Supreme Court No.: 93495-9
Court of Appeals No.: 73142-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID DESPAIN,

Petitioner.

PETITION FOR REVIEW

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

Marla L. Zink
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Rules

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

David DeSpain, petitioner here and appellant below, requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. DeSpain*, No. 73142-4-I, filed June 13, 2016. Mr. DeSpain's motion to reconsider in part was denied on July 22, 2016. A copy of the opinion and order denying the motion to reconsider are attached as appendices.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review where the Court of Appeals opinion relies on faulty logic and a misreading of the record to hold the repeated exposure of the jury to Mr. DeSpain's criminal history neither deprived him of his constitutional rights to a fair trial nor constituted a trial irregularity requiring reversal? RAP 13.4(b)(1), (2), (3).

2. Whether the Court should grant review on the issue of the sufficiency of the evidence to prove valuation of goods where that valuation affects the degree of the charged offense, where the property owner merely guessed at the replacement value, and where there is no authoritative Supreme Court opinion on the issue? RAP 13.4(b)(3), (4).

3. Whether the Court should grant review where no published case upholds an exceptional sentence based upon victim vulnerability when the victim was not present when the crime occurred and where the evidence

does not show this victim to have been particularly vulnerable? RAP 13.4(b)(4).

4. Whether the Court should grant review and establish that ER 609 evidence must be subject to balancing under ER 403 where the physical evidence is minimal, the case depends upon a determination of credibility, and the prior conviction is for the same charge as the instant offense? RAP 13.4(b)(4).

5. Whether the Court should grant review and hold that argument that clearly implies the jury must disbelieve the alleged victim in order to acquit constitutes flagrant and ill-intentioned prosecutorial misconduct? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

For three days in July 2014, David DeSpain worked for a third party landscaping Margaret Faltys' home on Whidbey Island. 2RP 163-69, 217, 241-42. Mrs. Faltys gave Mr. DeSpain some wood that her late husband had used for woodworking, so he picked up the wood from her garage two days later, and Mrs. Faltys let him use a first floor bathroom. 2RP 170-72, 247.

Mrs. Faltys resided six months of the year on Whidbey Island and the remaining time in the Palm Springs area. 2RP 163. The 81-year-old was a recent widow, but she enjoyed an active social life, including

socializing with friends and family and tap dancing lessons twice a week. 2RP 172-73, 174, 200.

When Ms. Faltys dressed for dinner at the Rod and Gun Club one night after the landscaping work had been completed, she discovered her jewelry pouch and several items of jewelry were missing, and she believed her home had been burglarized. 2RP 174-75. She called the police and shared her suspicion that the burglar was Mr. DeSpain. 2RP 176-77. Mrs. Faltys suggested that she call Mr. DeSpain, trick him by claiming he was seen in her home on a surveillance camera, and suggesting that she would not call the police if he returned her property. 2RP 177-78. After the police officer agreed with her plan, Mrs. Faltys called Mr. DeSpain on the telephone and left the message. 2RP 178.

According to Mrs. Faltys, Mr. DeSpain returned her call, apologized, and said he would return her property the next day. 2RP 178-79. He came to her home the next evening, again apologized, and gave her a heavy pouch. 2RP 180. After Mr. DeSpain left, Mrs. Faltys looked at the contents of the pouch and determined her gold jewelry and some other items were not there. 2RP 181.

Mrs. Faltys again called Mr. DeSpain and left a message stating he knew what she would have to do because he had not returned the items that really mattered. 2RP 181. Mr. DeSpain returned to Mrs. Faltys'

home the next day and gave her a man's watch with a broken band and a metal chain. *Id.* Mrs. Faltys took the items even though they were not hers, and Mr. DeSpain said he would try to get her remaining jewelry back. *Id.*

Mr. DeSpain testified that he did not burglarize Mrs. Faltys' home or take her jewelry. 2RP 252. Mr. DeSpain confirmed that Mrs. Faltys left him a telephone message accusing him of the theft. 2RP 249. In response, he went to Mrs. Faltys' residence one evening and talked to her for several minutes on the front porch. 2RP 249-50, 254. He did not bring her any property. 2RP 250. Elizabeth Walker, Mr. DeSpain's fiancée, waited in the truck when Mr. DeSpain went to Mrs. Faltys' house after the accusation, and she confirmed that he did not bring anything to Mrs. Faltys. 2RP 233-35.

