SUPREME COURT NO. 100143-6

NO. 80948-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE NAVA,

Petitioner.

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

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jose Nava asks this Court to grant review of the court of appeals' unpublished decision in State v. Nava, No. 80948-2-I, filed June 14, 2021 (Appendix A). The court of appeals denied Nava's motion for reconsideration and amended its opinion on August 2, 2021 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(3) and (4) to decide whether implicit racial bias—which this Court has recognized is a common and pervasive evil in our criminal justice system—must be considered in determining whether the jury can disregard improper evidence of a Hispanic defendant's history of incarceration?

2. Is this Court's review warranted under RAP 13.4(b)(4) to resolve the question of whether highly prejudicial firearm evidence is admissible despite the fact that it is "not probable" the gun at issue was the one issued in commission of the offense?

3. Is this Court's review warranted under RAP 13.4(b)(3) and (4) to determine if the prosecution exceeds the proper scope of voir dire by attempting to commit jurors on factual issues likely to arise in the case?

4. Is this Court's review warranted under RAP 13.4(b)(1) and (3) to determine whether the prosecution can vouch for an accomplice's testimony by eliciting their promise to "testify truthfully" on direct-

examination whenever the accomplice's credibility is at issue, which is virtually every case?

5. Is this Court's review warranted under RAP 13.4(b)(1) and (4), where Nava challenged the trial court's admission of evidence that unknown people threatened a state's witness, an issue that could be controlled by a forthcoming decision from this Court in State v. Jessica Vazquez, No. 98928-1?

6. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether cumulative error denied Nava a fair trial?

C. STATEMENT OF THE CASE

In 2018, Tye Burley won thousands of dollars in cash from a casino. 12/12 RP 627; 12/17 RP 347. He told his regular drug dealer, Jeremy Dailey, about his good fortune. 12/17 RP 338-40, 347. Burley rented a room at a Marysville motel and invited Dailey to stay there too. 12/17 RP 347-48. Burley gave Dailey some cash to use at the casino and another several $100 to buy drugs. 12/17 RP 340, 352.

Desperate for money to feed his own drug habit, Dailey began planning to steal Burley's winnings. 12/18 RP 467, 502, 532-35. Dailey told his childhood friend Jared Evans about Burley's cash and they discussed stealing it. 12/18 RP 641; 12/19 RP 727. Both Dailey and Evans were homeless and out of work, with longstanding heroin

addictions. 12/18 RP 502, 550, 626-32. Evans admitted he did not like Burley, and Burley owed him money. 12/18 RP 629.

When Jorge Nava Martinez met Dailey and Evans that afternoon to buy some drugs, Dailey told Martinez about his plans to steal Burley's money. 12/17 385. Martinez was driving a white Dodge Durango, which belonged to Nava's girlfriend, Tiffany Beston. 12/17 RP 355; 12/19 RP 838. Both Nava and Martinez regularly drove the Durango. 12/19 RP 838. According to Dailey and Evans, Martinez said he would go get his little brother, Nava, and a "cuete," which means gun in Spanish. 12/17 RP 386; 12/18 RP 642. Everyone agreed Nava was not present for any of this conversation. 12/18 RP 517, 638-39; 12/23 RP 1098. According to Martinez, he just wanted to buy drugs from Dailey, not steal Burley's money. 12/20 RP 1058-63.

Later in the day, Martinez returned with Nava to buy drugs. 12/20 RP 1060. All four men sat in the Durango, smoking heroin. 12/20 RP 1062. Dailey knew Burley was at a nearby tattoo shop with his girlfriend, Kristin Schram, and tried to learn when they would leave, hoping to surprise Burley and take his money. 12/17 RP 394-95. According to Dailey, he told Martinez and Nava to rob Burley when he left the tattoo shop, but Martinez and Nava ran back to the car when a police officer drove by. 12/17 RP 394-95, 398.

After trying to convince Burley to give him a ride back to the motel, Dailey claimed he walked back to the motel and got back in the Durango, now parked in an alley nearby. 12/17 RP 398-99, 402. According to Dailey, he and Evans sat in the backseat, while Martinez and Nava sat in the front seat, waiting for Burley. 12/17 RP 402-03.

Burley and Schram parked on the street and walked toward the motel. 12/12 RP 661, 668-69. According to Schram, two masked men approached them. 12/12 RP 671-75, 679. Immediately after the incident, Schram told police the two men were white, not Hispanic. 12/12 RP 722-23; 816 (another witness describing Nava and Martinez as Latino). She thought one of the men might have been Dailey. 12/12 RP 685.

Schram ran away when she saw one of the men holding a gun, while Burley struggled with the men. 12/12 RP 676-78, 776-78. People nearby heard a single gunshot. 12/11 RP 597; 12/12 RP 782-83. The bullet hit Burley in the head and he died a few days later. 12/19 RP 829-30. A bullet fragment was recovered from Burley's head. 12/19 RP 826.

