73142-4

NO. 73142-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

David Lynn DeSpain,

Appellant.

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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 14-1-00205-1

BRIEF OF RESPONDENT

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Island County Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 240-5506

By: Kathryn Ludwick
Deputy Prosecuting Attorney
WSBA # 46634
Attorney for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES 1

A. Whether two separate statements, made by the judge and victim, that imply that the defendant has a criminal history, rise to the level of a constitutional violation when the jury is neither informed of a specific prior conviction of the defendant nor learns the defendant has previously committed identical other acts. 1

B. Whether the trial court's use of technical legal jargon in informing the jury venire that the defendant had a "high offender score" warranted a mistrial when that particular trial irregularity was cured with a general jury instruction and the subsequent voir dire of the venire panel. 1

C. Whether a vague statement made by a witness that implies the defendant has a criminal history is enough of a trial irregularity to warrant a mistrial where the statement is cumulative and cured by a general jury instruction..... 1

D. Whether a victim's lay opinion of the value of her stolen jewelry, informed by her familiarity with the jewelry and its composition, is enough for a rational factfinder to find the State proved beyond a reasonable doubt the value of the jewelry stolen by the defendant was worth more than $750..... 1

E. Whether the advanced age and living situation of an 81-year old victim living alone can allow a rational jury to find beyond a reasonable doubt the victim was particularly vulnerable. 1

F. Whether the trial court was legally justified in imposing an exceptional sentence based, in part, on the jury's factual finding that the victim was particularly vulnerable due to her advanced age and living situation. 1

G. If this court invalidates the jury's factual finding that the victim was particularly vulnerable, whether the matter must be remanded for sentencing where it is clear from the record that the sentencing court would have imposed an exceptional sentence based solely on the unchallenged aggravating circumstance of the defendant's high offender score resulting in some of his current offenses going unpunished. 2

II. STATEMENT OF THE CASE 2

III. ARGUMENT 7

A. Absent evidence of a specific prior conviction, an errant statement by a judge or witness that merely implies the defendant has a criminal history is a trial irregularity, not a constitutional violation 7

1. The trial court's technical legal jargon did not warrant a mistrial as the jargon did not reveal a specific past conviction of the defendant, and was easily cured with a general instruction and the subsequent voir dire of the venire panel. 11
2. Just as in *Hopson*, a vague statement by a victim that infers a defendant might have a criminal past does not warrant a mistrial when such statement is cumulative in nature and can be cured with a general instruction. 14
3. As this court's opinion in *Young* makes clear, where a trial irregularity does not introduce otherwise inadmissible evidence regarding identical acts, a specific jury instruction is not required to cure a general irregularity 19

B. The victim's lay opinion of and familiarity with the value of her stolen jewelry allowed the jury to find beyond a reasonable doubt the value of the jewelry stolen by the defendant was worth more than $750. 22

C. The jury found beyond a reasonable doubt the victim was particularly vulnerable based on the evidence they heard of her advanced age and living situation; the trial court was then legally justified in imposing an exceptional sentence based, in part, on the jury's findings. 28

1. Viewing the evidence in the light most favorable to the State, the testimony from the victim and defendant regarding the victim's advanced age and living situation allowed the jury to make the requisite factual findings. .29
2. The imposition of the exceptional sentence was legally justified given the victim's advanced age and living situation. 33

D. Even if this court finds there was not a factual basis to support the imposition of the exceptional sentence based on the victim's vulnerability, remand for resentencing is inappropriate because the trial court still properly based the exceptional sentence on the defendant's high offender score resulting in some of his current offenses going unpunished. 35

IV. CONCLUSION 37

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. XIV; WASH. CONST., art. I, § 3 22

UNITED STATES SUPREME COURT DECISIONS

Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)), cert. denied, _____ U.S. _____, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013) 7
In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 3 68 (1970)... 22
Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 22
Mak v. Washington, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986) 9

WASHINGTON SUPREME COURT DECISIONS

Donaldson v. Greenwood, 40 Wn.2d 238, 242 P.2d 1038 (1952) 23
In re Martinez, 171 Wn.2d 354, 256 P.3d 277 (2011) 23
In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).. 7
McCurdy v. Union Pac. R.R. Co., 68 Wn.2d 457, 413 P.2d 617 (1966).. 23
Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711 (1989) 9
State ex rel. Edelstein v. Huneke, 140 Wash. 385, 249 P. 784 (1926) 8
State v. Alexis, 95 Wn.2d 15, 612 P.2d 1269 (1981) 8
State v. Berg, 181 Wn.2d 857, 337 P.3d 310 (2014) 22
State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996) 35
State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 8
State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012) 7
State v. Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001) 34
State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 35
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 22
State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997) 8
State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989) 7, 9, 10, 14, 16
State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 35
State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44 (1935) 8
State v. Kleist, 126 Wn.2d 432, 895 P.2d 398 (1995) 23
State v. Ozuna, 184 Wn.2d 238, 359 P.3d 739, 744 (2015) 22
State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011) 10
State v. Ray, 116 Wn. 2d 531, 806 P.2d 1220, 1228 (1991) 17
State v. Rowley, 74 Wn.2d 328, 444 P.2d 695 (1968) 23

State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010) 29, 24
State v. Suleiman, 158 Wn.2d 280, 143 P.3d 795 (2006) 29, 30
State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983) 9
State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007) 30
Winbun v. Moore, 143 Wn.2d 206, 18 P.3d 576 (2001) 29

WASHINGTON COURT OF APPEALS DECISIONS

State v. Clark, 13 Wn. App. 782, 537 P.2d 820 (1975) 23
State v. Clinton, 48 Wn. App. 671, 741 P.2d 52 (1987) 34
State v. Garcia, 177 Wn. App. 769, 313 P.3d 422, 426 (2013) 7, 9, 20
State v. Hammond, 6 Wn.App. 459, 493 P.2d 1249 (1972) 24
State v. McPhee, 156 Wn.App. 44, 230 P.3d 284 (2010) 24, 25
State v. Ross, 71 Wn.App. 556, 861 P.2d 473 (1993) amended, 71 Wn.App. 556, 883 P.2d 329 (1994) 35
State v. Sims, 67 Wn. App. 50, 834 P.2d 78 (1992) 31, 34
State v. Vandervlugt, 56 Wn.App. 517, 784 P.2d 546 (1990) 31
State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992) 23
State v. Young, 129 Wn. App. 468, 119 P.3d 870, 872 (2005) 10, 18, 19
State v. Zigan, 166 Wn. App. 597, 270 P.3d 625, 628 (2012) 30

