trial.*** I don't know whether that's the case or not. ***And the same point goes to whether or not it's cumulative. I don't know whether, at the end of the trial, there will be other similar evidence before the jury, in which case, at least arguably this could be cumulative.***

RP 183 (emphasis added).

The trial court proposed a limiting instruction, joined by defense counsel and incorporating some of his requested wording, which was then read to the jury:

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

RP 189-90, 202 (emphasis added).[5]

The State recalled Santos-Valdez for the sole purpose of clarifying that he had no firsthand knowledge of whether Jerez-Sosa had ever actually successfully robbed a liquor store or if he had really been shot while committing robberies, only that Jerez-Sosa had told him these things. RP 203. After the close of the State's case, Jerez-Sosa renewed his motion for mistrial. RP 279. The court again denied it without prejudice, inviting him to

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[5] Jerez-Sosa declined to have a written instruction as a tactical decision. RP 511.

raise the issue at the end of the defense case or rebuttal "if you believe that the facts have changed." RP 279.

Jerez-Sosa then testified, attempting to distance himself from the three men. He denied ever living with Santos-Valdez, being his friend, or spending time with him. RP 282, 315-16. He testified that he had met Santos-Valdez once at the Lago Vista Apartments (the site of the Berhanu robbery) in the '90s and had had no contact with him since. RP 282, 316, 321-24. Despite the fact that they shared a foster mother, Jerez-Sosa also claimed that he had not seen Duanes-Gonzalez since 1996, and was not good friends with either him or with Valle-Matos, whose house he had visited only "one time." RP 311. Jerez-Sosa said he had seen the two men once in 2012 at the home of Lillian Booth, the foster mother he shared with Duanes-Gonzales. RP 311-13, 316.

Jerez-Sosa testified that he had been shot twice, once in 2008 when he was "walking around on 23rd and Cherry and there was a shooting and I was shot here on my neck." RP 283-84. He then claimed he was shot 30 days later in the foot. RP 284. When asked how those events "make you feel to be around guns," Jerez-Sosa attested that it made him scared and apprehensive, with nightmares of getting shot. RP 285.

The State confronted Jerez-Sosa with Facebook photographs taken in 2012 showing Jerez-Sosa, Valle-Matos and Duanes-Gonzalez cavorting with a gun in Lillian Booth's house. RP 312-14; Ex. 33, 34, 37, 38. Jerez-Sosa identified the man in black holding the gun as Valle-Matos, the man in the greenish t-shirt as Duanes-Gonzalez, and the man in white as himself. RP 313-14. In one photo, Duanes-Gonzalez held the gun in his teeth. RP 38. Jerez-Sosa admitted knowing that Valle-Mattos had a gun on the night the photographs were taken. RP 314.

On the day of the robbery, Jerez-Sosa claimed that he had been working on a water pump for a client in Tacoma when the pain in his neck flared up, requiring Percocet or cocaine. RP 285-85, 288. He decided to ask his client, George (whose last name he did not know), to drive him all the way to Safeco Field in Seattle to buy some drugs. RP 287, 318. By complete coincidence, he ran into Santos-Valdez. RP 287. Despite having only $40 and driving all the way to Safeco Field because "[t]here are people [there] who sell drugs," Jerez-Sosa agreed to pay for a cab to Beacon Hill with Santos-Valdez to buy drugs there instead. RP 288, 320-21.

Jerez-Sosa said that the person he called in the cab was his girlfriend (whose number he no longer remembered). RP 325, 327. Santos-Valdez then pulled out a gun and demanded the driver's money and wallet before hitting him with the gun. RP 291. Jerez-Sosa said Santos-Valdez then pointed the gun at him, ordering him to "watch the front." RP 290.

Jerez-Sosa claimed he felt like "death [wa]s coming" and ran to the front of the cab "in despair" and grabbed a black bag. RP 291. He denied tearing the wires to the radio dispatch and said it was mere coincidence that he had pulled the visor down over the camera. RP 330-31. He claimed that the entire time, Santos-Valdez was in the backseat pointing his gun at both him and the driver. RP 292. This conflicted directly with the still photos from the cab, which showed Santos-Valdez pointing the gun only at Berhanu and an empty front seat. Ex. 1, Stills 112-24. Jerez-Sosa claimed that he ran up the stairs followed by Santos-Valdez, ran to the light rail station 4-6 blocks away, and took a train and then a bus to Federal Way. RP 292-93.