Although there were other people in the area, no one but Schram could describe the perpetrators. 12/11 RP 596; 12/12 RP 674-76, 778-79. Video surveillance cameras captured some action from a distance but offered only "shadows," not a clear view of the people involved. 12/23 RP 1214; Ex. 223. The video shows two people exit the Durango, running

towards the motel. Ex. 223. As the two individuals run away from the scene moments later, one falls and stumbles in the middle of the street. Ex. 223. The next day, Evans was arrested for shoplifting a knee brace at Walmart. 12/19 RP 745.

According to Dailey, he and Evans remained in the backseat of the Durango while Martinez and Nava robbed Burley. 12/17 RP 402-05. Dailey claimed he had no idea anyone had a gun. 12/17 RP 403. He said that, when the brothers returned to the car, Martinez was yelling he shot Burley and Nava was crying, saying his brother's name. 12/17 RP 408. According to Dailey, he, Martinez, and Nava split the cash from Burley's wallet, and Dailey later gave Evans some of his money. 12/17 RP 411-12. Evans offered a similar version of events. 12/19 RP 701-04.

Nava described the circumstances differently. Nava told police in an interview that he and his brother met up with Dailey and Evans just to buy heroin. 12/20 RP 1003, 1007. Dailey was going to buy more heroin from Burley because Dailey had money. 12/20 RP 1011. Nava explained Evans ended up driving the Durango back to the motel, because Nava does not have a license. 12/20 RP 1014-15. Back at the motel, Dailey and Evans got out of the car and Nava heard "a blast or something." 12/20 RP 1006, 1017.

Martinez testified similarly at trial. He explained he sought out Dailey that day because he and Nava were dope sick and wanted to buy drugs. 12/20 RP 1055-57. While they were in the car with Dailey and Evans, they smoked a substantial amount of drugs, swapped places, and Martinez passed out in the backseat while Dailey and Evans robbed Burley. 12/20 RP 1062, 1064-65.

Dailey was arrested the next day. 12/16 RP 104-06. He admitted he and Evans were present, but claimed Martinez and Nava were responsible for the shooting. 12/18 RP 476. When Martinez and Nava heard they were suspects, they got scared and fled. 12/20 RP 1070-71. They were arrested a week later in California. 12/18 RP 587-98.

The Durango was searched. 12/20 RP 1000. Martinez's DNA was found on the steering wheel and driver's door handle. 12/17 RP 247-49. Nava's DNA was found on the gear shifter. 12/17 RP 251. Other swabs from the steering wheel, front passenger seat, and backseat door handles contained a mixture from several sources, so no comparisons could be made. 12/17 RP 236-41. A socket wrench belonging to Evans, with his initials carved into it, was found on the driver's seat. 12/16 RP 187-88; 12/19 RP 748, 752.

All four men were charged with first degree felony murder, predicated on first degree robbery. CP 144, 155. Both Dailey and Evans

received plea bargains to lesser offenses in exchange for testifying "truthfully" against Martinez and Nava. 12/17 RP 337; 12/18 RP 624. Dailey pleaded guilty to second degree murder and received a sentence of 165 months. 12/17 RP 337. Evans pleaded guilty to first degree robbery and was sentenced to only 41 months. 12/19 RP 709-15.

At Nava's and Martinez's joint trial, the state agreed it would not elicit any unrelated misconduct by the brothers. 12/10 RP 171-73. Dailey nevertheless testified he met Martinez in 2014 in prison, when Dailey was serving time for two first degree robberies. 12/17 RP 337, 343. A police officer also testified he identified Martinez after finding his picture in a database of people who had been in jail in California. 12/18 RP 599-600. The defense moved for a mistrial after each of these improper references to Martinez's criminal history. 12/17 RP 360-63, 370; 12/19 RP 685-86. Though the trial court expressed it was "very concerned" about the prejudicial effect of the evidence, 12/17 RP 367, it nevertheless denied the mistrial motions. 12/18 RP 434-35; 12/19 RP 687-88.

Nava lived with Beston at the time of the incident. 12/19 RP 839. Beston described a gun she owned, a small Beretta Pico .380, which she kept in a lockbox hidden in her closet and later realized was missing. 12/19 RP 840-42; 12/20 RP 884, 973-74. A firearm expert from the state crime lab found no evidence this was the type of gun used against Burley.

12/20 RP 944-46. The defense objected to admission of the gun evidence based on the lack of proof it was used in the incident. 12/20 RP 973-77; CP 229-33. The court overruled the objection and allowed the testimony. 12/20 RP 978. The prosecution argued in closing the brothers must have stolen the gun and used it in the robbery. 12/23 RP 1134, 1153-54.

The jury convicted both Nava and Martinez as charged. 12/24 RP 1251-52; CP 109. The court of appeals affirmed Nava's conviction. Opinion, 16; see also State v. Jorge Nava Martinez, Jr., No. 80947-4-I, 2021 WL 2420114 (June 14, 2021) (affirming Martinez's conviction).

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court's review is necessary to address whether implicit racial bias—pervasive in our criminal justice system—impacts the jury's ability to disregard evidence of a Hispanic defendant's history of incarceration, testified to in violation of the trial court's pretrial rulings.

