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Court of Appeals
Division I
State of Washington

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. DeSpain's constitutional right to a fair trial before an impartial jury was violated when the trial court instructed the jury venire that Mr. DeSpain's offender score was so high that his current offenses would go unpunished.

2. The trial court erred by denying David DeSpain's two motions for a mistrial after the court instructed the jury venire that Mr. DeSpain's offender score was so high that his current offenses would go unpunished.

3. The State did not prove every element of the crime of theft in the second degree beyond a reasonable doubt.

4. The trial court erred by concluding that the jury's finding that Margaret Faltys was particularly vulnerable or incapable of resistance provided a substantial and compelling reason for an exceptional sentence when Mrs. Faltys was not present during the commission of the crime.

5. The State did not prove beyond a reasonable doubt that Mr. DeSpain knew or should have known that Margaret Faltys was particularly vulnerable or incapable of resistance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the due process right to a fair trial before a fair and impartial jury. U.S. Const. amend. VI, XIV; Const. art. I, § 22. A defendant's criminal convictions therefore can only be introduced against him in limited circumstances. The parties and court agreed that Mr. DeSpain could be impeached with a prior theft conviction if he testified, but no other prior convictions were to be admitted. When instructing the jury venire, the trial court read the information, including the allegation that Mr. DeSpain's offender score was so high that current offenses would go unpunished. The State also elicited rebuttal testimony that Mr. DeSpain had several convictions in addition to the theft, and the court sustained Mr. DeSpain's objection.

a. Must Mr. DeSpain's convictions for residential burglary and second degree theft be reversed because the State cannot demonstrate beyond a reasonable doubt that the violation of Mr. DeSpain's constitutional rights did not contribute to his convictions?

b. Given the seriousness of the trial irregularity, the fact that it did not involve cumulative evidence, and because the trial court did not specifically instruct the jury to disregard it, must Mr. DeSpain's

convictions for residential burglary and second degree theft be reversed?

2. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Mr. DeSpain was convicted of theft in the second degree, which requires the State to prove beyond a reasonable doubt that the defendant took property with a market value between \$750 and \$5,000. The owner of the property estimated the value of several pieces of stolen jewelry by “guessing” or “taking a stab in the dark,” and her estimates were based upon the replacement value of the pieces and not the market value. Viewing the evidence in the light most favorable to the State, must Mr. DeSpain’s conviction for second degree theft be dismissed?

3. A sentencing court may impose an exception sentence based upon the jury’s factual determination of an aggravating circumstance if the court concludes that circumstance is so substantial and compelling as to distinguish the crime in question from others in the same category. This Court reviews the basis for an exceptional sentence de novo. For the crime of residential burglary, the jury found that Mr. DeSpain knew or should have known that the homeowner was particularly vulnerable

or incapable of resistance. Where the homeowner was not present when the residential burglary was committed, must the exceptional sentence be vacated because the finding does not distinguish Mr. DeSpain's offense from other residential burglaries?

4. With the exception of prior convictions, any fact used to increase the defendant's maximum sentence must be found by a jury beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Mr. DeSpain received an exceptional sentence above the standard sentence range for the crime of residential burglary based upon a jury determination that Mr. DeSpain knew or should have known that the home owner was particularly vulnerable or incapable of resistance. The home owner was not present at the time of the offense. While she was 81 years old, the home owner was physically active, mentally alert, owned firearms, and knew how to use them. Viewing the evidence in the light most favorable the State, must the jury finding that Mr. DeSpain knew or should have known that the home owner was particularly vulnerable or incapable of resistance be vacated?

C. STATEMENT OF THE CASE

For three days in July 2014, David DeSpain worked for Michael Ferren trimming a thick Cedar hedge at Margaret Faltys' home in Clinton. 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.

After her hedge was trimmed, Mrs. Faltys discovered her jewelry pouch and several items of jewelry were missing when she dressed for dinner at the Rod and Gun Club, and she believed her home had been burglarized. 2RP 174-75. Mrs. Faltys 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 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.