WASHINGTON STATUTES

RCW 9.94A 28, 33, 36
RCW 9.94A.537 28
RCW 9.94A.585(4) 33
RCW 9A.56.010(21)(a) 23
RCW 9A.56.040(1)(a) 23

I. STATEMENT OF THE ISSUES

A. Whether two separate statements, made by the judge and victim, that imply that the defendant has a criminal history, rise to the level of a constitutional violation when the jury is neither informed of a specific prior conviction of the defendant nor learns the defendant has previously committed identical other acts.

B. Whether the trial court's use of technical legal jargon in informing the jury venire that the defendant had a "high offender score" warranted a mistrial when that particular trial irregularity was cured with a general jury instruction and the subsequent voir dire of the venire panel.

C. Whether a vague statement made by a witness that implies the defendant has a criminal history is enough of a trial irregularity to warrant a mistrial where the statement is cumulative and cured by a general jury instruction.

D. Whether a victim's lay opinion of the value of her stolen jewelry, informed by her familiarity with the jewelry and its composition, is enough for a rational factfinder to find the State proved beyond a reasonable doubt the value of the jewelry stolen by the defendant was worth more than $750.

E. Whether the advanced age and living situation of an 81-year old victim living alone can allow a rational jury to find beyond a reasonable doubt the victim was particularly vulnerable.

F. Whether the trial court was legally justified in imposing an exceptional sentence based, in part, on the jury's factual finding that the victim was particularly vulnerable due to her advanced age and living situation.

G. If this court invalidates the jury's factual finding that the victim was particularly vulnerable, whether the matter must be remanded for sentencing where it is clear from the record that the sentencing court would have imposed an exceptional sentence based solely on the unchallenged aggravating circumstance of the defendant's high offender score resulting in some of his current offenses going unpunished.

II. STATEMENT OF THE CASE

In September 2014, Margaret Faltys was an 81-year old widow living alone at her home in Clinton, Washington when she was burglarized by David DeSpain ("DeSpain"). 2RP 162-63[1]; 2RP 177-78.

Ms. Faltys had only met DeSpain about a month earlier on July 17, 2014, when he did landscaping work at her home. 2RP 167. The landscaping work took several days to complete, and during that time DeSpain and Ms. Faltys had several conversations. 2RP 258. During one of those conversations, Ms. Faltys told DeSpain he could have some of her late husband's wood which was sitting in the garage. 2RP 170-71. Two days after the landscaping job finished, on July 24, 2014, DeSpain returned to Ms. Faltys' home with a truck; it took him about three hours to load the wood from the garage into his truck, and during that time,

[1] For clarity, "1RP" refers to the Verbatim Report of Proceedings from Day 1 of the Jury Trial; "2RP" refers to the Verbatim Report of Proceedings from Day 2 of the Jury Trial; "3RP" refers to the Verbatim Report of Proceedings from the Sentencing Hearing held January 30, 2015.

DeSpain used the downstairs guest bedroom bathroom in Ms. Faltys' home before leaving. 2RP 171-72.

On Friday, September 5, 2014, Ms. Faltys was getting dressed to go to dinner with some friends at the Rod and Gun Club on Whidbey Island when she noticed a couple of her rings were missing from her wooden jewelry case. 2RP 174-75. When Ms. Faltys went to search her jewelry pouch for the missing rings, she learned the pouch itself was missing from its usual spot in a chest of drawers in her bedroom. 2RP 174. Ms. Faltys remembered she had previously worn the rings and other pieces of jewelry on September 1, 2014, and so knew her jewelry pouch must have been stolen sometime between September 1 and September 5, 2014. 2RP 173-75. Several of her missing pieces of jewelry were all gold, either 14- or 18-karat gold, and several pieces had been inlaid with precious stones. 2RP 173.

Having discovered the theft, Ms. Faltys called the Island County Sheriff's Office and spoke to Deputy Brent Durley. 2RP 176. Ms. Faltys was "reasonably certain" she knew who had taken her jewelry and asked Deputy Durley if she could call the suspect she had in mind and suggest she had surveillance cameras on the premises which caught the suspect in the act. 2RP 177-78. Deputy Durley saw no problem with the proposed ruse and told her so. 2RP 178.

Ms. Faltys then called DeSpain and left him a voice message saying that she had surveillance cameras in the home, she knew there were things missing from her home, and that if he returned the things he had taken she would not turn the surveillance tapes over to the police. 2RP 178. DeSpain called back and told Ms. Faltys he would be at her house the next day with what he took. 2RP 178.

DeSpain came to Ms. Faltys' home the Monday after the phone call. 2RP 180. He told Ms. Faltys "how very sorry he was" and that he had never done anything like that before. 2RP 180. DeSpain shoved a jewelry pouch at Ms. Faltys, which she took without checking its contents. 2RP 180-81. After DeSpain left, Ms. Faltys looked inside the pouch and realized the defendant had not returned all of her stolen items and had instead provided her with costume jewelry. 2RP 181.

As a result, the next day Ms. Faltys called DeSpain back and told him that not everything had been returned to her and implied she would be turning the surveillance footage over to the police. 2RP 181.

The following day, DeSpain turned up on Ms. Faltys' doorstep unannounced and shoved a man's watch with a broken band and a metal chain of some kind into her hands. 2RP 181. Neither item belonged to Ms. Faltys. 2RP 181. DeSpain said he was going to try and get the rest of Ms. Faltys' jewelry back. 2RP 181. Ms. Faltys asked DeSpain whether a key to

her home was with her missing jewelry. 2RP 182. DeSpain said he did not use a key to get into her home, and then said, "Margaret, for your protection, living here alone, I will show you how easy it is to get into your house." 2RP 182.