There is no dispute two serious irregularities occurred at Nava's and Martinez's trial: (1) Dailey testified he met Martinez in prison in 2014, when Dailey was serving time for two robberies, and (2) a police officer testified he located Martinez in a database of individuals who had been in jail in California, both in violation of the trial court's pretrial ruling excluding unrelated misconduct under ER 404(b). See, e.g., State v. Gamble, 168 Wn.2d 161, 176, 225 P.3d 973 (2010) (improper reference to defendant's "booking file" was a serious trial irregularity); State v. Escalona, 48 Wn.

App. 251, 256, 742 P.2d 190 (1987) (improper reference to defendant's prior record was a serious trial irregularity). The prejudicial effect of the jury learning of the accused's criminal propensity is widely recognized and will not be rehashed here.

What courts have not yet recognized is the particularly harmful effect of such evidence when the accused is a person of color. In this case, two white men accused two Hispanic brothers of being responsible for the robbery and death of Tye Burley. Studies document the implicit, subconscious bias jurors have about the supposed criminal propensity of Hispanic men. The Sentencing Project, Race and Punishment: Racial Perceptions and Crime and Support for Punitive Penalties, 13-14 (2014).[1]

For instance, implicit bias tests demonstrate the general public holds negative associations of Latinos and suspects them of criminality. Id. at 13-14. White Americans significantly overestimate the proportion of crime committed by Black and Latino individuals. Id. at 13. Persistent, implicit racial bias exists even among individuals who have "explicitly disavowed prejudice." Id. In one study, mock jurors were more likely to view ambiguous evidence as indication of guilt for darker skinned suspects than for those who were lighter skinned. Id. (citing Justin Levinson & Danielle

[1] https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/ (last visited Aug. 16, 2021).

Young, Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W. VA. L. REV. 307, 330-31, 338-39 (2010)).

Improper testimony about Martinez's history of incarceration reinforced these implicit biases and perceptions jurors would have, viewing Martinez and, by association, his little brother, as the type of people who would commit a violent crime—as opposed to Dailey and Evans, who are white. The trial court itself acknowledged that telling jurors to disregard decidedly prejudicial information is rarely effective. 12/18 RP 427-29. In this case, it is highly possible, even likely, the prior incarceration evidence distorted the jurors' perceptions of Martinez and Nava—Hispanic men—reinforcing subconscious suspicion of their criminal nature and impacting jurors' view of otherwise ambiguous or tenuous evidence.[2] See Br. of Appellant, 35-39 (discussing the conflicting evidence at Nava's trial).

In recent years, this Court has recognized implicit racial bias "is a common and pervasive evil that causes systemic harm to the administration of justice." State v. Berhe, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); see

[2] This should come as no great surprise. Indeed, during jury selection, one outspoken prospective juror informed the court, "I see [Martinez's] neck tattoo, and I wouldn't be able to judge [him] fairly because of it . . . I think I would be biased." RP 467-68. This juror was appropriately excused for cause. RP 468. However, most people are not so willing to admit to their conscious biases and, of course, implicit racial bias "primarily exists at an unconscious level, such that the biased person is unlikely to be aware that it even exists." Berhe, 193 Wn.2d at 663.

also State v. Walker, 182 Wn.2d 463, 478 n.4, 341 P.3d 976 (2015) (noting prevalence of implicit racial bias); State v. Saintcalle, 178 Wn.2d 34, 48-49, 309 P.3d 326 (2013) (recognizing implicit bias is no less pernicious than overt racism). It is now well understood by our courts that "racial and ethnic bias distorts decision-making in the criminal justice system." Task Force, Preliminary Report on Race and Washington's Criminal Justice System, 35 Seattle U. L. Rev. 623, 639 (2012).

But courts have not considered how implicit bias impacts the jury's ability to disregard prejudicial evidence of a Black or Latino defendant's prior incarceration and, by inference, their propensity for crime.[3] Here, the court of appeals engaged in only rote analysis, distinguishing Nava's case from the egregious facts in Escalona and reasoning the jail database testimony was "fleeting and indirect." Opinion, 8-9. The court presumed the jury followed the court's instructions to disregard the testimony.[4] Opinion, 8. The court nowhere acknowledged the effect of implicit racial

[3] It is also worth noting that improper testimony about the defendant's prior incarceration is more likely to occur when the defendant is a person of color, because the "American legal system . . . maintain[s] a state of mass incarceration that disproportionately impacts communities of color." L. Moy, A Taxonomy of Police Technology's Racial Inequity Problems, 2021 U. ILL. L. REV. 139, 147 (2021) ("[A]lthough only 32% of the U.S. population is either black or Hispanic, in 2015, 56% of all incarcerated people were black or Hispanic.").

[4] Because the court of appeals concluded the erroneous testimony "was not worthy of a mistrial," it declined to address Nava's argument that he was prejudiced by close association with his brother. Opinion, 9 n.6; Br. of Appellant, 27-28. Significantly, the prosecution agreed below that, if the trial court deemed a mistrial necessary as to Martinez, it was also necessary as to Nava, "because the jury has already heard the information against both defendants." 12/18 RP 424.

bias on the jury's decision making—or the fact that the state's case hinged on two white accusers blaming two Hispanic brothers for killing Burley.