Jerez-Sosa acknowledged telling Dr. Young nine months after the robbery that he had been shot twice randomly in 2008: once in the neck by a stranger at 23rd and Cherry, and once in the

foot by a stranger in a store. RP 336-37, 340. Because of these random shootings, he had become afraid of meeting new people or being on a sidewalk where people might become aggressive. RP 338. He denied telling Santos-Valdez that he had been shot by people he had been trying to rob. RP 338.

Dr. Young testified that besides interviewing Jerez-Sosa, administering a psychological test, and calling someone who identified herself as Jerez-Sosa's stepmother, he had relied on only a one-paragraph case summary, the charging document, 4 or 5 of the cab stills, and Officer Leenstra's and Detective Magan's summaries to form his opinion. RP 249, 385, 390, 397. He reviewed no medical records verifying the cause of the two shootings. RP 384. He did not review the 911 call or the recorded statement or defense interview of Fasil Berhanu. RP 385-88. He was unaware that a defense interview with Santos-Valdez had even taken place, much less what Santos-Valdez said about Jerez-Sosa's involvement. RP 388-89.

Dr. Young diagnosed Jerez-Sosa with PTSD. RP 374. He testified about Jerez-Sosa's habit of "continually engag[ing] in behaviors that are . . . self-destructive or self-defeating," his substance abuse, and a prior arrest for domestic violence. RP 362,

365-66. However, his opinion was based primarily on Jerez-Sosa's account of being shot twice:

> [Dr. Young]: [Jerez-Sosa] described that after he was shot in the neck, he decided for a time that perhaps he should find a way to return to Cuba because the United States was too dangerous. He wasn't allowed to do that and he reported that, in the months and years following that shooting in the neck, he had been feeling paranoid and hypervigilant, meaning very wary, suspicious, worried much of the time, and suffering a great deal of anxieties.
>
> Q Would that be consistent with a diagnosis of post-traumatic stress disorder?
>
> A Yes.

RP 365.

Dr. Young described Jerez-Sosa's claims of experiencing "nightmares that are violent and frightening about being shot." RP 368. Dr. Young also described Jerez-Sosa's self-report of "suffer[ing] hyperarousal in the form of an exaggerated startle reflex. He is ***unusually wary and hypervigilant in recent years . . . [and] often wary . . . avoiding certain kinds of situations that might lead to trouble***." RP 369 (emphasis added).

Based on these self-reports, Dr. Young testified that the shootings had rendered Jerez-Sosa "more fearful and terrified" at having a gun pointed at him than a normal person would be: "***[I]f his account is correct,*** then he would have been quite

terrified. And given PTSD, he would probably be more reactive to such fears than he would be if he didn't have PTSD." RP 376, 378-79 (emphasis added).

Dr. Young admitted that while he "like[s] initially to assume that most of what I'm hearing [from defendants] is true," he could not be certain whether this was the case here, "particularly [sic] in regard to the incident in the cab. I'm very clear that I don't know if Santos pointed a gun at him or not." RP 389. He further admitted that the story Jerez-Sosa told him about being randomly attacked by strangers could alter his opinion of the severity of any PTSD if it turned out to be untrue:

> [Prosecutor]: . . .***These symptoms we're talking about, particularly this fear of strangers, that wouldn't be consistent with someone who was shot while actually robbing someone?***
>
> A: I don't know whether I can say yes or no to that . . . [someone] could be traumatized and have a lot of anxiety and dread stemming from that for months or years whether they were participating in a crime themselves, whether they were the victim of a crime, or whether they were innocent bystanders. ***In general, people seem to have a stronger post-trauma response when the -- when the event was intentionally directed at them. And probably being assaulted by a person at random may be one of the worst kind of things that can happen, because somebody I don't even know for no reason came after me and did this terrible thing to me.*** But we also see PTSD in individuals who are -- undergo trauma when they themselves are participating in a crime. That's not unusual.