DeSpain took Ms. Faltys downstairs into her TV room where there was a door that opened into the backyard; using a plastic card, the defendant showed Ms. Faltys how he had slipped the lock to the door to get into the house. 2RP 182-83.

The next day, Ms. Faltys had all the locks changed and put a locking deadbolt on the downstairs door. 2RP 183.

The Island County Prosecutor's Office charged DeSpain by Second Amended Information with residential burglary, theft of a firearm, and theft in the second degree. CP 111-13; 1RP 4-5. The State also alleged two aggravating factors for the residential burglary charge: (1) the defendant's high offender score would result in some of the current offenses going unpunished; and (2) the defendant knew or should have known that the victim was particularly vulnerable or was incapable of resistance. CP 11 at 111-12. The charge of theft of a firearm was dismissed with prejudice prior to the opening of the State's case-in-chief. 1RP 136.

At trial, Deputy Durley and Ms. Faltys testified for the State; DeSpain testified, as did his fiancée, Elizabeth Walker. 1RP 146; 2RP 162; 2RP 241; 2RP 232. The jury found DeSpain guilty of both residential burglary and theft in the second degree. 2RP 303; CP 14; CP 15. In addition, the jury found beyond a reasonable doubt the defendant knew or should have known Ms. Faltys was particularly vulnerable or incapable of resistance. CP 12.

At sentencing, the State calculated that DeSpain had an offender score of 23 as to the residential burglary charge, and an offender score of 20 as to the second degree theft charge. 3RP 7. Defense counsel agreed with these calculations. 3RP 9. The court subsequently found the defendant's high offender scores would result in some of his current offenses going unpunished. 3RP 16-17. Thus, taking both aggravating factors into account—but finding that each aggravator on its own was sufficient to support an exceptional sentence—the court imposed an exceptional sentence, running the sentences for each count consecutive for a total of 113 months[2]. 3RP 17; CP 5 at 7, 18.

[2] Both the State and the defendant recommended 113 months at sentencing. 3RP 8-9.

III. ARGUMENT

A. Absent evidence of a specific prior conviction, an errant statement by a judge or witness that merely implies that the defendant has a criminal history is a trial irregularity, not a constitutional violation.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). However, while a defendant is entitled to a fair trial, he is not entitled to a perfect one. State v. Garcia, 177 Wn. App. 769, 784, 313 P.3d 422 (2013) (citing State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012) (internal quotation marks omitted) (quoting Brown v. United States, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)), cert. denied, _____ U.S. _____, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013)).

Here, the defendant did not receive a perfect trial: The trial court mistakenly read to the jury venire an aggravator which included the language that the defendant had a "high offender score." 1RP 18. In addition, the victim implied DeSpain had a criminal history. 2RP 258.

However, an errant statement by a judge or witness that implies the defendant has a criminal history is a trial irregularity, not a constitutional violation. See State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989) (at

trial, witness statement that the victim had known the defendant "three years before he went to the penitentiary the last time" was a trial irregularity that did not warrant a mistrial); Garcia, supra (trial irregularity did not warrant a mistrial where trial court read the wrong jury instruction and mistakenly told the jury the defendant had previously been convicted of Robbery in the First Degree).

Trial irregularities are irregularities which occur during a criminal trial that only *implicate* the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, n.1, 675 P.2d 1213 (1984) (emphasis added). Such irregularities neither independently violate a defendant's constitutional rights[3], nor violate a statute or rule of evidence. Id. In cases involving only trial irregularities, the harmless error analysis

---

[3] None of the case law cited by the defendant supports the proposition that at issue here is a violation of a constitutional right. This was not a case where the defendant was prejudiced by the introduction of specific prior convictions while on trial for being a habitual criminal offender. See State ex rel. Edelstein v. Huneke, 140 Wash. 385, 249 P. 784 (1926) (trial court disagreed with defendant's contention that in trial for habitual criminal offender charge, the State should have been forced to put before the jury the defendant's prior convictions, as that would have been procedurally incorrect); State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44 (1935) (In contravention of the procedure advocated in Huneke, the State incorrectly put before the jury the specific criminal offenses that made the defendant habitual criminal while he was on trial for the same). Nor was this a case where a specific prior conviction was improperly introduced following an erroneous balancing test under ER 609. See State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997) (Court conducted incorrect balancing test under ER 609(a)(1) in allowing evidence of prior conviction, and reversal was thus required); State v. Alexis, 95 Wn.2d 15, 612 P.2d 1269 (1981) (Matter remanded for trial court to conduct correct balancing test pursuant to ER 609 regarding defendant's prior rape conviction, which was erroneously admitted at trial).

is not appropriate. Id. (citing State v. Weber, 99 Wn.2d 158, 163-64, 659 P.2d 1102 (1983)).

After each irregularity here at issue, the defendant moved for a mistrial; each motion was denied by the trial court. 1RP 84; 2RP 263. The proper standard of review in reviewing a trial court's denial of a motion for mistrial is abuse of discretion, which in turn is informed by three factors: The Hopson factors. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

"The 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. Only errors affecting the outcome of the trial will be deemed prejudicial." Hopson, 113 Wn.2d at 284 (citing State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, Mak v. Washington, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)). An abuse of discretion by the trial court can only be found when the appellate court concludes that "no reasonable judge would have reached the same conclusion." Hopson, 113 Wn.2d at 284 (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)).

A court considers the Hopson factors when determining whether an irregularity warrants a mistrial. State v. Garcia, 177 Wn. App. 769, 776, 313 P.3d 422, 426 (2013); see also State v. Young, 129 Wn. App.

468, 472, 119 P.3d 870, 872 (2005) (applying the three-part Hopson to trial court's error in reading an actual past conviction of the defendant into evidence). More specifically, the Hopson factors are designed to guide determination of the ultimate question in the review of the denial of a mistrial motion: whether there is a substantial likelihood that the error affected the jury's verdict. Garcia, 177 Wn. App. at 783.