Courts must "be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial." State v. Quijas, 12 Wn. App. 2d 363, 375, 457 P.3d 1241 (2020). Applying the 1987 Escalona decision in a vacuum, without recognizing of the pernicious effect of implicit racial bias, is no longer adequate under this Court's more recent jurisprudence. Entrenched cultural bias must be considered when assessing the harmful effect caused by two state's witnesses telling the jury of Martinez's—Nava's brother and codefendant—history of incarceration. Because of how frequently this issue is likely to arise—and how significant the prejudicial impact of such evidence for accused persons of color—this Court's review is warranted and necessary under RAP 13.4(b)(3) and (4).

2. This Court's review is warranted to resolve the question of whether prejudicial firearm evidence is admissible where it is "not probable" the gun at issue was the one used in commission of the crime.

On appeal, Nava challenged admission of the firearm evidence, where the prosecution's firearm expert could not link Beston's stolen gun to the gun used to shoot Burley. Br. of Appellant, 30-35. In State v. Luvene, this Court recognized: "Although evidence of weapons entirely unrelated to the crime is inadmissible, if the jury could infer from the evidence that the

weapon could have been used in the commission of the crime, then evidence regarding the possession of that weapon is admissible." 127 Wn.2d 690, 708, 903 P.2d 960 (1995). In Luvene, a .380-caliber handgun was used in the robbery and .380 cartridges were recovered from Luvene's apartment, so the cartridges were "highly relevant." Id.

Division One subsequently recognized "[e]vidence of weapons is highly prejudicial." State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001). Evidence that an accused person possessed or had access to a firearm is therefore unduly prejudicial and inadmissible unless that firearm is connected to the charged offense. Id. Courts "uniformly condemn" evidence that the accused possessed a firearm that has nothing to do with the charged crime. Id.

The Freeburg court held the trial court erroneously admitted evidence that Freeburg was in possession of a gun when he was arrested, where the prosecution had no evidence that gun was the murder weapon. Id. Without proof the gun was connected to the charged crime, the evidence unfairly tended to show Freeburg was a "bad man," or was likely to have been in possession of a gun at the time of the offense. Id. at 502.

In Nava's case, Dijana Coric from the state crime lab testified as the prosecution's expert in firearm identification. 12/20 RP 888. Coric examined the bullet fragment recovered from Burley's skull in an effort to

identify the type of gun used to kill Burley. 12/20 RP 892-93. Coric found multiple firearm manufacturers with the same rifling characteristics as the recovered bullet. 12/20 RP 901-02. Relying on an FBI database, Coric generated a long list of firearms that could have been used. 12/20 RP 898, 901-02. The list did not include a Beretta Pico .380, the gun Beston owned, or any Berettas, for that matter. 12/20 RP 901-02.

Based on the width of land and groove impressions in a Beretta, Coric concluded it was "not probable" that a Beretta fired the bullet found in this case. 12/20 RP 946. Although the FBI list is "not an all-inclusive one," Coric believed it would have considered and excluded a Beretta—a very common and popular firearm—intentionally leaving it off the list as a possible match. 12/20 RP 944-46. Though Coric could not definitively exclude a Beretta Pico .380, she considered it unlikely that such a gun fired the recovered bullet. 12/20 RP 902, 946.

In addition to Coric's testimony, Beston's gun did not match Schram's description of the gun used. CP 232-33. Schram saw a long round barrel, as long as a Kleenex box, with a big hole. 12/12 RP 672, 711-12. The Pico .380 that Beston owned was very small, with an overall length of just over five inches and a height of four inches. CP 232-33.

Both Dailey and Evans insisted they did not see any gun before the shooting and only briefly glimpsed a gun afterward. 12/17 RP 409; 12/18

RP 471-72; 12/19 RP 702. Evans offered no description of the gun at all, and Dailey thought it was a "little gun," with chrome or silver. 12/17 RP 409; 12/19 RP 704-05. Beston said her gun was black and could not remember if it had silver on it. 12/19 RP 840.

Furthermore, Beston never saw Nava or Martinez with her firearm. 12/20 RP 883-84. She testified she noticed the gun was missing after Nava and Martinez left for California. 12/20 RP 986-88. But she also testified the police did not ask her about the gun until November after the incident, which is when she first noticed it was gone. 12/20 RP 985-86. Ultimately, Beston could not say when the gun went missing. 12/20 RP 987.

The court of appeals in Nava's case concluded Freeburg was inapposite because, there, the prosecution agreed Freeburg did not use the weapon in the underlying crime, instead arguing that possession of the gun evidenced flight and consciousness of guilt. Opinion, 12-13. By contrast, the court reasoned, the prosecution in Nava's case "elicited testimony that Beston's gun could have been the firearm used to kill Burley." Opinion, 13. The court concluded "[t]he jury was free to weigh the competing evidence and consider inferences in reaching its verdict," and so the trial court did not err in admitting the gun evidence. Opinion, 14.