Q: But ***the random nature makes it worse?***
A: ***The random nature -- other things makes it worse***.

RP 402-03 (emphasis added).

Jerez-Sosa's self-reporting to Dr. Young differed in significant ways from his trial testimony. He told Dr. Young he had known Santos-Valdez for 18 years and claimed that "there was nothing" in the front seat when he looked, after which he had simply run away and taken a train to Tacoma. RP 406-07, 409-10. He never mentioned taking Berhanu's wallet or cab bag, or going to the passenger's side to continue searching for goods to steal. RP 409.

b. Post-Trial.

At the sentencing hearing, defense counsel again requested a mistrial. RP 510. The court stated that its "overall inclination" was to deny the motion but requested additional briefing from the parties before making its final ruling. RP 514; CP 337-40. After reviewing the materials, the court ruled that as to Santos-Valdez's first statement (about Jerez-Sosa's previous successful liquor store robberies), "I'm persuaded by the State's argument, at least currently, that that alleged statement is very probative of Mr. Sosa's state of mind, that he was at least arguably an enthusiastic participant in the robbery." RP 521. The court was "more troubled"

by the second statement (about Jerez-Sosa getting shot during prior robberies) that arose during defense counsel's cross-examination, stating that "I think what it really comes down to is is this second statement admissible to essentially impeach what Mr. Sosa told Dr. Young?" RP 522.

Although defense counsel attempted to state that such impeachment evidence required an ER 404(b) analysis, the court noted, "Or 403, as well." RP 523. The court stated that while the second statement was probative of Jerez-Sosa's credibility, it was also highly prejudicial and "I'm not sure that I would have admitted it for purposes of impeachment." RP 524. The State responded that any prejudicial value was "significantly diminished" by both the trial court's instruction prohibiting the use of the statements for the truth of the matter asserted, and Santos-Valdez's admission that he had no knowledge of whether they were even true. RP 524-25.

The court granted the mistrial: "I'm ultimately persuaded that when you have these types of extremely prejudicial statements . . . it is unrealistic to expect a jury to make the distinction between the statement that's being admitted solely for the purpose of showing Mr. Sosa's state of mind" and that the "natural inclination" of the jury was to use it as propensity evidence. CP 61; RP 527.

The State made a motion for reconsideration, citing newly discovered authority in State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989), which explicitly authorized the use of evidence of non-duress burglaries to negate a duress defense on a separate burglary. CP 62-78, 341-51.

Because Jerez-Sosa had chosen to place his state of mind at the forefront of the case by arguing duress, the State emphasized that the probative value of his comments encouraging the charged robbery and his claims of past successful robberies were highly probative. RP 533. Jerez-Sosa's comment about being shot while committing a robbery (rather than while an innocent bystander) was especially critical and went "to the very heart of the defense" in this case. RP 534. Moreover, the evidence was not even being used to prove that past robberies had actually occurred, as in Watkins, only to call into question Jerez-Sosa's claimed state of mind given his inconsistent statements to different people about the origin of his injuries. RP 533-34. In short, the evidence would be admissible even in a new trial. RP 539.

Acknowledging that the relevant issue was *whether the statements were made* rather than whether their subject matter was true, the court inquired how it could find by a preponderance of the

evidence that the statement had been made, "[a]ssuming 404(b) applies." RP 547. The State responded that the court could assess Santos-Valdez's greater degree of credibility compared to the inconsistencies in Jerez-Sosa's statements and the incongruity of his testimony with both the other witnesses and the physical evidence. 548-50.

The court reconsidered its previous ruling and denied the motion for mistrial, finding that the operative question was the ultimate admissibility of each of the allegedly offending statements: "[A]ssuming that Santos-Valdez had complied with the Court's instructions not to mention either of these things, what would have happened? . . . [W]ould any of this come in perhaps in a different manner?" RP 551, 554.

The court answered in the affirmative, concluding that the first statement would have come in "to show that this was not a – there was no duress, but that Mr. Jerez-Sosa was a willing participant ." RP 551. The court opined that in a new trial, the State would have been allowed to inquire about Jerez-Sosa's level of participation in planning the robbery, and upon his denial that he had first suggested robbing a restaurant, could legitimately have recalled Santos-Valdez to testify how Jerez-Sosa had encouraged

them to do so based on his past success: "[T]o the extent there is prejudice, it was I think cured by the fact that it was made very clear to the jury that . . . Mr. Santos-Valdez had no knowledge of the underlying statement, that [sic] only that this was a statement that was made." RP 551-52.