Island County charged Mr. DeSpain with residential burglary and theft in the second degree. CP 111-13; 1RP 4-5.[1] The State also alleged two aggravating factors for the residential burglary charge: (1) Mr. DeSpain's high offender score results in some of the current offenses going unpunished and (2) Mr. DeSpain knew or should have known that

[1] An additional charge for theft of a firearm charged was dismissed upon the State's motion just after the jury was sworn. CP 108-09; 1RP 130, 136.

the victim was particularly vulnerable or was incapable of resistance. CP 111-12.[2]

Prior to voir dire, the State agreed to limit introduction of Mr. DeSpain's criminal history to his 2009 theft conviction unless he opened the door.[3] However, the court itself then told the venire that Mr. DeSpain "has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished."[4] Once the venire exited, defense counsel moved for a mistrial.[5] The court apologized for reading that to the prospective jurors but denied the motion.[6]

The Court's revelation was soon magnified by a State's witness, the alleged victim Margaret Faltys, who told the jury that Mr. DeSpain had been convicted of theft in 2009 and had also previously committed "several other" crimes.[7] The Court denied another motion for mistrial.[8]

The jury convicted Mr. DeSpain of residential burglary and theft in the second degree and found by special verdict that he knew or should

---

[2] The State also included the high offender score aggravator for the second degree theft count. CP 112.

[3] 1RP 12.

[4] 1RP 18.

[5] 1RP 84-85.

[6] 1RP 85.

[7] 2RP 258.

[8] 2RP 263.

have known that Mrs. Faltys was particularly vulnerable or incapable of resistance for the burglary charge. CP 79-81.

At sentencing the court concluded that Mr. DeSpain's offender scores resulted in a current offense going unpunished. CP 6, 18; Sentencing RP 13. Based upon both aggravating factors, the court entered an exceptional sentence, running the sentences for each count consecutive for a total sentence of 113 months. CP 7, 9, 18; Sentencing RP 15.

Mr. DeSpain's appealed but the Court of Appeals affirmed and denied the motion to reconsider in part. Slip Op. at Appendix; Order at Appendix.

D. ARGUMENT

1. The Court should grant review to enforce its case law as to the constitutional errors or to establish Supreme Court case law for the trial irregularities that occurred when repeated statements about Mr. DeSpain's criminal history was broadcast to the jury.

Because evidence of prior criminal history runs a high risk of prejudicing the jury against the defendant, this Court has held the admissibility of such evidence is highly circumscribed. *E.g.*, *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705 (2008) (noting "highly prejudicial" danger that jury that learns of prior conviction for "the very same type of crime" will infer propensity); *State v. Oster*, 147 Wn.2d 144, 147-48, 52 P.3d 26 (2002) (noting prejudicial effect of evidence of prior

offenses and citing authorities discussing same); ER 404; *see* Op. Br. at 12 (discussing authority). To ensure a fair trial and to limit the risk of unfair prejudice, the parties agreed before jury selection that only one prior theft conviction would be admissible at trial and only if Mr. DeSpain testified. 1RP 12-13; *see In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citing U.S. const. amends. VI, XIV; const. art. I, § 22).

But at the outset, while instructing the prospective jurors, the court read charging language that included the aggravating factor that some of Mr. DeSpain's offenses would go unpunished due to his high offender score. 1RP 18-19; CP 111-12. Then, Mrs. Faltys testified she knew that Mr. DeSpain had "several other[]" convictions, including one for theft. 2RP 258.

Even if not a constitutional error, the Court should grant review to hold this trial irregularity constitutes reversible error when examining "(1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." *State v. Young*, 129 Wn. App. 468, 119 P.3d 870 (2005), *rev. denied*, 157 Wn.2d 1011 (2006).

"There was nothing trivial, formal or merely academic about th[ese] error[s]." *State v. Christopher*, 20 Wn. App. 755, 759, 583 P.2d 638 (1978).

It was particularly serious for the trial court to say Mr. DeSpain had a "high offender score"[9] and for Mrs. Faltys to say he had "several other"[10] prior convictions. It is illogical to conclude, as the Court of Appeals did below, that a jury would have interpreted "a high offender score"[11] to mean that Mr. DeSpain's "current offenses resulted in a high offender score."[12] The trial court broadcast, "the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished."[13] A jury could not have reasonably believed that the "high offender score"[14] came from "current offenses." The trial court informed the jurors that Mr. DeSpain was charged only with three counts–all property crimes: residential burglary, second degree theft, and theft of a firearm (later dismissed).[15] Given that the jurors were told of only three offenses and given that they were merely property offenses, no jury could have