Nava's case is not precisely like Freeburg. But nor is it precisely like this Court's decision in Luvene. Instead, in Nava's case, the prosecution was

allowed to introduce evidence of Beston's missing gun because the prosecution's expert could not definitively exclude it as the firearm used in the robbery. This turns the Luvene standard on its head, allowing for admission of highly prejudicial but only minimally probative evidence. The firearm evidence not only allowed the jury to speculate that Beston's gun was the one used to kill Burley, but also infer Nava and Martinez were "bad men," the type who would steal a firearm and then use it to shoot someone in a robbery. This Court should decide whether the prosecution is permitted to introduce such prejudicial evidence with so tenuous a connection to the crime. RAP 13.4(b)(4). In short, if the firearm cannot be definitively excluded, does that mean it is admissible? And can the prosecution argue therefrom that it was the weapon used in commission of the offense, as occurred in Nava's case? Guidance is needed.

3. This Court's review is warranted to determine whether the prosecution exceeds the proper scope of voir dire by compelling jurors to declare the circumstances under which they would find a person guilty as an accomplice.

On appeal, Nava argued the prosecution improperly used jury selection to minimize its burden of proving accomplice liability and commit jurors to convicting based on knowledge and mere presence. Br. of Appellant, 14-18. The purpose of voir dire is to enable the parties to determine prospective jurors' qualifications to serve. CrR 6.4(b). Voir dire

should not be used to prejudice the jury for or against a party, to argue matters of law, or to compel jurors to commit to voting a particular way. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985).

During voir dire, the prosecution repeatedly pressed jurors to declare the circumstances under which they would consider someone to be an accomplice to a crime. The prosecutor suggested a scenario where "[y]our friend asked you for a ride to the bank," then pulls out a ski mask, cuts eyeholes out of it, then pulls out a gun, goes inside the bank, and then comes out wearing the ski mask with a sack and says, "drive." 12/10 RP 347-48. At each stage, the prosecutor inquired of prospective jurors, "Have you done anything wrong at this point?" 12/10 RP 347-48. Nava and Martinez repeatedly objected to the prosecutor's inquiries, but the court overruled their objections. 12/10 RP 349-51.

Nava contended on appeal that the trial court should have sustained the objections, because the prosecutor's questions were not intended to elicit the jurors' qualifications to serve. Br. of Appellant, 14-18. Instead, the prosecution attempted to commit jurors to finding someone guilty because they were present for a robbery. The prosecutor further urged the jury to speculate on the law of accomplice liability, suggesting a person could be an accomplice even if they did not know what was going on until after the fact.

The court of appeals disagreed, reasoning "[t]he prosecutor did not instruct the jurors on the legal definition of accomplice liability or use particular facts of Nava's case, and he did not use the hypothetical to argue the State's case." Opinion, 6. The court believed the prosecutor appropriately "explored the concept of accomplice liability in general to learn the jurors' state of mind." Opinion, 6.

In so holding, the court ignored the record and stretched the limits of voir dire too far. Without instructions on the law of accomplice liability, the prosecutor's questions served only to compel jurors to make a moral snap judgment on culpability, based on their gut feeling. This was made readily apparent by the repeated questions, "have you done anything wrong?"—i.e., "are you guilty as an accomplice?" The questions had nothing to do with jurors' biases, their willingness to follow the court's instructions, or their ability to serve fairly and impartially. Rather, the prosecutor wanted to commit jurors to finding Nava and Martinez guilty simply for being present and knowing about the robbery after the fact.

It has been years since this Court weighed in on the proper scope of voir dire, and Nava's case appears relatively unique in that it involves the prosecution exceeding the limits of voir dire over defense objection.[5] Nava's

[5] See, e.g., State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018) (no abuse of discretion in limiting defense questions on prospective jurors' religious affiliations);

case presents this Court an opportunity to do address this issue and clarify the law for lower courts and practitioners. RAP 13.4(b)(4). It also appears to be an open question whether exceeding the proper scope of voir dire can constitute prosecutorial misconduct. RAP 13.4(b)(3); State v. Jacobson, 3 Wn. App. 2d 1058, 2018 WL 2215888, at *12 (2018).

4. This Court's review is warranted to determine whether the prosecution can elicit an accomplice's promise to "testify truthfully" on direct-examination any time the accomplice's credibility is at issue, which is virtually every case and calls into question the vitality of this Court's decision in *Ish*.

At Nava's trial, the prosecution's first questions to both Dailey and Evans pointedly asked them whether they had "agreed to testify truthfully" as part of their plea agreements with the State. 12/17 RP 337 (Dailey); 12/18 RP 624 (Evans). The prosecution offered this evidence without waiting for the defense to ask the witnesses about the specifics of their plea agreements.