The court then found that the defense had opened the door with respect to the second statement:

> ***[I]f the Defense had not raised this issue, having been shot in the neck, we might have a different situation. But this was a critical part of the Defense argument*** and it was raised in two respects. It was raised during the cross-examination of Mr. Santos-Valdez and . . . through the testimony of Dr. Young, whose PTSD diagnosis was based on the -- his assumption that Mr. Jerez-Sosa was telling the truth when he talked about being an innocent bystander and being shot.

RP 553 (emphasis added)

The court agreed that in a new trial, it would have allowed the State to explore what Santos-Valdez knew about Jerez-Sosa's neck injury to rebut the claim made by Jerez-Sosa and his defense expert that Santos-Valdez had knowingly capitalized on the vulnerability of an innocent victim of a random shooting: "It seems to me that once the issue has been raised, it would have been proper for the State to actually explain the context." RP 553. The court also would have admitted this same information following

cross-examination of Dr. Young, whose PTSD diagnosis was based on his belief that Jerez-Sosa had been shot as an innocent bystander. RP 553.

The court concluded that the information was "extremely probative" and not outweighed by prejudice, "particularly in light of the fact that the Court did give a limiting instruction telling the jury that they should be aware of the fact that an accomplice – like the statements are suspect." RP 554. The court also agreed that if the jury believed that Santos-Valdez had told the truth about Jerez-Sosa's statements, it would also believe Santos-Valdez's admission that he had no firsthand knowledge of their truth. RP 554.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED JEREZ-SOSA A MISTRIAL.

Jerez-Sosa argues that the trial court abused its discretion by denying his motion for a mistrial. This Court should reject that claim. Because the trial court found that the statements would have been properly admitted to rebut Jerez-Sosa's duress defense, and further instructed the jury to consider them only to assess Jerez-Sosa's state of mind and not for their truth, Jerez-Sosa cannot establish the requisite degree of prejudice.

A trial court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). The trial judge is in the best position to determine the impact of a potentially prejudicial remark, so appellate courts will not overturn the trial court's decision to deny a mistrial absent abuse of discretion. State v. Escalona, 42 Wn. App. 251, 742 P.2d 190 (1987). "A reviewing court will find an abuse of discretion only when no reasonable judge would have reached the same conclusion." State v. Rodriguez, 146 Wn.2d 50, 270, 45 P.3d 541 (2002) (internal quotations omitted).

To determine whether a trial irregularity may have prejudiced the jury, a court should consider several factors, all "viewed against the backdrop of all the evidence": (1) the seriousness of the irregularity; (2) whether the statement was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction, which a jury is presumed to follow. Escalona, 49 Wn. App. at 254; see also State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). "In the context of a given case it may be that improper evidence did not affect the outcome of the trial, and in such situations a trial court may deny a motion for a mistrial."

Gamble, 168 Wn.2d at 177. A trial court is afforded "wide discretion to cure trial irregularities resulting from improper witness statements." Id.

a. Seriousness Of The Irregularity.

Counsel claims that this was a serious irregularity because it violated a motion in limine. This is overstated. The record more accurately shows that the trial court reserved its ruling on the defense motion for exclusion, with the State noting that it did not intend to offer testimony referencing Jerez-Sosa's claims of past robberies until Jerez-Sosa advanced a duress defense. RP 16-17. Jerez-Sosa unequivocally did so in his opening statement. 2RP 12-16.

While testimony violating an order in limine often qualifies as a serious irregularity, see State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998), it is significant that, unlike virtually all the cases addressing this subject, the order in limine here was not a final and absolute prohibition of the type of testimony elicited from Santos-Valdez, but instead a conditional ruling *pending later developments at trial*. Cf. Escalona, 49 Wn. App. at 252 (non-conditional ruling excluding mention of prior crimes); Thompson, 90 Wn. App. at 44 (final ruling prohibiting officers from offering their opinions on reckless nature of defendant's driving).