---

[9] 1RP 18.
[10] 2RP 258.
[11] 1RP 18.
[12] Slip Op. at 8 (emphasis added).
[13] 1RP 18.
[14] *Id.*
[15] 1RP 18-19.

reasonably "interpreted the provision as alleging that Mr. DeSpain's multiple current offenses resulted in a high offender score," as the Court of Appeals found.[16]

Further, the jury would not have believed that three property charges could create such a "high" score so as to render Mr. DeSpain "unpunish[able]."[17] Thus, a jury would have understood the court's comment to mean that Mr. DeSpain had prior convictions, which resulted in a "high offender score" and made the "current offenses going unpunished."[18]

Next, a jury could not have reasonably concluded that "multiple"[19] current offenses could possibly result in less punishment. Jurors understand that the State seeks to punish law breakers. They also understand that breaking more laws or having "multiple" charges does not result in a lighter sentence–just the opposite. Thus, even if the jury would have interpreted the court's statement as meaning that Mr. DeSpain's "multiple current offenses ... resulted in a high offender score,"[20] it does not follow that they could have then logically concluded that the current

---

[16] Slip Op. at 8 (emphases added).
[17] 1RP 18.
[18] *Id.*
[19] *Id.*
[20] Slip Op. at 8.

offenses (with a "high" score[21]) meant that Mr. DeSpain would be "going unpunished."[22] Indeed, when the jury was informed that the "high offender score" results in "current offenses going unpunished," they must have concluded that the "high offenders score" was from prior convictions, not the "current" charges.[23]

It was also "particularly serious"[24] for the jury to learn from a State's witness that Mr. DeSpain had "several other"[25] prior convictions. The Court of Appeals opinion relies on *State v. Hopson*, 113 Wn.2d 273, 276-77, 778 P.2d 1014, 1016 (1989).[26] In *Hopson*, a witness said he knew the defendant "before he went to the penitentiary last time."[27] However, because the jury did not know of either the "nature" or "number" of prior convictions, the irregularity was not serious enough to materially affect the trial.[28]

Here, both the "nature" and "number" of Mr. DeSpain's prior convictions was established. At trial, the prosecutor asked, "did [Mr.

---

[21] *Id.*
[22] *Id.*
[23] 1RP 18.
[24] *Id.*
[25] 2RP 258.
[26] Slip Op. at 8.
[27] *Hopson*, 113 Wn.2d at 284.
[28] *Id.*

DeSpain] indicate that he'd been convicted of theft in 2009?"[29] The witness responded, "Not then. I learned that later," and then offered, "That and several others."[30] The witness twice refers to "that," the direct object being "theft." Thus, the jury knew that the number of prior crimes Mr. DeSpain had "been convicted of" was "several" and that the "nature" of some of those "several" previous convictions were "thefts."[31] As such, the witness' comment was likely to generate significant prejudice from the jury.

Both trial irregularities were noncumulative. While Mr. DeSpain's 2009 theft conviction was properly admitted, Mrs. Faltys' improper testimony indicated "several other" theft convictions. This improper testimony went well beyond the admitted evidence and thus was noncumulative. Likewise, the trial court's statements about Mr. DeSpain's high offender score resulting in "current offenses going unpunished"[32] logically also encompassed more than the admitted 2009 conviction. Accordingly, neither impropriety was cumulative of properly admitted evidence.

---

[29] 2RP 258.
[30] *Id.*
[31] *Id.*
[32] 1RP 18.

Further, neither impropriety was cumulative of the other because each contained separate prejudicial information. Mrs. Faltys' testimony emphasized the nature of prior convictions–theft–in addition to the number–several. The court, meanwhile, told the jury Mr. DeSpain's offender score, generally, was "high."[33] The court's statement generated further noncumulative prejudice by adding the high offender score to Mrs. Faltys' testimony.

The irregularities were also not curable by instruction. Contrary to the appellate court opinion, defense counsel's decision not to obtain a curative instruction does not indicate that "counsel thought the irregularities were not particularly prejudicial"–just the opposite.[34]

The defense chose not to ask for a curative instruction because it would have only served to yet again highlight Mr. DeSpain's prior criminal history for the jury, not cure the irregularities. In *Hopson*, a trial court granted the defense the opportunity to talk to the jurors individually after an irregularity. However, the Court recognized that defense counsel could conclude that talking with jurors "would merely highlight the problem."[35]

---

[33] 1RP 18.
[34] *See* Slip Op. at 9.
[35] *Hopson*, 113 Wn.2d at 276-77.