In determining the effect of an irregularity, an appellate court examines the following factors: (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. Hopson, 113 Wn.2d at 284. Application of these factors requires a balancing approach; they cannot be viewed in isolation from each other. Garcia, 177 Wn. App. at 783. The seriousness of the irregularity (which possibly could be reduced if the evidence was cumulative) must be weighed against the likelihood that the trial court's limiting instruction will eliminate any prejudice. Id. Thus, it is for the appellate court to decide whether, based on the seriousness of the irregularity and whether the information provided to the jury was cumulative, the irregularity was "so inherently prejudicial that it rendered the curative instruction ineffective and necessitated a new trial." Id. at 784 (citing State v. Perez-Valdez, 172 Wn.2d 808, 819, 265 P.3d 853 (2011)). That said, application of the Hopson factors must occur in the context of

deference to the trial court, who, "'having seen and heard the proceedings, is in a better position to evaluate and adjudge than [an appellate court] can from a cold, printed record.'" Garcia, 177 Wn. App. at 784 (citing Perez-Valdez, 172 Wn.2d at 819 (internal quotation marks omitted, brackets added)). Importantly, application of the Hopson factors means that not every irregularity in trial—even a relatively serious one—triggers a mistrial. Garcia, 177 Wn. App. at 784. Id.

Here, the defendant received a fair trial despite two separate trial irregularities. It is useful to take each irregularity in turn.

1. The trial court's technical legal jargon did not warrant a mistrial as the jargon did not reveal a specific past conviction of the defendant, and was easily cured with a general instruction and the subsequent voir dire of the venire panel.

Immediately after seating the venire panel on the first day of trial, the trial court read the charging document to the jury venire, which included the language of the following aggravating circumstance:

> And, furthermore, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished.

1RP 18. The defendant contends the trial court's remark counts as one of two "mentions of Mr. DeSpain's prior convictions[.]" Brief of Appellant at 11 (brackets added).

However, notably absent from the trial court's language was the word "conviction" or the mention of any specific crime that had previously been committed by the defendant. Rather, the language told the jury venire the defendant had committed multiple offenses for which he was on trial, and that the defendant had a "high offender score."

This particular trial irregularity was, in part, cumulative, as the jury already knew the defendant was charged with multiple offenses: The trial court had just finished informing the venire that the defendant was charged with Residential Burglary, Theft of a Firearm, and Theft in the Second Degree. 1RP 18. Further, the cumulative, "legalese" nature of the remark reduced the seriousness of the irregularity. As the trial court noted, "the language of that aggravator is difficult to understand for any lay person." 1RP 86. The trial court was best placed to judge the seriousness of the irregularity, and the trial judge noted that the technical jargon of the aggravator would likely prevent the venire panel from fully grasping the implications of a "high offender score." Indeed, as Washington case law continues to demonstrate, the meaning and calculation of offender scores are difficult enough for attorneys to understand, let alone lay persons.

Furthermore, the general language of the irregularity necessitated only that it be cured by a general instruction to disregard. This the trial court did. On the heels of the trial irregularity, the trial court properly

instructed the jury to not use the reading of the charging document as evidence of guilt:

> And I would just note that the filing of the Information itself is not evidence of guilt, and is just read to you for the purpose of advising you of what the charges are.

1RP 21. In addition, throughout the trial court's questioning of the venire panel, the trial judge repeatedly asked, and different members of the panel affirmed, that they could "objectively consider the...evidence and make determinations about the facts and apply the Court's instructions on the law to those facts." 1RP 24 (ellipses added); 1 RP 28; 1 RP 34-35. In fact, at the end of his questioning, the court asked of the panel:

> Ladies and gentlemen, would any of you be unable to assure the Court that you would follow the Court's instructions on the law regardless of what you personally believe the law is or ought to be? Anybody who would be unable or unwilling to follow the law as I give it to you in my instructions?

1RP 41. There was no response. 1RP 41. Thus, while the trial court did not specifically ask about the particular trial irregularity, the court did inquire as to whether the venire panel could follow instructions, which at that point included the instruction that the language of the charging document was not to be used as evidence of guilt. Every member of the venire panel affirmed he/she could follow the court's instructions. 1RP 41.

The trial court minimized the impact of the trial irregularity by moving the trial along, conducting an extensive voir dire to determine if the members of the venire panel could be fair and impartial, and instructing the jury that the language of the charging document was not to be considered as evidence of guilt. Because the trial court's error was not so serious that it could not be cured by a general instruction, the trial court did not abuse its discretion in denying the defendant's motion for mistrial.

2. *Just as in Hopson, a vague statement by the victim that infers a defendant might have a criminal past does not warrant a mistrial when such statement is cumulative in nature and can be cured with a general instruction.*

The second trial irregularity involves a vague statement made by the victim, Ms. Faltys, during her rebuttal testimony. 2RP 258.

In assessing this second irregularity, Hopson is instructive as the trial irregularity here at issue is similar to that in Hopson. There, the irregularity was a witness's statement that the victim had known the defendant "three years before he went to the penitentiary the last time." Hopson, 113 Wn.2d at 284. Even though Hopson contended the evidence of his criminal record was "inherently prejudicial," the Washington Supreme applied the three-part test discussed above and determined the trial court did not abuse his discretion in denying the appellant's motion

for a mistrial. Id. at 285-87. Analysis pursuant to the three Hopson factors is therefore appropriate.

In examining the seriousness of Ms. Faltys' remark, it is useful to recount the exact exchange between the State and Ms. Faltys for context. At that point in the trial, the jury had learned from the defendant himself that he had been convicted of theft. 2RP 241. On rebuttal, the State re-called Ms. Faltys to the stand to refute certain points that had been raised by the defendant, including that Ms. Faltys—an 81-year old widow—had been making sexual advances towards the 52-year old defendant when he was trimming the hedge at her home:

> Mr. Ohme: And when he was working at your house, did you have conversations with him?
>
> Ms. Faltys: Hmm. Occasional— A Few times. Primarily regarding the hedge.
>
> Mr. Ohme: Okay. And do you remember touching him a lot during that time?
>
> Ms. Faltys: No. He was on the bank with equipment and I was down in the yard.
>
> Mr. Ohme: So is it fair to say you weren't hitting on him when he was working at your house?
>
> Ms. Faltys: It's more than fair.
>
> Mr. Ohme: All right. So when he was telling you that he'd never done anything like this before, did he indicate that he'd been convicted of theft in 2009?