The Island County Prosecutor charged Mr. 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 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 jury convicted Mr. DeSpain of both residential burglary and second degree theft. CP 79, 81.

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 the victim was particularly vulnerable or was incapable of resistance. CP 111-12. The State also included the high offender score aggravator for the second degree theft count. CP 112. The jury found by special verdict that he knew or should have known that Mrs. Faltys was particularly vulnerable or incapable of resistance for the burglary charge. CP 80.

At sentencing the court found that Mr. DeSpain had an offender score of 23 for residential burglary and 20 for second degree theft. CP 6. The court concluded these offender scores resulted in a current offense going unpunished. CP 18; SRP 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; SRP 15.

D. ARGUMENT

1. **Mr. DeSpain's right to a fair trial was violated when the court informed the jury he had a lengthy criminal history.**

While instructing the jury venire, the trial court read the information, including the allegation that Mr. DeSpain's high offender score would result in some of his multiple current offenses going unpunished. The jury later learned from a State's witness that Mr. DeSpain had several prior convictions. The court denied Mr. DeSpain's two motions for a mistrial and never gave the jury a special instruction on either its instruction or the witness's inadmissible comment. The admission of a defendant's prior record is inherently prejudicial. This Court should reverse Mr. DeSpain's convictions because the errors violated his constitutional right to a trial by a fair and

impartial jury or, in the alternative, because the trial irregularities were so prejudicial that there is a substantial likelihood they affected the jury verdict.

- a. Despite the parties' agreement that only Mr. DeSpain's theft conviction would be admitted at trial, the jury learned that Mr. DeSpain had a lengthy prior record.

Prior to jury selection, the parties agreed that David DeSpain's 2009 theft conviction could be used by the State for impeachment if Mr. DeSpain chose to testify. 1RP 12-13. The State agreed not to introduce any other criminal history, absent the defendant "opening the door" to the convictions. *Id.* at 12. Thus, it was clear that the jury would learn of only one prior conviction.

When the court instructed the prospective jurors, it read the charging language from the amended information to the jury, including 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. Because of this, the jury learned that Mr. DeSpain "has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished." *Id.* at 18.

When the venire was no longer present, defense counsel moved for a mistrial. 1RP 84-85. The court apologized for reading that

portion of the information to the prospective jurors, acknowledging that this factor would be decided by the court, not the jury. Id. at 85.

The court nonetheless denied the mistrial motion, reasoning that the jury would be instructed that the charges were not evidence of guilt and the prospective jurors probably did not understand the language of the charged aggravator. 1 RP 85-86. The court, however, did not instruct the jury not to consider the charges as evidence of guilt during its oral instructions after the jury was sworn, choosing to wait until the written instructions after both sides had rested. 1RP 121-28; CP 83.

The trial court's error in reading the aggravating factor was magnified when key State's witness Margaret Faltys informed the jury that Mr. DeSpain had "several" prior convictions in addition to the 2009 theft. 2RP 258. After Mr. DeSpain admitted the theft conviction, the prosecutor again brought it up when he asked Mrs. Faltys on rebuttal if Mr. DeSpain had told her about the conviction. Id. She responded by stating that she learned about that and several other convictions after her conversations with Mr. DeSpain:

Q: All right. So when [Mr. DeSpain] was telling you that he'd never done anything like this before, did he indicate that he'd been convicted of theft in 2009?

A: Not then. I learned that later.

Q: Okay.

A: That and several others.

Id. (emphasis added).

The court sustained Mr. DeSpain's prompt objection but did not instruct the jury to disregard the evidence. 2RP 258-59. Thus, the bell first rung by the trial court was rung again by a witness.

Defense counsel again moved for a mistrial based upon both mentions of Mr. DeSpain's prior convictions. 2RP 263. The court found no reason for a mistrial because the objection to Mrs. Faltys testimony had been sustained. Id. at 264.

b. The improper introduction of Mr. DeSpain's criminal history violated his constitutional right to a fair trial by an impartial jury.