Here, defense counsel concluded similarly, that asking for a curative instruction would not cure the Court's nor the witness' comments, but merely highlight Mr. DeSpain's prior convictions. Thus, a curative instruction would have only exacerbated the effect of irregularities.

Because Mr. DeSpain did not receive a fair trial and because the trial abused its discretion in failing to grant a mistrial, this Court should grant review and reverse and remand for a new trial.

2. The Court should grant review to determine whether a property owner's guess at the replacement value is sufficient evidence to sustain a criminal conviction for second degree theft.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.[36] An essential element of theft in the second degree is that the value of the property is between $750 and $5,000. RCW 9A.56.040(1)(a); *see State v. Clark*, 13 Wn. App. 782, 787, 537 P.2d 820 (1975) (State required to prove property's value).

Mrs. Faltys' testimony did not establish the current market value of the missing jewelry. Her testimony merely reflected her guess of the replacement value of the pieces. 2RP 203. Replacement value of an item,

---

[36] *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. 1, § 22.

however, is not admissible "unless it is first shown that the property has no value." *State v. Ehrhardt*, 167 Wn. App. 934, 944, 276 P.3d 332 (2012). Ms. Faltys also said her estimate of the replacement value of some of the items was based in part upon her guess of the item's original price. 2RP 194. Because she had owned many of the items for a number of years, the purchase price was not relevant. *Ehrhardt*, 167 Wn. App. at 944; *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). Yet, Mrs. Faltys did not indicate that she considered any diminished value based upon use. Nor did she tell the jury the present value of the gold, silver, or gems found in the various pieces.

This Court has not addressed an individual's self-valuation of items allegedly taken from her home. The closest case, from 20 years ago, discusses valuation of retail goods based on a store's price tags for the goods. *State v. Kleist*, 126 Wn.2d 432, 436-37, 895 P.2d 398 (1995). The instant case presents the distinct scenario described above. The Court should grant review and hold the State failed to prove beyond a reasonable doubt that the market value of the missing jewelry was between $750 and $5,000, an essential element of second degree theft. *See* RAP 13.4(b)(3), (4).

3. This Court should grant review to determine whether an exceptional sentence for a particularly vulnerable victim can be imposed where the victim is not present during the crime and the evidence shows she is not particularly vulnerable and incapable of resistance.

In order to justify an exceptional sentence, the aggravating or mitigating factor "must be 'sufficiently substantial and compelling to distinguish the crime in question from others in the same category.'" *State v. O'Dell*, 183 Wn.2d 680, 690, 358 P.3d 359 (2015). Thus, when an exceptional sentence is based upon a victim's vulnerability, "that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

No reported cases uphold an exceptional sentence based upon victim vulnerability when the victim was not present when the crime occurred. *See State v. Jones*, 130 Wn.2d 302, 311-12, 922 P.2d 806 (1996) (victim's vulnerability involved in case where 77-year-old woman was awoken, robbed, and raped in the middle of the night); *State v. Gordon*, 172 Wn.2d 671, 674, 260 P.3d 884 (2011) (murder victim outnumbered five to one and was unable to defend himself in any way); *State v. Barnett*, 104 Wn. App. 191, 204, 16 P.3d 74 (2001) (reviewing cases and concluding particular vulnerability factor is usually applied to victims who are vulnerable "when the attack began" or "were rendered particularly vulnerable by their attacker"); *State v. Butler*, 75 Wn. App. 47,

876 P.2d 481 (1994) (defendant pushed an elderly women to the ground and tried to rape her).

Here, Mrs. Faltys was not present during the commission of the residential burglary, but merely suspected a burglary had occurred when her good jewelry was missing. Thus, any vulnerability was unrelated to the commission of the crime. Moreover, because Mr. DeSpain had been at her home before, he presumably chose to break into Mrs. Faltys' residence when her car or her pickup truck was gone and she was not home.

The Court should accept review of this issue of first impression and substantial public import. RAP 13.4(b)(4).

Imposition of the aggravator is also problematic because the State did not prove Mrs. Faltys was particularly vulnerable beyond a reasonable doubt. Mrs. Faltys led an active life, taking tap dance lessons twice a week, playing tennis, and socializing with friends. 2RP 199-200, 214. Mrs. Faltys had two vehicles, was still driving her car, and she knew how to use the telephone and call the police. 2RP 215-16.