Ms. Faltys: Not then. I learned that later.

Mr. Ohme: Okay.

Ms. Faltys: That and several others.

2RP 258. Defense counsel objected and the objection was sustained. 2RP 258-59. Later, defense counsel moved for a mistrial. In the course of denying the motion, the trial court recalled Ms. Faltys' statement and noted:

> I do not recall that there was any actual testimony about other convictions. I could be wrong about that....I do not have a specific recollection of what the testimony was in that regard.

2 RP 264. The trial court's reaction to Ms. Faltys' statement best demonstrates its lack of seriousness. In its immediate aftermath, the trial court could not recall "any actual testimony about other convictions." Id. That is, nothing in Ms. Faltys' wording raised any red flags about the defendant's prior convictions; there was no information from Ms. Faltys concerning the nature or number of the defendant's prior convictions. At best, the jury was left with a vague statement made by Ms. Faltys that could have been referring to any number of issues. As in Hopson, Ms. Faltys' statement was not "earth-shaking" even though it potentially implied the defendant had a criminal history. Hopson, 113 Wn.2d at 284. Here, it was not earth-shaking for the judge who was in the best position

to determine its impact, and it was thus not earth-shaking for the jury – especially since Ms. Faltys' statement was cumulative evidence.

By the time this second trial irregularity occurred, the jury already knew of the defendant's 2009 theft conviction. 2RP 252-53. This conviction was properly admitted as impeachment evidence pursuant to ER 609 as crimes of theft involve dishonesty and are *per se* admissible for impeachment purposes under ER 609(a)(2). State v. Ray, 116 Wn. 2d 531, 545, 806 P.2d 1220, 1228 (1991). The seriousness of this trial irregularity was therefore reduced because Ms. Faltys' general remark was cumulative.

In addition, and just as with the first trial irregularity, the general nature of Ms. Faltys' statement did not necessitate the trial court address the irregularity with a specific instruction. Rather, the only instruction required was the one given:

> You may consider evidence that the Defendant has been convicted of a crime only in deciding what weight or credibility to give to the Defendant's testimony and for no other purpose.

2RP 272. Because the trial irregularity was general in nature, a general instruction such as the one given properly cured any error. For reasons discussed further below, the Court of Appeals case of Young does not require otherwise.

However, in the event this court disagrees, the doctrine of invited error now prevents the defendant from challenging the lack of a specific jury instruction as it was the defendant who specifically requested such an instruction not be given.

The invited error doctrine prevents a defendant from appealing an action of the trial court that the defendant himself procured. Young, 129 Wn.App. at 472. This prevents counsel from "setting up" the trial court by seeking a specific action of the court and then seeking reversal on the basis of that same action. Id. Here, defense counsel did not seek a jury instruction, and explicitly put his reasoning on the record:

> I would not be asking for an instruction for the same reason that I have not been asking for an instruction thus far, which is that I think it would be counterproductive to Mr. De Spain.

2 RP 264-65. This was a tactical choice made by DeSpain. He could have asked for a jury instruction. See Garcia, supra (even in face of glaring trial irregularity promulgated by trial court, trial court did not err in calling the jury's attention to the irregularity and instructing the jury to disregard it). The defendant specifically requested the court not give a curative jury instruction, and the record establishes that decision was made for strategic reasons. The defendant cannot now complain on appeal that an instruction was not given when it was he himself who made that request.

3. As Young makes clear, where a trial irregularity does not introduce otherwise inadmissible evidence regarding identical acts, a specific jury instruction is not required to cure a general irregularity.

The two general trial irregularities here at issue can easily be distinguished from the specific nature of the irregularity at issue in State v. Young, supra. In Young, the trial court read to the jury the charges against the defendant directly from the information which expressly stated the defendant had previously been convicted of second degree assault; the specificity was especially damning given the defendant was then on trial for first degree assault. Young, 129 Wn.App at 470. The trial court did not specifically address the error, but chose instead to read a general curative instruction to the jury. Id. at 476-77. On appeal, this court held this general instruction failed to "directly address the specific evidence at issue, [and so] cannot logically be said to remove the prejudicial impression created *by revelation of identical other acts*." Id. at 477 (brackets in original, emphasis added).

Unlike in Young, the trial irregularities at bar informed neither the venire panel nor the empaneled jury the specifics of the defendant's criminal history, nor revealed he had previously committed identical other acts. Lacking those specific details, a specific instruction to disregard the trial irregularity was not required. In fact, as a more recent case

demonstrates, the sort of trial irregularity promulgated by the trial court does not lead automatically to a constitutional violation or grounds for a mistrial. Garcia, supra.

In Garcia, the defendant, who was on trial for first degree unlawful possession of a firearm, stipulated to a jury instruction that read he had been convicted of a "serious offense," without specifying the offense. Garcia, 177 Wn.App. at 775. However, instead of reading the correct instruction to the jury, the trial court mistakenly informed the jury the "defendant had previously been convicted of Robbery in the First Degree"; the error was compounded by the State putting a copy of the erroneous instruction on the overhead for the jury to consider during closing argument. Id.

With the agreement of counsel, the trial court gave the jury corrected copies of the instruction, reread the correct version of the instruction to the jury, and informed the jury that while they had previously been given a wrong instruction for the case, they now had the correct instruction, and they should disregard the previous instruction. Id.

Garcia demonstrates that not every trial irregularity automatically gives rise to a mistrial, even if the irregularity involves a defendant's prior conviction being accidentally mentioned on the record by the trial court. Here, the trial court's general reference to the defendant's high offender

score, while unfortunate, came before the jury had even been empaneled or any evidence had been presented, and at a time when every member of the venire panel was able to affirm he/she could follow the court's instructions to not use the language of the charging document as evidence of guilt. Similarly, the vague statement made by Ms. Faltys neither informed the jury of any additional conviction nor suggested the defendant had previously committed identical other acts.

In keeping with both Garcia and Young, the trial judge correctly denied the defendant's two separate motions for mistrial. Each motion was based on a trial irregularity that did not violate the defendant's constitutional right to a fair trial, and neither was serious enough to warrant a mistrial. The defendant may not have received a perfect trial, but he did receive a fair one.