"Whether a witness has testified truthfully is entirely for the jury to determine." State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A majority of this Court held in Ish that the prosecution improperly vouches for its witnesses when it asks them on direct-examination about their promises to testify truthfully. Id. at 199. "Evidence that a witness has promised to

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State v. Davis, 141 Wn.2d 798, 834, 10 P.3d 977 (2000) (no abuse of discretion in failing to sua sponte question prospective jurors about their racial prejudices); State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (no abuse of discretion in refusing to allow individual voir dire of each prospective juror).

give 'truthful testimony' in exchange for reduced charges . . . is generally self-serving and irrelevant," "and should not be admitted as part of the State's case in chief." Id. at 198. A witness's out-of-court promise to testify truthfully has "the potential to prejudice the defendant by placing the prestige of the State behind [the witness's] testimony." Id. at 199.

On appeal, Nava challenged the prosecutor's improper vouching, given the well-established rule of Ish. Br. of Appellant, 18-21. But the court of appeals found no misconduct, emphasizing both brothers attacked Dailey's and Evans' credibility in opening statement and planned to do the same on cross-examination. Opinion, 10. The court believed, "As a result, it was reasonable for the prosecutor to elicit testimony about the witnesses' agreements to testify truthfully during questioning on direct to 'pull the sting' out of the defense attack on their credibility during cross-examination." Opinion, 10-11.

The rehabilitation exception espoused by the court of appeals effectively renders the rule of Ish a dead letter. A state's witness who has signed a plea agreement to "testify truthfully" against the accused will nearly always be an accomplice whose credibility is at issue. (Or, in the case of Ish, a jailhouse snitch with similar credibility issues.) Indeed, Washington courts recognize significant credibility concerns when an accomplice testifies on behalf of the State and incriminates the defendant. State v. Harris, 102

Wn.2d 148, 152-55, 685 P.2d 584 (1984). This is the precise reason for WPIC 6.05, which cautions the jury to carefully examine such testimony and act upon it only "with great caution."[6] The rule of Ish makes no sense if the prosecution can simply "pull the sting" in every case where the witness's credibility is at issue.

This Court's review is appropriate under RAP 13.4(b)(1), to determine whether Nava's case is in conflict with Ish, and RAP 13.4(b)(3), because prosecutorial misconduct implicates the defendant's right to a fair trial. Prosecutors are presumed to the know the law, and Ish has been the law of this state for 10 years. While the error was harmless in Ish because other untainted evidence supported the state's case, the same cannot be said in Nava's case. The prosecution's case hinged on the supposed truthfulness of Dailey's and Evans's testimony. Nava's case therefore presents a distinguishable scenario from Ish that warrants this Court's input.

[6] WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 26.04 (4th ed. 2016) ("Testimony of an accomplice, given on behalf of the [State] [City] [County], should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.").

5. This Court's review is also necessary where the trial court admitted evidence that unknown people threatened a state's witness, an issue potentially controlled by a forthcoming decision from this Court in *Vazquez*.

Nava also challenged on appeal the trial court's admission of evidence in the state's case-in-chief that someone told Dailey to contact Nava's and Martinez's mother and tell her they were not involved in the shooting. 12/18 RP 458-59, 477-81; Br. of Appellant, 28-29. Dailey said he made the call because some unidentified person (or people) threatened him. 12/18 RP 478 ("Told me if I made the phone call that I wouldn't be getting beat up anymore, that they'd stop sending people to beat me up."). Dailey testified he was beaten once before the call, a second time after the call, but never again after he made people aware of the call. 12/18 RP 478-81.

This Court long ago held, to introduce evidence that someone other than the accused threatened a witness, the prosecution must first show "such person was acting at the request of the accused" or with the accused's "knowledge and consent." State v. Kosanke, 23 Wn.2d 211, 215, 160 P.3d 541 (1945). More recently, this Court held in State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997), that the prosecution may not use allegations that someone other than the accused may have threatened a witness to bolster its case when there is no proven connection between the accused and the threat.

Despite this controlling authority, the court of appeals rejected Nava's argument, concluding "the evidence that Nava Martinez Jr.'s friends coerced Dailey was relevant to rebut the inference that Dailey willingly exonerated Nava Martinez Jr. and Nava when he called their mother." Opinion, 15. The court believed "[e]vidence that someone coerced Dailey to make the call was relevant to Dailey's state of mind, no matter who threatened him." Opinion, 15.

This issue will potentially be impacted by a forthcoming decision from this Court in State v. Jessica Vazquez, No. 98928-1 (argued March 11, 2021). There, defense counsel failed to object to testimony that two witnesses were threatened for their cooperation in the case, even though there was no evidence Vazquez was responsible for the threats. No. 98928-1 Supp'l Br. of Pet'r, 11-16. An issue before this Court is whether defense counsel was ineffective for failing to object to such evidence, given this Court's holdings in Kosanke and Bourgeois. The prosecution in Vazquez has maintained the threat evidence was admissible to explain the witnesses' prior inconsistent statements to police—similar to the court of appeals' conclusion in Nava's case. No. 98928-1 Supp'l Br. of Resp't, 15-16. In light of Vazquez, this Court should either grant review or stay resolution of Nava's petition until this Court issues a decision in Vazquez.