"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) (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) and State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999)). These constitutional provisions also accord the accused the right to trial before a "fair and impartial jury." State v. Roberts, 142

Wn.2d 471, 157, 14 P.3d 713 (2000) (quoting State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996)); accord Const. art. I, § 21 (“The right of trial by jury shall remain inviolate”). The right to the presumption of innocence inheres in the constitutional right to a fair trial. Finch, 137 Wn.2d at 844.

Washington courts have long recognized the prejudicial impact of a defendant’s prior convictions on the jury. State ex rel. Edelstein v. Huneke, 140 Wash. 385, 388, 249 P. 784, 250 P. 469 (1926); State v. Kirkpatrick, 181 Wash. 313, 43 P.2d 44 (1935); State v Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997); State v. Alexis, 95 Wn.2d 15, 18, 612 P.2d 1269 (1981).

It is obvious that evidence of former convictions is so prejudicial in its nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged.

Alexis, 95 Wn.2d at 18 (quoting State v. Nass, 76 Wn.2d 368, 371, 456 P.2d 347 (1969)).

In light of these constitutional concerns, ER 404(b) forbids the introduction of a party’s prior crimes or other bad acts to prove the person’s character or general propensity to commit the charged offenses and sharply limits their introduction for specific purposes. ER

404(b). “The law is not comfortable with the notion that once a criminal, always a criminal. The State has the burden of proving that the defendant committed the crime that is currently charged, not that the defendant committed crimes in the past.” Karl B. Tegland, 5Wash. Pract. Evidence Law and Practice §404.10 at 498 (5th ed. 2007).

The jury learned that Mr. DeSpain had several prior convictions through the court’s instructions to the jury venire and again through the State’s key witness, but Mr. DeSpain’s motions for a mistrial were denied. Given the inherent prejudice of learning the defendant had a criminal record, this Court should reverse Mr. DeSpain’s convictions and remand for a new trial.

c. Mr. DeSpain’s convictions must be reversed because the violation of his constitutional right to a fair trial before an impartial jury was not harmless beyond a reasonable doubt.

When a defendant’s constitutional rights are violated, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to his conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011); Finch, 137 Wn.2d at 859. The harmless error test is designed to block the reversal of convictions for small errors or defects

that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. “The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Constitutional error is presumed to be prejudicial, and the State has the burden of proving that the error was harmless. Finch, 137 Wn.2d at 859. This Court cannot be convinced beyond a reasonable doubt that the errors in this case did not contribute to the guilty verdicts.

This Court’s opinion in State v. Christopher, 20 Wn. App. 755, 583 P.2d 638 (1978) is instructive. In that case the defendant did not testify and no evidence of a prior conviction was introduced, but the trial court inadvertently instructed the jury it could use the defendant’s prior convictions for determining credibility but not as evidence of guilt. Christopher, 20 Wn. App. at 757, 758. Concluding that the instruction “strongly inferred” that the defendant had one or more prior convictions, this Court determined the error was prejudicial and required reversal. Id. at 759-60, 763. “There was nothing trivial,

formal, or merely academic about this error. It violated a fundamental constitutional right and must be presumed to have prejudiced the defendant.” Id. at 759.

The State did not produce any physical evidence connecting Mr. DeSpain to the burglary of Mrs. Faltys’ house and theft of her jewelry. Instead, the jury heard Mrs. Faltys’ account of her conversations with Mr. DeSpain where he purportedly admitted the burglary and Mr. DeSpain’s testimony that he did not commit the burglary or admit committing the crime to Mrs. Faltys. Thus, the jury’s decision rested upon who it believed.