In light of the Hopson factors and Garcia, supra, the trial judge properly denied both motions for mistrial because there was not a substantial likelihood either error affected the jury's verdict. The record here does not support a conclusion that no reasonable judge would have denied the mistrial motions, and the trial court must therefore be affirmed.

B. The victim's lay opinion of and familiarity with the value of her stolen jewelry allowed the jury to find beyond a reasonable doubt the value of the jewelry stolen by the defendant was worth more than $750.

The sufficiency of the evidence is a question of constitutional law that is subject to de novo review. State v. Berg, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 3 68 (1970); U.S. CONST. AMEND. XIV; WASH. CONST., art. I, § 3. To determine if sufficient evidence supports a conviction, an appellate court considers "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (some emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In considering the evidence, an appellate court assumes the truth of the state's evidence, views reasonable inferences from the evidence in the light most favorable to the state, and deems circumstantial and direct evidence equally reliable. State v. Ozuna, 184 Wn.2d 238, ___, 359 P.3d 739, 744 (2015). This standard is a deferential one, and questions of credibility, persuasiveness,

and conflicting testimony must be left to the jury. In re Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (citing State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)).

An essential element of the charge of theft in the second degree is that the value of the property stolen exceeds $750 in value. RCW 9A.56.040(1)(a). "Value" means the market value of the property or services at the time and in the approximate area of the criminal act. RCW 9A.56.010(21)(a). The jury was properly instructed of this definition. 2RP 274.

Criminal law has derived a definition for market value from that developed in civil cases. State v. Kleist, 126 Wn.2d 432, 434, 895 P.2d 398 (1995); State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975); see State v. Rowley, 74 Wn.2d 328, 334, 444 P.2d 695 (1968) (eminent domain); McCurdy v. Union Pac. R.R. Co., 68 Wn.2d 457, 467, 413 P.2d 617 (1966) (damages in negligence action); Donaldson v. Greenwood, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952) (trust property). "Market value" is defined in Washington as the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction. Kleist, 126 Wn.2d at 435; Clark, 13 Wn. App. at 787. Market value is based on an objective standard. Kleist, 126 Wn.2d at 438.

It is longstanding and well-established that a property owner may testify as to the property's market value without being qualified as an expert in this regard. State v. McPhee, 156 Wn.App. 44, 65, 230 P.3d 284 (2010); State v. Hammond, 6 Wn.App. 459, 461, 493 P.2d 1249 (1972) (citing McCurdy, supra). "The weight of such testimony is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness." McPhee, 156 Wn.App. at 65 (citing Hammond, 6 Wn.App. at 461).

The facts at bar closely resemble those in Hammond. At issue in Hammond was the sufficiency of the evidence as it related to the value of a diamond ring[4]. There, the only evidence of value introduced to the jury was the testimony of the victim: "Well, I am well satisfied that you couldn't buy a ring like this for $600, I know." Id.

From this single statement, the appellate court concluded a rational factfinder could find the value element of grand larceny had been proved beyond a reasonable doubt. Even though the defendant argued the victim-witness's opinion was improperly based on replacement value, the Court of Appeals found the witness's valuation constituted a "layman's manner

---

[4] The defendant was alleged to have committed grand larceny, which required the State prove the jewelry the defendant was alleged to have stolen had a combined value in excess of $75. Though the grand larceny statute was repealed in 1975, the Court's analysis of "value" nevertheless remains pertinent.

of expressing market value[,...and] that replacement cost is a recognized factor to be considered in determining market value." Id. at 463 (brackets added). The court affirmed the Wigmore rule on the matter of value:

> The Owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and courts have usually made no objections to this policy.

Id. at 461 (citing 3 J. Wigmore, evidence s 716, 56 (1970). The court further noted that:

> The testimony also revealed that the witness had owned the diamond ring some 30 to 40 years. Under the general rule we think the witness was entitled to give her estimate of the value of the ring for whatever it might be worth in aiding the trier of the facts in determining the value. She was subject to cross-examination to bring out the basis or lack of basis for the estimate and in the end little or no weight might have been given to her testimony. To adopt any other holding would foster a too narrowed and technical application of the general rule relating to an owner's testimony of value of personal property.

Id. Indeed, Washington case law continues to demonstrate the State need not produce receipts or an exact figure for a jury to find the value of stolen items proved beyond a reasonable doubt. See McPhee, 156 Wn.App. at 65 (court found the State established the market value of stolen binoculars through the victim-owner who testified he traded two salmon charter license permits, each worth $750, for the binoculars).

Here, a rational jury could find the State proved the value of the stolen property beyond a reasonable doubt based on the testimony of Ms. Faltys. Ms. Faltys relayed to the jury with certainty different prices of jewelry stolen by DeSpain. She testified the price of a tennis bracelet was between $150-175 and added she knew the bracelet came from a street fair booth at Palm Springs after she had won her first tennis match. 2RP at 213. She estimated a pair of plain gold hoop earrings were "probably $100," and the value of gold earrings with dangling turquoise stones were worth "probably 75, $100." 2RP at 212-13. She also estimated the value of a silver chain with a turquoise stone, a gift from her granddaughter, at $75. 2RP at 213. Furthermore, she told the jury that all the gold jewelry she would use for dressing up and that was subsequently stolen by the defendant "were all gold, either 14- or 18-karet (sic) gold." 2RP at 173.

In addition, Ms. Faltys testified she had a "fair idea" that the sapphire and gold ring her husband specifically made for her, after taking into account the stone was bought in Florence, was approximately $300. 2RP 204. And, she testified she was "not unfamiliar with...the price of gold at the time" she and her husband purchased gold necklaces in Mazatlan, Mexico. 2RP 210. In estimating the value of one of those necklaces, Ms. Faltys put down the price she thought would be the value if she had to purchase a similar item, which was $250. 2RP 210-212.

Viewing the evidence in the light most favorable to the State, a jury could find the total value of the stolen items listed above was $1,000. In fact, totaling all the valuations provided by Ms. Faltys, the State proved the essential element of value almost three times over[5].