6. The above errors accumulated to prejudice the outcome of Nava's trial.

Finally, Nava argued the cumulative effect of the errors described above prejudiced the outcome of his trial. Br. of Appellant, 13-14, 35-39. The cumulative error doctrine is rooted in the accused's due process right to a fair trial. In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). If this Court determines review is warranted on any of the above issues, then is should likewise consider whether cumulative error deprived Nava of a fair trial. RAP 13.4(b)(3).

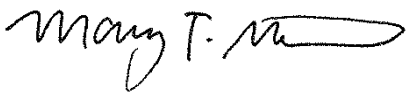
E. CONCLUSION

For the reasons discussed above, Nava respectfully requests that this Court grant review, reverse the court of appeals, and remand for a new trial.

DATED this 27th day of August, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Attorneys for Petitioner

Appendix A

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

STATE OF WASHINGTON, Respondent, v. NAVA, JOSE ANTONIO, DOB: 12/23/1987, Appellant.	)	No. 80948-2-I UNPUBLISHED OPINION

BOWMAN, J. — Jose Antonio Nava appeals his jury conviction for one count of first degree murder with a firearm enhancement. Nava alleges the State improperly minimized its burden during jury selection, the trial court erred in denying his motions for a mistrial after witnesses twice violated a pretrial order, the prosecutor committed misconduct by vouching for two witnesses, the trial court erred in admitting certain evidence, and the cumulative effect of these errors deprived him of a fair trial. He also asserts the trial court inadvertently imposed a DNA[1] collection fee. We affirm Nava's conviction but remand for the trial court to strike the DNA fee from his judgment and sentence.

FACTS

On February 19, 2018, Tye Burley won around $2,000 at a casino. He used some of the money to rent a hotel room in Marysville that he shared with his friend and

[1] Deoxyribonucleic acid.

drug supplier Jeremy Dailey. Dailey saw Burley win the "jackpot" of money that night and began scheming ways to get his hands on it. He thought about taking Burley's wallet while he slept but did not want to be the obvious suspect.

On February 20, Burley left the hotel with his girlfriend Kristin Schram. Dailey knew Burley planned to buy Schram a tattoo that day. Dailey met with two friends, Jared Evans and Jorge Nava Martinez Jr.[2] Nava Martinez Jr. is Nava's older brother. Dailey told Evans and Nava Martinez Jr. about Burley's casino winnings.[3] Evans did not know Burley very well but he "didn't like him." He was angry that Burley did not pay back some money he believed Burley owed him. Later, Nava joined them. Neither Nava Martinez Jr. nor Nava knew Burley.

According to Dailey, the men drove around in a white Dodge Durango owned by Nava's girlfriend Tiffany Beston while they formulated a plan to rob Burley at the tattoo shop. They planned to mace Burley as he left the shop and steal his wallet. Nava Martinez Jr. said that if Burley " 'does anything dumb, I'll shoot him.' " Nava Martinez Jr. told the group he planned to get a "cuete."[4]

The four men aborted their original plan after seeing a police car drive by the tattoo shop. They decided to confront Burley back at his hotel instead. They drove to the hotel, sat in the Durango smoking methamphetamine, and waited for Burley to arrive. Dailey and Evans testified that Nava Martinez Jr. was driving and Nava was in the front passenger seat.

[2] Dailey also regularly sold drugs to Evans. He said that he never sold drugs to Nava Martinez Jr. but they did drugs together.

[3] Dailey thought Bailey had as much as $7,000 in cash winnings.

[4] "Cuete" can be slang for "gun" in Spanish.

Burley and Schram arrived at the hotel at around 7:00 p.m. and began walking to Burley's room. Nava and Nava Martinez Jr. got out of the Durango and confronted them. They wore face coverings and hooded sweatshirts. One of the two pointed a gun at Schram. She remembered "seeing the hole of the gun" and that it was silver, and she had the impression that it was a handgun with "a pretty long barrel." Schram screamed and ran away. Nava Martinez Jr. and Nava then beat Burley to the ground and robbed him. At some point, Nava Martinez Jr. shot Burley once in the back of the head. Burley died from the wound two days later.

The brothers ran back to the Durango. Nava Martinez Jr. got in the driver's seat first, holding a silver handgun and yelling, " 'I shot him in the head.' " Nava got in the front passenger side a few moments later, crying Nava Martinez Jr.'s name and holding Burley's wallet. They fled the scene and abandoned the Durango. The four spilt the money from Burley's wallet between them.

Marysville police arrived and interviewed Schram. She told them that she suspected Dailey was involved in the attack. Detectives found Schram's wallet and a can of bear mace at the scene. The next day, police interviewed Dailey and Evans. Everett police officers also found the abandoned Durango about a week later. Police never found Burley's wallet or the gun used to shoot him.