Juries are more likely to convict, especially in a close case, when they learn the defendant had a criminal record. Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes, 94 Cornell L.Rev. 1353, 1386 (2009) (study showed “jurors appear more willing to convict on less strong other evidence if the defendant has a criminal past”); Alan D. Hornstein, Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Convictions, 42 Vill. L.Rev. 1 (1997) (“If the jury learns that a defendant previously has been convicted of a crime, the probability of

conviction increases dramatically.”); State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984) (citing studies for proposition that “prior conviction evidence is inherently prejudicial” when defendant testifies because it tends to shift the jury’s attention “from the merits of the charge to the defendant’s general propensity for criminality.”), overruled on other grounds, State v. Brown, 113 Wn.2d 420, 554, 782 P.2d 1013 (1989).

Given the highly prejudicial effect of evidence of a defendant’s prior criminal record, this Court thus cannot be convinced beyond a reasonable doubt that the guilty verdicts were not impacted by the evidence of Mr. DeSpain’s high offender score and several prior convictions. His conviction should be reversed and remanded for a new trial. See State v. Booth, 36 Wn. App. 66, 671 P.2d 1218 (1983) (bailiff’s comment to deliberating jury that defendant and the missing codefendant “jumped bail” violated defendant’s right to fair trial and was not harmless beyond a reasonable doubt); Christopher, 20 Wn. App. at 579

d. Reversal is also mandated by this Court’s opinion in *Young*.

This Court reversed second degree murder and first degree assault convictions where the court read the information to the jury

venire, thus informing them the defendant had a prior second degree assault conviction. State v. Young, 129 Wn. App. 468, 119 P.3d 870 (2005), rev. denied, 157 Wn.2d 1011 (2006). This Court treated the error as a trial irregularity and addressed the court's denial of defendant's mistrial motion under the abuse of discretion standard. Young, 129 Wn. App. at 472-73. In determining if a trial irregularity constitutes reversible error, the reviewing court reviews three factors: "(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." Id. at 473.

Concerning the seriousness of the irregularity, the Young Court found that the inadvertent disclosure of the defendant's prior conviction "created prejudice so substantial that it could be cured by nothing short of a new trial." Young, 129 Wn. App. at 473. In addition to the murder and assault convictions, Young was charged with unlawful possession of a firearm. Id. at 474. Young, the State, and the court all agreed that Young could stipulate to the prior conviction element of that crime so as to avoid the prejudice inherent in informing the jury of his prior assault conviction. Id. The Young Court concluded "no one can seriously dispute" the inherent prejudice in disclosing Young's

prior second degree assault conviction in a prosecution for assault and murder. Id. at 475.

Here, the court told the jury that Mr. DeSpain was charged with having an offender score so high that current offenses might go unpunished. The jury then learned from a witness that Mr. DeSpain had “several” prior convictions in addition to a theft. As in Young, this information was inherently prejudicial.

Concerning the second factor, whether the irregularity presented cumulative evidence, the Young Court held that nothing else was disclosed to the jury about the nature of Young’s prior offense. Young, 129 Wn. App. at 476. Here, the jury learned that Mr. DeSpain had a single prior conviction for theft. No admissible evidence told the jury that Mr. DeSpain had other criminal history, and thus the irregularity revealed only cumulative evidence.

In addition, the irregularity here was not just evidence, but also an instruction by the trial court. Jurors are presumed to follow the court’s instructions, not ignore them. See State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). Mr. DeSpain’s jury was told on at least three occasions that it was their “duty to accept the law from my instructions, regardless of what you personally believe the law is or

what you personally think it should be.” 1RP 122; 2RP 266; CP 83.

The court’s instruction was thus more serious than non-cumulative evidence.

The third factor addressed in Young is whether the court gave a curative instruction. There, the court never gave an instruction that specifically addressed the inadvertent disclosure, but instead gave the standard instruction informing the jury that the information is only an accusation and cannot be considered proof of the crimes charged. Young, 129 Wn. App. at 476-77. The Young Court found that the generic instruction given could not logically cure the prejudice because it did not “directly address the specific evidence at issue.” Id. at 477.