Ms. Faltys emphasized to the jury she was trying her best to be accurate with her valuations. 2RP 210. And, like the victim-owner in Hammond, Ms. Faltys demonstrated years, if not decades, of familiarity with each and every item stolen by the defendant: She recounted to the jury how her deceased husband bought a sapphire stone in Florence which he then had specially set for her in a gold ring[6]; she shared with the jury the history of a gold and garnet ring won by her grandfather in a poker game in Victoria[7]; she told the jury about a sapphire gold ring designed for her by her deceased husband, again using a stone he had purchased in Florence[8]; and she described a narrow gold band set with small emeralds that had been used as her wedding band when she married her husband.[9]

---

[5] The total value of the items stolen by the defendant was $2,150. In addition to the items listed above, this total includes a $300 gold and garnet ring (2RP 205); $300 for a narrow gold band set with real emeralds (2RP 208); $175 for a white hammered gold band (2RP 209); $375 for a gold chain necklace with a blue sapphire stone.

[6] 2RP at 204.

[7] 2RP at 201.

[8] 2RP at 202.

[9] 2RP at 202.

It was for the jury to decide what weight to give Ms. Faltys' valuations given what they heard about the history of the different pieces of jewelry, their origins, the fact that each piece was either "real" gold or silver and studded with genuine gem stones, and Ms. Faltys's familiarity with each. Because the State presented sufficient evidence through Ms. Faltys so that a rational jury could find Ms. Faltys' stolen jewelry was worth more than $750, the defendant's conviction for theft in the second degree must be affirmed.

C. The jury found beyond a reasonable doubt the victim was particularly vulnerable based on the evidence they heard of her advanced age and living situation; the trial court was then legally justified in imposing an exceptional sentence based, in part, on the jury's findings.

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of RCW 9.94A, that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537. The legal justification for the exceptional sentence may rely on aggravating circumstances; in some instances, facts supporting aggravating circumstances must first be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3). In those instances, the jury's verdict on the aggravating factor must be unanimous and by special interrogatory. Id.

After finding the defendant guilty of Residential Burglary, the jury returned a special interrogatory wherein they found the defendant knew or should have known Ms. Faltys was a particularly vulnerable victim. 2RP at 303-04; CP 12. Following the return of the verdicts and special interrogatory, the court polled the jury; each member of the jury confirmed the verdicts—including the special interrogatory—were unanimous. 2RP at 304-07. At sentencing, the court imposed an exceptional sentence based, in part, on the jury's finding of particular vulnerability. 3RP at 14.

Here, the defendant challenges not only the sufficiency of the evidence of the jury's finding of the special interrogatory, but also the legal justification for the imposition of the exceptional sentence. Because the standards of review differ for each, it is useful to take each in turn.

1. Viewing the evidence in the light most favorable to the State, the testimony from the victim and defendant regarding the victim's advanced age and living situation allowed the jury to make the requisite factual findings.

Whether a victim is "particularly vulnerable" is a question of fact. State v. Suleiman, 158 Wn.2d 280, 292, 143 P.3d 795 (2006). A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); See also Winbun v. Moore, 143 Wn.2d 206, 18 P.3d 576 (2001). Under this standard, an appellate court reviews the evidence in the light

most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007); State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625, 628 (2012). An exceptional sentence based on victim-vulnerability cannot be imposed without three factual findings: (1) the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime. Suleiman, 158 Wn.2d at 291 (emphasis in original).

Here, a rational jury could easily make the first two factual findings. Ms. Faltys was an 81-year old woman who lived alone in her home in Clinton. 2RP 162-63. All this the defendant knew: There was uncontroverted evidence the defendant did yardwork for Ms. Faltys over the course of several days in July 2014; during that time, the defendant had a number of face-to-face conversations with Ms. Faltys. 2 RP169-70; 2RP 243. During the course of those conversations, the defendant learned Ms. Faltys's husband died and she was living alone in her Clinton home. 2RP 170. Furthermore, during those conversations, the defendant would have seen Ms. Faltys lived alone and was of an obvious advanced age.

As for the third factual finding, viewing the evidence in the light most favorable to the State, the defendant's own statements to Ms. Faltys indicate he targeted her because she was an elderly widow living alone.

According to Ms. Faltys, the second time the defendant came to her house to return her jewelry to her, he took her around to her basement door to show her how he had entered her home. 2RP 182. In so doing, the defendant said, "Margaret, *for your own protection, living here alone*, I will show you how easy it is to get into your house." 2RP at 182 (emphasis added). The defendant himself recognized that Ms. Faltys' advanced age and living situation would make it more likely she would be burglarized again in the future, which is why he showed her how to protect herself. The defendant targeted Ms. Faltys because, as the Prosecutor put it at trial, she "was an easy mark," 1RP 140, and the defendant took advantage of Ms. Faltys' vulnerabilities. That Ms. Faltys responded surprisingly well to being burglarized after the fact does not affect whether or not she was vulnerable. See State v. Sims, 67 Wn. App. 50, 60, 834 P.2d 78 (1992) (just because the 78-year old victim managed to pull away from her attacker and run out the front door to the neighbors' to call the police does not change the fact she was particularly vulnerable because of her advanced age); State v. Vandervlugt, 56 Wn.App. 517, 522, 784 P.2d 546 (1990) (the fact the elderly victim responded well to the situation did

not alter her vulnerability) vacated on other grounds, 120 Wn.2d 427, 842 P.2d 950 (1992).

The defendant's argument that Ms. Faltys was not at home when the crime was committed is not supported by the record and is actually undermined by the jury's factual finding. Regardless of whether or not Ms. Faltys was at home when the defendant burglarized her home, the defendant's statement to her regarding her living alone suggests that she was targeted and made the victim of a crime because of her age and living situation. Certainly, an 81-year old widow would present less of a threat to a burglar than a more youthful and physically powerful victim would upon finding the burglar in the home. This formed a factual basis for the jury's finding of vulnerability, which is unrelated to whether or not Ms. Faltys was at home when the crime was committed.

Furthermore, there is no evidence in the record to suggest Ms. Faltys was *not* at home when the defendant burgled her house. While Ms. Faltys was unsure when her home was burgled, it is clear from the record she was living at her home in Clinton during the time span when she thought the burglary occurred. 2RP 163; 2RP 173-75; 2RP 215. That was the only factual finding relevant to the jury's determination; the jury did not have to determine Ms. Faltys' whereabouts when the crime occurred.