Mrs. Faltys also was obviously quick-witted and capable of taking care of herself. She thought of tricking Mr. DeSpain by pretending he was seen in her home on a surveillance camera in order to provide proof that he committed the crime and pressure him into returning her jewelry. 2RP 177-78. A police officer affirmatively agreed to this plan and did not take

any precautions or make special efforts to protect Mrs. Faltys as she called Mr. DeSpain and talked to him at her home. 2RP 178. Mrs. Faltys was also able to have all of her locks changed the day after Mr. DeSpain reportedly showed her the door that did not have a deadbolt. 2RP 183.

Mrs. Faltys was also capable of resistance as she owned at least two pistols, which were kept on her property, she knew how to use them, and she was an active member of the Rod and Gun Club. 2RP 222.

In short, proof that Mrs. Faltys was 81 years old and living alone does not establish particular vulnerability, especially when she was not present for the crime.

4. This Court should grant review to abolish the use of ER 609 when evidence of a conviction exceeds an impeachment purpose.

As set for the in Mr. DeSpain's statement of additional grounds, this Court should grant review and hold that the application of ER 609 in this context violated his substantive and procedural rights under the state and federal constitution, including to a fair and impartial jury and the presumption of innocence. SAG at 4-18; *see* Slip Op. at 12-13 (noting argument must be addressed to this Court); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. The Court should announce a new rule that applies where the physical evidence is minimal, the case depends upon a determination of credibility, and the prior conviction is for the same

charge as the instant offense. SAG at 8. Where those factors are satisfied, the admission of ER 609 evidence should be subject to the balancing of ER 403. *Id.*

5. This Court should grant review and hold that argument that forces the jury to choose between the defendant and the alleged victim is comparable to telling the jury that an acquittal depends on its disbelief of the alleged victim.

"It is well settled that a prosecutor may not tell a jury that in order to acquit it must conclude the State's witnesses are lying. Slip Op. at 13 (citing *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), *rev. denied*, 131 Wn.2d 1018 (1997)). Relying on another Court of Appeals opinion, the court held there was no misconduct here because the prosecutor did not expressly contrast an acquittal with a disbelief of the alleged victim. Slip Op. at 13-14. The prosecutor's argument at least clearly implied that in order to acquit the jury must conclude Mrs. Faltys, the alleged victim, was lying. The Court should grant review and hold such argument is flagrant and ill-intentioned misconduct. RAP 13.4(b)(1), (3), (4); SAG at 12-15.

E. CONCLUSION

The Court should grant review for reasons set forth above.

DATED this 17th day of August, 2016.

Respectfully submitted,

s/ Marla L. Zink
Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Petitioner

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. DAVID LYNN De SPAIN, Appellant.	No. 73142-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, David DeSpain, has filed a motion for reconsideration of the opinion filed on June 13, 2016. Respondent, State of Washington, has not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 22nd day of July, 2016.

FOR THE COURT:

Becker, J.
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID LYNN De SPAIN, Appellant.	No. 73142-4-I DIVISION ONE UNPUBLISHED OPINION FILED: June 13, 2016

BECKER, J. — During David DeSpain's[1] trial for residential burglary and second degree theft, his counsel twice moved for a mistrial following vague references to DeSpain's criminal history. The court denied both motions. DeSpain appeals, challenging the mistrial rulings, the sufficiency of the evidence supporting his theft conviction, and the basis for his exceptional sentence. We affirm.

Based on allegations that DeSpain stole jewelry and a firearm from the home of 81-year-old Margaret F., the State charged him with theft of a firearm, second degree theft, and residential burglary.

[1] Although the State charged the defendant as "David Lynn De Spain." Counsel for the appellant and counsel for respondent refer to appellant's last name as DeSpain on appeal. We therefore refer to the appellant as DeSpain throughout the opinion.

During voir dire, the court read the information to the jury, including the following allegation:

> 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.

The court also told the jury: "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."

A short time later, defense counsel moved for a mistrial, arguing that the court's references to DeSpain's high offender score and offenses going unpunished were "going to cause the jury to speculate on the nature of those convictions" and prejudice them against DeSpain based on his criminal history. The court conceded it should not have read the challenged portion of the information but denied the mistrial motion. The court noted that it told the jury the charges themselves were not evidence and that they were not to consider the charges in determining guilt or innocence. The court also stated:

> I think the jury will follow my instructions not to consider the charges themselves in determining guilt or innocence in effect. And, quite frankly, I think that the language of that aggravator is difficult to understand for any lay person
> *It would be highly—highly unlikely, in my judgment, that a jury would have understood . . . what that was about.*

(Emphasis added.) Defense counsel then told the court "we're not going to be asking for a curative instruction."