Here, the court did not provide a specific instruction during jury voir dire at the request of defense counsel, who did not want to draw added attention to the inadvertent reading of the aggravating factor.¹ 1RP 86. But the court indicated it would instruct the jury it could not consider the charges as evidence in determining guilt. 1RP 85, 87. The

¹ Defense counsel may justifiably decide not to take the risk that giving a cautionary instruction may increase the danger of prejudice by again bringing the juror’s attention to inadmissible evidence or improper argument. Stewart v. United States, 366 U.S. 1, 10, U.S. Ct. 941, 6 L. Ed. 2d 84 (1961).

court, however, did not include that message in its opening instructions to the newly-sworn jury, although it could easily have been added to the oral instructions. 1RP 121-28. It was not until both parties had rested that the court gave the same general instruction found insufficient by Young. 2RP 266; CP 83.

The court also gave the standard instruction informing the jury of the limited use of convictions admitted pursuant to ER 609. CP 90 (Instruction 6); WPIC 5.05. That instruction, however, did not cure the problem created by the court's reading of the information, as it did not inform the jury that it had only the 2009 theft conviction could be considered in determining Mr. DeSpain's credibility and that any other convictions could not be used for any purpose. As in Young, the trial court made no effective curative action to cure the disclosure it made that Mr. DeSpain had a significant prior record.

Telling the jury that Mr. DeSpain's offender score was so high that some of his offenses would go unpunished told the jury that he had a significant prior criminal history. The error was magnified when Mrs. Faltys told the jury she learned Mr. DeSpain had several prior convictions in addition to the theft. The introduction of this information was inherently prejudicial. As in Young, the trial

irregularity in this case was serious, it was not cumulative of any admissible evidence, and the court did not provide an effective curative instruction or take other action to ameliorate this prejudice. Because there is a substantial likelihood that the error affected the jury's verdict, the error is not harmless.

As argued in Section 1(c), the State did not produce any physical evidence tying Mr. DeSpain to the charged offenses but instead relied upon the testimony of Mrs. Faltys, especially Mr. DeSpain's alleged admission of the offenses to her. Mr. DeSpain, however, testified that he did not commit the burglary or theft and disputed Mrs. Faltys' account of their conversations. Considering the record as a whole, there is a substantial likelihood that the court's prejudicial instruction, coupled with Mrs. Faltys' comment, affected the jury verdict. Mr. DeSpain's convictions must be reversed and remanded for a new trial. Young, 129 Wn. App. at 479; see State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) (defendant alleging ineffective assistance of counsel proved failure to object to inadmissible prior conviction was prejudicial, requiring reversal).

2. The State did not prove beyond a reasonable doubt that Mr. DeSpain committed theft in the second degree.

- a. The State was required to prove every element of first degree burglary beyond a reasonable doubt.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. 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. On appellate review, the court must reverse if, after viewing the evidence in the light most favorable to the prosecution, it determines that a rational trier of fact could not have found an element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Proof beyond a reasonable doubt is not provided by “[m]ere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence.” State v. Taplin, 9 Wn. App. 545, 557, 513 P.2d 549 (1973).

Mr. DeSpain was convicted of theft in the second degree by means of wrongfully obtaining unauthorized control of another person’s property with the intent to deprive her of the property. RCW 9A.56.040; RCW 9A.56.020(1)(a); CP 79, 98, 102. An essential

element of the crime is that the value of the property is between \$750 and \$5,000. RCW 9A.56.040(1)(a); CP 97, 102. When the State seeks to convict a defendant of an offense relating to property having a value greater than a specific amount, the State must present evidence of the property's value. State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975).

b. The State did not prove the value of the stolen property beyond a reasonable doubt.

The statutory definition of "value" is "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); CP 101. Washington courts use the same definition of market value in criminal and civil cases. State v. Kleist, 126 Wn.2d 432, 434, 895 P.2d 398 (1995). "Market value" means "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." Id. at 435; Clark, 13 Wn. App. at 787. Market value is an "objective standard." Kleist, 126 Wn.2d at 438.