Based on Ms. Faltys's advanced age and living situation, a rational jury could find sufficient evidence to find Ms. Faltys was a particularly vulnerable victim and that her particularly vulnerability—age and living situation—was what caused the defendant to target her as the victim of his crimes.

2. The imposition of the exceptional sentence was legally justified given the victim's advanced age and living situation.

Based in part on the jury's factual findings regarding particular vulnerability, the trial court imposed an exceptional sentence outside the standard range. 3RP 15. Pursuant to RCW 9.94A.535, an exceptional sentence is subject to review only as set forth in RCW 9.94A.585(4). That statute provides as follows:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge *or that those reasons do not justify a sentence outside the standard sentence range for that offense*...

RCW 9.94A.585(4)(a) (emphasis and ellipses added). Having already addressed the factual sufficiency underlying the exceptional sentence, it remains only to examine the trial court's legal justification for the imposition of the exceptional sentence. The legal justification for a

sentence is reviewed de novo. Stubbs, 170 Wn.2d at 124; State v. Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001).

Washington case law[10] has long established that where the victim of an offense is particularly vulnerable due to advanced age, that fact alone, as a matter of law, is sufficient to justify the imposition of an exceptional sentence. Sims, 67 Wn. App. at 60; see State v. Clinton, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (as a matter of law, advanced age is sufficient in and of itself to justify imposition of an exceptional sentence).

As the State noted at sentencing, the basis for the victim-vulnerability was not only the advanced age of the victim, Ms. Faltys, but also the fact that she was an 81-year old widow living alone in isolation. 3RP 6. The jury earlier made the requisite factual findings to support the exceptional sentence imposed by the trial court. Clearly, evidence in the record supported by the factual findings made by the jury, and so the trial court was legally justified in imposing the exceptional sentence. The imposition of the exceptional sentence must therefore be affirmed.

---

[10] As originally enacted, the victim-vulnerability provision indicated that a court could consider a laundry list of vulnerabilities, including advanced age. See Laws of 1987, Chapter 131, § 2(2)(b). The latest version of the provision, codified in 2005, places no qualifications upon the source of the victim's vulnerability, which is consistent with the Legislature's intent to codify existing common law aggravating factors. Laws of 2005, Chapter 68, § 1. It stands to reason the Legislature's broadening of the victim-vulnerability provision in no way negates pre-2005 case law.

D. Even if this court finds there was not a factual basis to support the imposition of the exceptional sentence based on the victim's vulnerability, remand for resentencing is inappropriate because the trial court still properly based the exceptional sentence on the defendant's high offender score resulting in some of his current offenses going unpunished.

When the trial court imposed the exceptional sentence, its basis for doing so was two-fold: 1) the vulnerability of the victim; and 2) the defendant's high offender score would result in some of his current offenses "washing out" or going unpunished. 3RP 6. The trial court made it clear that either aggravator, taken together or considered individually, constituted sufficient cause to impose the exceptional sentence. 3RP 17; 5CP at 18.

Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003); State v. Gore, 143 Wn.2d 288, 321, 21 P.3d 262 (2001); see also State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (affirming sentence while invalidating two of three aggravators); State v. Ross, 71 Wn.App. 556, 861 P.2d 473 (1993) amended, 71 Wn.App. 556, 883 P.2d 329 (1994) (affirming sentence while invalidating two of six aggravators). It is for the trial court

to consider and impose the aggravating circumstance of whether the defendant's offender score is so high it results in some of the defendant's current offenses going unpunished. RCW 9.94A.535(2)(c).

Here, the first finding of fact entered by the trial court to justify the exceptional sentence was that "[a]s to both Counts I and III, the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c)." 5CP at 12. This finding was properly supported by facts adduced at sentencing: The State calculated the defendant had an offender score of 23 on Count I, Residential Burglary, and an offender score of 20 on Count III, Theft in the Second Degree. 3RP 7. The defense attorney agreed with the State's calculation of the defendant's offender scores. 3RP 9. In fact, the defendant's criminal history was so lengthy, the court noted it was "one of the more lengthy histories, if not the most lengthy history that the Court has encountered over the course of time." 3RP 14.

Regardless of this court's decision regarding the aggravating circumstance of victim-vulnerability, the exceptional sentence here imposed was nevertheless justified by the defendant's high offender score. The defendant does not challenge this aggravating factor, which as the trial court made clear, constituted sufficient cause in and of itself for the trial court to impose the exceptional sentence it did. 3RP 17; 5CP at 18.

The defendant had one of the longest—if not *the* longest—criminal histories the trial court had ever seen. The court was legally justified in imposing an exceptional sentence based on this unchallenged aggravator because the defendant would have otherwise benefited from his lengthy rap sheet. He would have gotten away with committing "free crimes."

Because the trial court would have imposed an exceptional sentence based on this unchallenged aggravator alone, it is unnecessary to remand the matter to the trial court for resentencing.

IV. CONCLUSION

DeSpain was accorded every constitutional and procedural right due under the law and received a fair trial. Two separate trial irregularities do not change that analysis. Further, an exceptional sentence was justified based on the factual findings made by the jury and a specific legal finding made by the trial court. For these reasons and those stated above, the State respectfully requests this court affirm the decisions of the trial court, and affirm DeSpain's convictions and sentence.

/ /

/ /

/ /

/ /

Respectfully submitted this 9th day of February, 2016.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

KATHRYN L. LUDWICK
DEPUTY PROSECUTING ATTORNEY
WSBA # 46634
ATTORNEY FOR RESPONDENT

Island County Prosecuting Attorney
PO Box 5000
Coupeville, WA 98239
360.240.5506
ICProsecutor@co.island.wa.us

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	
Plaintiff/Respondent,	NO. 73142-4-I
vs.	DECLARATION OF SERVICE
DAVID LYNN DE SPAIN,	
Defendant/Appellant.	

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 9th day of February, 2016, a copy of the Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Elaine L. Winters
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 9th day of February, 2016.

Jennifer Wallace