Here, the record amply demonstrates that the State and the trial court anticipated from the beginning that the statements at issue might become admissible rebuttal evidence following Jerez-Sosa's presentation of his duress defense. Given the trial court's ultimate determination that the evidence would have come in during rebuttal, the irregularity was one of timing, not admissibility, and was thus not as serious as the introduction of something that had been wholly forbidden.

Moreover, the intentional introduction of inadmissible evidence regarding criminal history is deemed to be more serious than "an unintentional interjection of inadmissible testimony." Gamble, 168 Wn.2d at 178. "The fact that a witness is a 'professional' witness also indicates a serious irregularity." Id. Here, Santos-Valdez was no such professional. The record also supports that both statements were unintentional. Prior to the first statement, Santos-Valdez expressed confusion about what he could say before trying to explain how Jerez-Sosa had encouraged him to rob a liquor store. RP 126. The second statement arose only after defense counsel tried to insinuate that Santos-Valdez was knowingly trying to exploit Jerez-Sosa's history of gunshot wounds, which drew a

natural attempt to dispel such an assumption from Santos-Valdez. RP 152-53.

Jerez-Sosa attempts to heighten the seriousness of the irregularity here by analogizing his case to the circumstances in Escalona. His reliance is misplaced. In Escalona, this Court held that the prejudice engendered by the victim's mention of Escalona's prior conviction for assault "becomes particularly serious *because of the paucity of credible evidence against Escalona*" and the "many inconsistencies" during the testimony of the victim, which the court described as "essentially the State's entire case": "*There were no other witnesses to the alleged crime except Escalona himself, whose testimony was not substantially impeached.*" 49 Wn. App. at 255 (emphasis added).

Such was not the case here. There was a wealth of credible evidence against Jerez-Sosa, including video surveillance of him committing the crime without any signs of duress, and the testimony of victim Fasil Berhanu and bystander David Mitchell, both of whom described Jerez-Sosa and Santos-Valdez as working together and neither of whom saw Santos-Valdez pointing a gun at or threatening Jerez-Sosa. And unlike Escalona, Jerez-Sosa's testimony about his fearfulness of guns and his role in the robbery *was* "substantially

impeached," not just by the admission of Santos-Valdez's statements but the introduction of damaging Facebook photos showing him cavorting with the other robbery participants as they played with a gun. It was further damaged by his highly incongruous and conflicting testimony.

Jerez-Sosa's reliance on State v. Wilburn, 51 Wn. App. 827, 755 P.2d 842 (1988) (witness referenced defendant's confession that he "did it again"), and State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968) (officer stated that defendants were on their way to commit a second robbery when arrested), is also misplaced. In Miles, the court noted that the offending testimony would have been inadmissible *under any circumstances*, and the State conceded that it was neither "relevant [n]or necessary to prove an ingredient of the crime charged." In contrast, Jerez-Sosa's duress defense opened the door to the very rebuttal evidence of which he complains.

Wilburn can be distinguished for two reasons. First, the defendant there only had to show prima facie reversible error following the State's failure to file a response brief or present oral argument. Wilburn, 51 Wn. App. at 828-30, 832-33. Second, the reviewing court held that that "*[i]nasmuch as the outcome turned largely on the credibility of Wilburn and the victim*, and the court

had already determined that evidence of prior acts *must be excluded*, a curative instruction would not have helped." Id. at 832 (emphasis added).

Here, the case did not turn largely on the credibility of Jerez-Sosa and Santos-Valdez. Victim Fasil Berhanu testified about the absence of any coercion or gunplay used by Santos-Valdez against Jerez-Sosa, the lack of any observable distress or fear on Jerez-Sosa's part, his actions consistent with someone who was an eager and willing participant (tearing out the radio wires, obscuring the camera, and not only taking the wallet but moving on to the front seat to find more to steal), and the manner in which Jerez-Sosa and Santos-Valdez ran away together and appeared to be working in concert. 911 caller David Mitchell attested to how the two men ran away as if they were together, and observed no signs of distress by Jerez-Sosa or threats or gun use by Santos-Valdez. The cab stills also negated any duress defense, showing that Santos-Valdez never once pointed his weapon at Jerez-Sosa.