The State may prove market value in a variety of ways, using direct or circumstantial evidence. State v. Hermann, 138 Wn. App. 596, 602, 158 P.3d 96 (2007). The original purchase price may help determine the market value, but only when the purchase was not too

remote in time. See State v. Ehrhardt, 167 Wn. App. 934, 944, 276 P.3d 332 (2012); State v. Melrose, 2 Wn. App. 824, 831, 470 P.2d 552 (1970). A property owner may testify about the property's value even if the owner's basis of knowledge is limited. State v McPhee, 156 Wn. App. 44, 65, 230 P.3d 284, rev. denied, 169 Wn.2d 1028 (2010).

Mrs. Faltys testified that a number of pieces of jewelry were taken from her home during a suspected burglary. 2RP 174-75. Defense counsel moved to exclude Mrs. Faltys' list of testimony about the value of her jewelry and examined her briefly when the jury was not present. 2RP 188-96. Mrs. Faltys told the court that she had a good idea of the replacement cost of some items, but for others she just guessed. 2RP 194-96. The trial court denied Mr. DeSpain's motion. 2RP 198.

Mrs. Faltys had not had her jewelry appraised. 2RP 203. She gave the jury her guesses as to the value of the individual pieces based upon what she imaged the replacement costs would be. 2RP 203. Her guess of the replacement cost was based upon her guess or memory of the original purchase price. 2RP 204.

Mrs. Faltys "guessed" that a gold ring with a sapphire was worth \$300. 2RP 204. Concerning a garnet ring that was a family

heirloom, Mrs. Faltys “again . . . just took a stab in the dark” and estimated it was also worth \$300 based upon the amount of gold and the setting style. 2RP 201-02, 205-06. She also estimated value of her wedding band with emeralds was \$300. 2RP 202, 206-08. And she valued a white gold band at \$175. 2RP 208-09.

Mrs. Faltys guessed that a gold chain necklace purchased 20 years ago in Mexico was currently worth \$200 or \$250. 2RP 209-11. She valued a gold chain necklace with a sapphire stone at \$374. 2RP 211-12. And she valued a silver chain given to her by her granddaughter at \$75, a tennis bracelet purchased at a Palm Springs street fair at \$150 to \$175, a set of gold hoop earrings at \$100, and a set of gold earrings with turquoise stones at \$75 to \$100. 2RP 212-13

The State provided no other evidence concerning the value of the jewelry.

c. Mr. DeSpain’s conviction must be reversed and dismissed.

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, however, is not admissible “unless it is first shown that the property has no value.” Ehrhardt, 167 Wn. App. at 944 (citing Clark,

13 Wn. App. at 788). 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. Since she had owned many of the items for a number of years, the purchase price was not relevant. Ehrhardt, 167 Wn. App. at 944; Melrose, 2 Wn. App. at 831. 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.

The State thus 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. Mr. DeSpain's second degree theft conviction must be reversed and dismissed. Ehrhardt, 167 Wn. App. at 946.

3. Margaret Faltys was not present when the residential burglary was committed and was not particularly vulnerable and incapable of resistance.

The superior court may sentence a defendant to an exceptional sentence if (1) the jury finds by special verdict, beyond a reasonable doubt, one of the aggravating factors alleged by the State and (2) the court determines the facts constitute substantial and compelling reasons for an exceptional sentence. RCW 9.94A.535; State v. Stubbs, 170

Wn.2d 117, 123-24, 240 P.3d 143 (2010). On appellate review, the jury's factual finding is reviewed for substantial evidence using the same standard as for the elements of a crime. Stubbs, 170 Wn.2d at 123; State v. Webb, 162 Wn. App. 195, 205-06, 252 P.3d 424 (2011). This Court reviews de novo whether the aggravating factors justify a sentence outside the standard range for the offense. Stubbs, 170 Wn.2d at 124.

The trial court gave Mr. DeSpain an exceptional sentence based in part upon the jury's finding that, for the charge of residential burglary, Mr. DeSpain knew or should have known that Mrs. Faltys was "particularly vulnerable or incapable of resistance." CP 17, 111-12; RCW 9.94A.535(3)(b). Mr. DeSpain's exceptional sentence must be vacated because the record does not support the jury's special verdict finding, and the finding does not provide the basis for a departure from the standard sentence range in this case.