Prior to trial, the court ruled that DeSpain's 2009 theft conviction was admissible as a crime on dishonesty under ER 609. On the State's motion, the court dismissed the theft of a firearm charge.

At trial, Margaret testified that in July 2014, DeSpain performed landscaping work at her Clinton, Washington, residence. At one point, DeSpain commented on the quality of wood-working materials stacked in her garage. Margaret offered the wood to DeSpain, explaining that her late husband would have wanted it to go to someone who appreciated it.

On July 24, 2014, shortly after finishing the landscaping work, DeSpain returned to Margaret's residence to pick up the wood. She testified it took DeSpain several hours to load the wood into his truck. During that time, DeSpain used Margaret's guest bathroom.

On September 5, 2014, Margaret discovered that several pieces of her jewelry were missing from her residence. Because she had worn some of the jewelry on September 1, 2014, she believed it was stolen between September 1 and September 5. She immediately reported the theft to police. Because she suspected DeSpain, Margaret asked police if she could tell him she saw him on her surveillance cameras, even though she had no such cameras. The police approved her plan. Margaret then left DeSpain a phone message saying he was caught on her surveillance cameras and she would not give the tapes to police if he returned everything he took.

The following day, DeSpain called Margaret and apologized. He also promised to return all the jewelry. He brought her a heavy pouch the next day and apologized again for his actions. When he left, Margaret realized the pouch did not contain all the stolen jewelry. She called DeSpain and left a message saying "that the things that . . . were really worth something were not in that jewelry pouch, and now you know what I have to do."

DeSpain returned to Margaret's home the following day. He handed her a broken watch and metal chain that were not hers and said he would try to get the rest of her jewelry back. When Margaret asked how he entered her house when he took the jewelry, DeSpain demonstrated how he opened a door with a card.

Margaret testified over objection to the value of each stolen piece of jewelry. Defense counsel argued that her proposed testimony was speculation. Noting "that a person can testify about the value of his or her own property, and that any objection to that would go to the weight," the court ruled that Margaret could testify to values so long as the State laid a proper foundation.

Margaret testified that she recalled the amount she or her late husband paid for some of the jewelry. As to other pieces, she made an "educated . . . estimate" based on the amount of gold and her "knowledge of what a good piece of jewelry costs." With respect to four rings, she testified that "I more or less had some idea of what it would cost if I were to go out and do that again."

DeSpain testified and conceded that he had been convicted of theft in 2009. He testified, however, that he did not burglarize Margaret's home or take her jewelry. He conceded that she left a message accusing him of the theft and that he went to her residence to talk to her about it. He denied bringing her any jewelry. His fiancée, Elizabeth Walker, testified that she was in DeSpain's truck that evening and that he did not bring Margaret any jewelry.

In rebuttal, the prosecutor asked Margaret if DeSpain ever mentioned his 2009 theft conviction. She answered:

> A. Not then. I learned that later.
> Q. Okay.
> A. That and several others.

Defense counsel objected and asked for a sidebar. The court responded, "I don't think it's necessary. I'm going to sustain the objection."

At the close of the evidence, defense counsel renewed his motion for mistrial:

> [DEFENSE COUNSEL]: . . . I wanted to renew the defense Motion for a Mistrial. There was testimony . . . during the State's rebuttal case regarding not just Mr. De Spain's 2009 conviction, which is obviously admissible; but also . . . a reference to other convictions which ties into the issue that led defense to make this motion in the first place. So we're renewing it on that basis.
>
> . . . .
>
> [PROSECUTOR]: Your Honor, it was objected to. No Motion to Strike was made . . . .
>
> THE COURT: I do not recall that there was any actual testimony about other convictions. I could be wrong about that.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor . . . [the prosecutor] asked [Margaret] whether or not Mr. De Spain had mentioned his

> 2009 conviction . . . . And she said, no, but I found out he has done that and then a "couple others" or something to that effect.
>
> THE COURT: . . . .
>
> . . . I do not have a specific recollection of exactly what the testimony was in that regard.
>
> It was right about that time there was an objection, which I sustained. There was no Motion to Strike any testimony that came in in that connection.
>
> So the objection was sustained. I don't find any basis for granting a mistrial under these circumstances.

Defense counsel then told the court he did not want a curative 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." The court noted that "we do have the instruction that the conviction . . . in 2009 can only be considered for impeachment purposes, in effect. So there is that."