Because of the strength of the case and conditional nature of the pretrial ruling, the seriousness of the irregularity was low.

b. Cumulativeness.

Jerez-Sosa couches the issue of cumulativeness as one of admissibility. He contends that because the trial court could not properly have admitted Santos-Valdez's statements as rebuttal evidence, the statements could not have been considered cumulative. He is incorrect.

Allegations of robberies not committed under duress are admissible to rebut a claim of duress raised in other robberies. Watkins, 53 Wn. App. at 271. In Watkins, the defendant moved to sever five counts of robbery, which included four counts of robbing convenience stores, for which she claimed duress, and one for robbing someone at knifepoint in a car, for which she argued mistaken identity. Id. at 267-69. This Court held: "*We agree that proof that Watkins committed the car robbery without duress tends to negate her duress defense to the convenience store robberies.*" Id. at 271 (emphasis added). While Jerez-Sosa attempts to distinguish Watkins on the basis that it was decided in the context of a severance motion, this is of no moment; this Court's holding arose during the portion of the severance analysis discussing "*admissibility of the evidence of the other crimes.*" Id. at 269 (emphasis added).

Thus, testimony that Jerez-Sosa had claimed to have participated in robberies previously without duress would have been admissible to negate his duress defense on the present charges. This is especially true in light of the nature of his duress defense; namely, that he was particularly vulnerable to duress having been randomly shot in the past as an innocent bystander. This claim served as the linchpin of Dr. Young's diagnosis of PTSD and Jerez-Sosa's own claim of extreme vulnerability around guns.

Santos-Valdez's first statement, which described Jerez-Sosa's suggestion that they rob a liquor store based on his prior success, would also have been admissible to negate his claim of duress and his attempt to paint himself as a reluctant and unwilling participant rather than an active, engaged cohort. Unlike the statements in Escalona, which were "not cumulative or *repetitive of other evidence*," both of the unsolicited statements in this case were indeed repetitive of evidence that would have been elicited during rebuttal anyway. Escalona, 49 Wn. App. at 255 (emphasis added). Moreover, as discussed below, the statements were not even offered as substantive proof of prior robberies, only as impeachment evidence.

i. ER 404(b) does not apply because the statement was offered as impeachment only.

ER 404(b) generally prohibits evidence of prior bad acts to prove a person's character in order to show conformity therewith; however, such evidence may be admitted for other valid purposes. State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). Prior to admission, the court must conduct an analysis on the record and "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." Id. at 175.

Jerez-Sosa insists that the trial court abused its discretion because the admission of both statements was subject to ER 404(b), and no such analysis was conducted on the record. In this vein, he attempts to distinguish Watkins by stating that the trial court there "had the benefit of a previous court making a determination of probable cause . . . in the non-duress case, thereby fulfilling the first component of Foxhaven [sic] that there be a preponderance of proof that the prior misconduct actually occurred." BOA at 27.

These arguments are misguided because ER 404(b) applies only to conduct offered as *substantive evidence*. See e.g. State v. Wilson, 60 Wn. App. 887, 891-92, 808 P.2d 754 (1991). Santos-Valdez confirmed on the stand that he had no firsthand knowledge of whether Jerez-Sosa had actually been involved in any other robberies, only that Jerez-Sosa had claimed to have been. This comported with the trial court's limiting instruction, which specifically told the jury that it could not consider the statements "for their truth, that is, whether or not the Defendant committed other robberies," but only to evaluate Jerez-Sosa's state of mind. RP 202.

Had the first statement arisen in the proper sequence during the rebuttal stage, it would not have been offered as substantive evidence, i.e., to establish that Jerez-Sosa had actually successfully robbed liquor stores, but to rebut his portrayal of his state of mind at the time of the incident as one of "despair," reluctance and fear. Because Jerez-Sosa had put this issue into play, the State would have been entitled to show that his claims of prior success established that he was instead an eager and willing participant in the Berhanu robbery.