- a. The jury's finding that Mrs. Faltys was particularly vulnerable does not support an exceptional sentence where Mrs. Faltys was not present and her vulnerability was not connected to the commission of the crime.

Once a jury has answered a special verdict finding an aggravating circumstance, the trial court must determine if that

circumstance was so substantial and compelling as to justify an exceptional sentence. RCW 9.94A.537(3) (5); State v. Suleiman, 158 Wn.2d 280, 291, 143 P.3d 795 (2006). The jury’s finding that Mr. DeSpain knew or should have known that Mrs. Faltys was particularly vulnerable or incapable of resistance does not support an exceptional sentence in this case.

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, ___ Wn.2d ___, 2015 WL 4760476 at *5 (No. 90337-9, 8/13/15). 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.” Suleiman, 158 Wn.2d at 291-92.

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.

No reported cases uphold an exceptional sentence based upon victim vulnerability when the victim was not present when the crime occurred. Instead, the victims' vulnerability is involved in the case. The Supreme Court, for example, upheld an exceptional sentence for first degree rape and second degree robbery based upon victim vulnerability. State v. Jones, 130 Wn.2d 302, 311-12, 922 P.2d 806 (1996). In that case the defendant awoke a 77-year-old woman in the middle of the night, had her lead him to a basement where she gave him money, and then raped her before leaving her home. Other cases also involve direct contact between the defendant and the vulnerable victim. See 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).

This Court should conclude that the aggravating factor of particular vulnerability does not support an exceptional sentence in Mr. DeSpain's case where the victim was not present during the offense and thus any vulnerability was not a substantial factor in the commission of the crime.

b. The State did not prove beyond a reasonable doubt that Mrs. Faltys was particularly vulnerable.

An aggravating fact must be proven to a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.537(3). On appellate review this Court must reverse if, viewing the evidence in the light most favorable to the State, it determines that a rational trier of fact could not have found the aggravating circumstance beyond a reasonable doubt. Gordon, 172 Wn.2d at 680; Webb, 162 Wn. App. at 208; see Jackson, 443 U.S. at 334. The State did not prove that Mrs. Faltys was particularly vulnerable or incapable of resistance.

Mr. DeSpain worked on Mrs. Faltys' Whidbey Island property and had met her, so he knew her age and that she was a widow. But

those facts do not prove that Mrs. Faltys was particularly vulnerable or incapable of resistance.

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.

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

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. The aggravating circumstance should be vacated because the State did not prove beyond a reasonable doubt that Mr. DeSpain knew or should have known that Mrs. Faltys was particularly vulnerable or incapable of resistance.

c. Mr. DeSpain's case should be remanded for a new sentencing hearing.

The State did not prove beyond a reasonable doubt that Mrs. Faltys was particularly vulnerable or incapable of resistance. Moreover, the jury finding does not provide substantial and compelling reasons for an exceptional sentence in a case where Mrs. Faltys was not present at the time of the crime. This Court should vacate the special verdict and/or reverse the court's conclusion that an exceptional sentence was warranted.

E. CONCLUSION

Mr. DeSpain's second degree theft conviction must be reversed because the State did not prove the value of the stolen property beyond a reasonable doubt. His residential burglary conviction should be reversed and remanded for a new trial because the trial court inadvertently informed the jury that Mr. DeSpain had a prior criminal

record and a witness later testified that Mr. DeSpain had several prior convictions.

Mr. DeSpain's exceptional sentence must also be vacated because Mrs. Faltys was not present for the commission of the residential burglary. The factor does not support an exceptional sentence in this case, and the State did not prove beyond a reasonable doubt that Mrs. Faltys was particularly vulnerable.

DATED this 12th day of October 2015.

Respectfully submitted,

s/Elaine L. Winters

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73142-4-I
)	
DAVID DESPAIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF OCTOBER, 2015.

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