The jury convicted DeSpain of burglary and second degree theft. By special verdict, the jury also found that DeSpain knew or should have known that Margaret was particularly vulnerable or incapable of resistance for purposes of the burglary.

At sentencing, the court found DeSpain had offender scores of 23 on the burglary and 20 on the theft. The court concluded these scores resulted in a current offense going unpunished. Based on that conclusion and the jury's finding of particular vulnerability, the court imposed an exceptional sentence. The top of the standard range was 84 months on one count and 29 months on the other. The court imposed high-end sentences and ran them consecutively for an exceptional sentence of 113 months. DeSpain appeals.

MISTRIAL MOTIONS

We review a trial court's denial of a mistrial for abuse of discretion. State v. Young, 129 Wn. App. 468, 472-73, 119 P.3d 870 (2005), review denied, 157 Wn.2d 1011 (2006). A trial court abuses its discretion only if no reasonable judge would have reached the same conclusion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). We will overturn a decision denying a mistrial only if there is a substantial likelihood the error affected the verdict. Young, 129 Wn. App. at 472-73. In making that determination, we consider (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether it could be cured by an instruction. Young, 129 Wn. App. at 473; State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). Applying these criteria here, we conclude the trial court did not abuse its discretion.

First, the alleged irregularities were not, either individually or collectively, particularly serious. DeSpain initially sought a mistrial based on the court's reading of the following language in the information: "the Defendant has committed multiple *current offenses* and the Defendant's high offender score results in some of the *current offenses* going unpunished." (Emphasis added.) But this provision never mentions convictions, let alone *prior* convictions. Rather, it repeatedly refers to "current offenses." We agree with the trial court that it is highly unlikely the jury interpreted this language as a reference to prior convictions. If anything, given the repeated references to "current offenses," the

jury more likely interpreted the provision as alleging that DeSpain's multiple current offenses resulted in a high offender score. This was not a serious irregularity.

The same is true of Margaret's vague reference to "several others." While her statement came closer to referencing prior convictions, the trial court correctly noted that the reference was not express and thus unlikely to generate significant prejudice. We concur and conclude that the two challenged references neither individually nor collectively amount to a serious irregularity. See, e.g., State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (statement that victim knew defendant "'three years before he went to the penitentiary the last time'" was not serious enough to materially affect the trial since there was no information concerning the nature or number of convictions); Young, 129 Wn. App. at 476 (informing jury of prior assault conviction was serious irregularity because that conviction and current offenses were for violent offenses); State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993) (ambiguous statement about defendant having been in jail was not so serious as to warrant a mistrial), review denied, 123 Wn.2d 1031 (1994).

Second, because the court had already admitted evidence of DeSpain's 2009 theft conviction, any implied reference to additional unnamed prior convictions was cumulative.

Finally, the challenged references were oblique at best and could easily have been cured by an instruction. Defense counsel expressly decided, however, not to seek a curative instruction. That decision strongly indicates that counsel thought the irregularities were not particularly prejudicial and that an instruction would likely do more harm than good.

The trial court did not abuse its discretion in denying DeSpain's motions for mistrial.

SUFFICIENCY OF THE EVIDENCE

DeSpain next asserts there was insufficient evidence supporting the value element of second degree theft. He contends Margaret's testimony regarding the value of her jewelry was too speculative to support a finding, beyond a reasonable doubt, that he stole property worth at least $750. We disagree.

Evidence is sufficient if, viewed in light most favorable to the prosecution, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When reviewing a challenge to the sufficiency of the evidence, all reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201.

An essential element of second degree theft is that the value of the property stolen exceeded $750. RCW 9A.56.040(1)(a). In this context, "value" is the "market value" of the property at the time and in the approximate area of the

criminal act. RCW 9A.56.010(21)(a). Market value is an objective standard and consists of "'the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.'" State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995), quoting State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975). An owner of property may testify to the property's value "'whether he [or she] is generally familiar with such values or not.'" State v. Hammond, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972), quoting 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 716, at 56 (James H. Chadbourn rev. ed. 1970). As the Hammond court noted,

> *the general rule requiring that a proper foundation be laid*, showing the witness to have knowledge upon the subject before he can qualify to testify as to market value, *does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales.*

Hammond, 6 Wn. App. at 461 (emphasis added). In addition, the Hammond court noted that while market and replacement value are different, replacement value "is a recognized factor to be considered in determining market value." Hammond, 6 Wn. App. at 463.