Similarly, had the second statement arisen in proper sequence, it would not have been offered as substantive evidence to

establish that Jerez-Sosa had been shot while committing other crimes. The statement would have been admissible during re-direct examination to clarify a misleading line of inquiry by defense counsel implying that Santos-Valdez had known about Jerez-Sosa's claims of prior innocent victimhood. Where a defendant begins an inquiry into a particular subject, the State may pursue the subject further to clarify a false impression. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) ("It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.").

Defense counsel attempted to imply that Santos-Valdez knowingly bullied Jerez-Sosa into committing the crime *based on Santos-Valdez's belief* that Jerez-Sosa was a vulnerable, frightened man traumatized after being shot in the past. Santos-Valdez had no such belief because Jerez-Sosa had told him an entirely different story. Whether or not that story was true was beside the point. The contrary account given to Santos-Valdez would also have been admissible to impeach the basis for Dr. Young's opinion of extreme vulnerability.

Watkins supports the proposition that despite its inherent prejudice, the State may offer evidence of other robberies to disprove duress. Here, the evidence presented to the jury was even less prejudicial than the type of evidence contemplated in Watkins because it involved only Jerez-Sosa's *claims* of past involvement in other robberies. Santos-Valdez was very clear that he had no firsthand knowledge that Jerez-Sosa was involved in other robberies. Nor did the State attempt to prove them up by calling other witnesses or bringing in extrinsic evidence.

In short, the evidence was offered only to show that contrary to his claim of duress, Jerez-Sosa had been integrally involved in planning the robbery of Berhanu and had told inconsistent stories about his 2008 shooting, which undermined both his credibility and the validity of his defense expert's conclusions regarding his extreme vulnerability.

ii. Under ER 403, the statements were more probative than prejudicial.

Because ER 404(b) does not apply, the evidence is more properly analyzed as an admission of a party opponent under ER 801(d)(2) and under ER 403 to determine its probative value versus its prejudicial effect. Jerez-Sosa argues that the statements

fail under the latter's balancing test. He first contends that the probative value was low because the statements were not corroborated. He cites to no authority holding that a statement must be heard by more than one witness to be sufficiently probative.

With respect to the first statement, Jerez-Sosa next argues that "whether Jerez-Sosa *previously succeeded* in robbing a liquor store shed little light on his state of mind at the time of the charged offense." BOA at 29. However, this misses the very point of the evidence. As argued earlier, the evidence was not to be considered for the truth of the matter, i.e., whether Jerez-Sosa had actually committed a prior robbery. Regardless of its truth, it was to be considered only to show whether Jerez-Sosa was an eager and active participant in *this* robbery, someone who had suggested prospective victims and had claimed prior success in order to convince the others to select his target of choice.

With respect to the second statement, Jerez-Sosa argues that "[t]he context in which Santos-Valdez learned . . . how Jerez-Sosa had been shot, was of little relevance." BOA at 29. In fact, it was Jerez-Sosa who put the context of the shooting at issue. Defense counsel's questioning was designed to convey the

impression to the jury that Santos-Valdez knew about Jerez-Sosa's alleged victimization by gunfire in 2008 and was exploiting his resulting vulnerability to force him to commit a robbery. This followed counsel's unequivocal announcement of a duress defense just hours earlier in opening statement, in which he stated that "we intend to prove that [Santos-Valdez] threatened Mr. Jerez-Sosa, and Mr. Jerez-Sosa complied," invoking Jerez-Sosa's prior injury as a primary reason for his ultimate involvement in the crime: "He will tell you that he has been shot in the past and the threat of being shot again was real and he was very, very scared." 2RP 12.

The trial court properly found that any prejudice was reduced by the detailed oral limiting instruction given after both statements as well as the other instructions urging the jury to approach Santos-Valdez's statements with caution. RP 554.

iii. Even if ER 404(b) applied, the lack of an explicit preponderance finding was harmless.

To the extent this Court finds that ER 404(b) applies, the lack of an explicit preponderance finding does not preclude a finding that the record as a whole showed that the trial court had fulfilled the requirements of the rule. Where the record shows in some way that the court, after weighing the consequences of admission, made a

"conscious determination" to admit or exclude the evidence, the lack of explicit ER 404(b) findings is harmless. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996); State v. Gogolin, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). Here, given the court's request for briefing and thorough revisitation of the issue, there is ample proof in the record that the court painstakingly weighed its decision and the consequences of admission. The record thus presents a situation "where, from the record as a whole, the reviewing court can decide issues of admissibility without the aid of an articulated balancing process on the record." Gogolin, 45 Wn. App. at 645.