Here, Margaret testified to replacement values for four rings, stating "I more or less had some idea of what it would cost if I were to go out and do that again." She valued three of the rings at $300 apiece and a fourth at $175. She testified that she had "some basic knowledge of what a good piece of jewelry costs. Over the years I've learned." She also indicated awareness of the price of

gold and the original purchase price of some items. She valued a necklace with a sapphire stone at $375, another gold necklace with a two-peso piece at $250, gold earrings with turquoise stones at $75, plain gold hoop earrings at $100, a gold tennis bracelet with diamonds at $150, and a silver chain with a turquoise stone at $75. Viewed in a light most favorable to the State, Margaret's testimony would permit a rational trier of fact to find the value element of second degree theft beyond a reasonable doubt.

SPECIAL VERDICT / EXCEPTIONAL SENTENCE

DeSpain next contends the State did not prove beyond a reasonable doubt that Margaret was particularly vulnerable, thus warranting an exceptional sentence. Again, we disagree.

The court instructed the jury to determine "whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." The instruction defined "particularly vulnerable" as being "more vulnerable to the commission of the crime than the typical victim of Residential Burglary. The victim's vulnerability must also be a substantial factor in the commission of the crime." In this case, Margaret was an 81-year-old widow living alone. DeSpain knew this from working at her residence before the burglary. He understood that she was particularly vulnerable, telling her after the crime that "'for your own protection, *living here alone*, I will show you how easy it is to get into your house.'" (Emphasis added.) Viewing the evidence in a light most

favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that Margaret's advanced age and living situation made her particularly vulnerable. See State v. Hawkins, 53 Wn. App. 598, 606, 769 P.2d 856 (particular vulnerability was shown by victim's advanced age and fact that she lived alone), review denied, 113 Wn.2d 1004 (1989); State v. Jones, 130 Wn.2d 302, 312, 922 P.2d 806 (1996) (upholding exceptional sentence based on victim's vulnerability due to advanced age of 77); State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005) (advanced age and living alone may make a victim particularly vulnerable).

Even if we were to conclude that Margaret was not particularly vulnerable, we would still uphold the exceptional sentence based on the unchallenged finding that DeSpain's high offender score results in current offenses going unpunished. RCW 9.94A.535(2)(c). The court in this case stated that "I would have imposed this sentence if only one of the grounds . . . that I outlined here was valid." When it is clear the sentencing court would impose the same exceptional sentence based on any one of several aggravating factors, an error regarding one of the factors is inconsequential and the exceptional sentence may be upheld. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

STATEMENT OF ADDITIONAL GROUNDS

DeSpain has filed a pro se Statement of Additional Grounds for Review. Most of his arguments either echo his counsel's and fail for the same reasons, or

request adoption of a "new rule" relating to ER 609 that would modify longstanding jurisprudence and must therefore be addressed to our State Supreme Court. State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984) (decisions of state Supreme Court are binding on lower courts).

DeSpain also contends the prosecutor committed misconduct when he stated in closing argument:

> So the defense would have us—would need you to believe that Margaret [ ] made this up . . . out of the blue.
> Why? Why? Why would Margaret [ ] make this up?
> . . . .
> It's pretty simple. You either believe [Margaret] or you believe the Defendant. There's not a whole lot more I can . . . beat the drum on this case about.

DeSpain contends these remarks improperly told the jury "that in order to acquit, the defendant, it has to not believe the alleged victim."

It is well settled that a prosecutor may not tell a jury that in order to acquit it must conclude the State's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Here, however, the prosecutor did not expressly state that *acquittal* hinged on disbelieving Margaret's testimony. See State v. Rafay, 168 Wn. App. 734, 837, 285 P.3d 83 (2012) (no misconduct where remarks "did not expressly contrast an acquittal . . . with a jury determination that the State's witness were lying" and "merely highlighted the obvious fact that the two accounts were fundamentally and obviously different") (emphasis omitted), review denied, 176 Wn.2d 1023

(2013), cert. denied, 134 S. Ct. 170 (2013). Moreover, the prosecutor's statement that "you either believe [Margaret] or you believe the Defendant" arguably fell within the rule permitting a prosecutor to state, in an appropriate case, that the jury necessarily must choose between two different versions of what happened. State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); Rafay, 168 Wn. App. at 837.

In any event, because the defense did not object to the remarks, any error was waived "unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. The prosecutor's brief and indirect comments were neither flagrant nor incurable.

Affirmed.

Becker, J.

Spearman, J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73142-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kathryn Ludwick, DPA
Island County Prosecutor's Office
[ICPAO_webmaster@co.island.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 18, 2016