During the motion for reconsideration, the trial court specifically inquired of the State that "[a]ssuming 404(b) applies," how it could find by a preponderance that Jerez-Sosa had made the statements. RP 547. The State responded that the court could do so by assessing the credibility of both men, including the consistency of their statements both internally and against the backdrop of all the other evidence such as the surveillance video and other witness testimony. RP 547-51. Immediately after this exchange, the trial court granted the motion for reconsideration. RP 554. Given this sequence of events and the fact that the evidence amply supported

the theory that Jerez-Sosa was, in fact, an active and engaged participant, the record supports a preponderance finding.

Nor was the trial court's determination an improper hindsight decision. Even if Santos-Valdez had not made any of the allegedly offending comments during the State's case-in-chief, a credibility assessment and preponderance finding would still have taken place at the close of the defense case, after all the evidence had already been heard and both men had testified.

c. Effectiveness Of Instruction.

Jurors are presumed to follow the limiting instruction of the court following a trial irregularity. Escalona, 49 Wn. App. at 254; Gamble, 168 Wn.2d at 177. Here, the trial court gave a carefully detailed instruction to the jury:

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

RP 189-90, 202 (emphasis added).

The instruction explicitly forbade the jury to consider the statements for their truth, i.e., whether Jerez-Sosa had actually committed any prior robberies, limiting their use to assessment of his state of mind. The court further buffered any prejudicial effect by emphasizing that each statement had "allegedly" been made to Santos-Valdez, reminding the jury to evaluate them with a level of skepticism. Most importantly, the court prefaced the entire colloquy with an admonition that the statements could only be considered at all if the jury first found them to be credible. This prerequisite effectively conditioned the jury to approach the statements with a high level of scrutiny.[6]

This tone of skepticism was reinforced by two additional instructions. Instruction No. 6 reminded the jury to "give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, *taking into consideration the surrounding circumstances*." CP 42 (emphasis added). Instruction No. 9A also communicated an explicit caveat to the jury with respect to Santos-

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[6] Moreover, as the State argued and the trial court agreed during the motion for reconsideration, if the jurors were to find Santos-Valdez's statements about Jerez-Sosa's claims of prior robberies to be credible, then it was likely they also found credible Jerez-Sosa's acknowledgement that he had no firsthand knowledge about whether the claims were true. RP 534-35, 554. The jury's belief in the credibility of Santos-Valdez's statements would also logically mean that it believed in the truth of his testimony regarding the charged offense. Id.

Valdez's testimony, a caveat cited by the trial court during the motion for reconsideration as an especially effective prophylactic against undue prejudice:

> Testimony of an accomplice, given on behalf of the State should be subjected to careful examination in the light of the evidence in this case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 45; RP 554.

Jerez-Sosa nonetheless argues that the multiple instructions were not effective. He bases this argument primarily on this Court's holding in Escalona, where an instruction was found insufficient to cure the prejudice resulting from an assault victim's reference to the defendant's prior assault conviction. 49 Wn. App. at 256.

But Jerez-Sosa misreads the holding in Escalona. There, this Court recognized that "[e]ach case must rest upon its own facts" and held that it was the *combination* of facts distinctive to that case that mandated such a result: "[T]he seriousness of the irregularity here, *combined with the weakness of the State's case* and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect." 49 Wn. App. at 256 (emphasis added). Here, as argued above, the State's case was

extremely strong and the irregularity was one of timing rather than ultimate admissibility. Thus, Escalona does not dictate that the limiting instruction should be presumed to have been ineffective here.

Given the multiple instructions admonishing the jury to approach Santos-Valdez's statements with great care, this Court should not overturn the presumption of their effectiveness.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Jerez-Sosa's conviction.

DATED this 4 day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
NAMI KIM, WSBA #36633
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, DANA NELSON, containing a copy of the Brief of Respondent, in STATE V.RODOLFO JEREZ-SOSA, Cause No. 71823-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

02-04-15

Date

Done in Seattle, Washington