A Washington State Patrol Crime Laboratory (WSPCL) forensic scientist found Nava's DNA on the gearshift of the Durango and "excluded" Dailey, Evans, and Nava Martinez Jr. "as the source" of the DNA. A WSPCL forensic scientist also traced Nava Martinez Jr.'s DNA to the steering wheel and the handle pulls and controls of the driver's side interior door of the Durango and excluded Dailey, Evans, and Nava as the

source of the DNA. Surgeons recovered part of a bullet from Burley's head. Testing by a WSPCL ballistics expert showed the bullet was fired from a .38 caliber handgun.[5]

Nava and Nava Martinez Jr. fled to California. On February 28, 2018, members of the Escondido Police Department arrested them and managed to identify Nava Martinez Jr. using facial recognition software. They discovered an active warrant from Washington. Marysville police detectives interviewed Nava in California. In his statement to police, Nava admitted that on February 20, 2018, he "wanted to . . . get high" and drove around Marysville in Beston's Durango with Dailey and Evans to get drugs. "[B]ut they were short of money" so the three planned to wait outside a tattoo shop to rob someone. Nava also told detectives that he was not the driver and that they ended up at the hotel where Burley was shot because the robbery did not " 'work out.' " According to Nava, they sat in the car and smoked heroin, Dailey and Evans put on a "sweater or something," and exited the Durango. Then he heard a "bang or something." Nava never said Nava Martinez Jr. was with them.

The State charged Dailey, Evans, Nava Martinez Jr., and Nava with first degree murder with firearm enhancements. Dailey and Evans later agreed to plead guilty to reduced charges in exchange for "truthful" testimony against Nava and Nava Martinez Jr. At their joint trial, Nava Martinez Jr. testified but Nava did not.

The jury convicted Nava of first degree murder and found that he was armed with a firearm when he committed the crime. The court imposed a standard-range sentence of 331 months. The court also ordered Nava to pay a $100 DNA collection fee. It

[5] Detectives later learned that Nava's girlfriend Beston owned a black and silver .38 caliber Beretta and kept it in a lockbox at her home. When detectives asked to see her gun, she discovered it was "missing." Beston testified that she and Nava lived together and the last time she saw the gun was about a week before the murder.

otherwise found Nava indigent and waived all discretionary legal financial obligations. Nava appeals.

ANALYSIS

Nava alleges the State improperly minimized its burden during jury selection, the trial court erred in denying his motions for a mistrial after witnesses twice violated a pretrial order, the prosecutor committed misconduct by vouching for two witnesses, and the trial court erred in admitting certain evidence. He argues that the cumulative effect of these errors denied him a fair trial. He also argues the court improperly imposed the DNA fee. We address each argument in turn.

Jury Selection

Nava contends the State improperly minimized its burden during jury selection by "repeatedly press[ing] jurors about finding a person guilty based on accomplice liability and ask[ing] them to declare the circumstances under which they would convict a person as an accomplice." We disagree.

"The limits and extent of voir dire examination are within the discretion of the trial court, and it has considerable latitude." State v. Robinson, 75 Wn.2d 230, 231, 450 P.2d 180 (1969). "[A]bsent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court's ruling on the scope and content of voir dire will not be disturbed on appeal." State v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000).

Jury selection is meant to "enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges." State v. Tharp, 42 Wn.2d 494, 499-500, 256 P.2d 482 (1953). But a party

should not use jury selection to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). Asking general hypothetical questions without implicating the unique facts of the case does not commit potential jurors to a verdict. See Green v. Johnson, 160 F.3d 1029, 1036-37 (5th Cir. 1998).

Here, the State introduced the concept of accomplice liability by posing a hypothetical question about driving a friend to the bank. The hypothetical involved the jurors assuming the role of the driver and increasingly suspicious behavior by the "friend," including putting on a ski mask, pulling out a gun before entering the bank, and returning from the bank "holding a sack of something." At each stage, the prosecutor asked jurors whether they believed they had "done anything wrong" by failing to intervene. The prosecutor asked one juror, "Does it matter to you when you knew what was going on." The prosecutor did not instruct the jurors on the legal definition of accomplice liability or use particular facts of Nava's case, and he did not use the hypothetical to argue the State's case. Rather, the prosecutor explored the concept of accomplice liability in general to learn the jurors' state of mind. The prosecutor's hypothetical did not minimize the State's burden or otherwise exceed the proper scope of jury selection.

Motions for Mistrial

Nava argues the trial court should have granted his motions for a mistrial because the State twice violated a pretrial order prohibiting it from offering evidence that Nava Martinez Jr. "had been in prison before." We disagree.

Because the trial court is in the best position to determine whether a trial irregularity caused prejudice, we review a trial court's decision to deny a motion for mistrial for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). The court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

In determining whether a trial irregularity is so prejudicial as to require a mistrial, we look to (1) the seriousness of the irregularity, (2) whether the irregularity was cumulative of other admissible evidence, and (3) whether the court could cure the irregularity by an instruction to disregard the remark. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). Ultimately, we will reverse the trial court only if there is a substantial likelihood the irregularity affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

In his interview with the police, Dailey said that "he first met Mr. [Nava] Martinez [Jr.] in prison." Before trial, the prosecutor agreed that "[w]e will not seek to admit that fact. We will simply talk about their connections outside of jail." At trial, the prosecutor and Dailey had the following exchange:

Q. Do you know Jorge [Nava] Martinez [Jr.]?
A. Yes.
Q. Do you know when it was that you met him?
A. In prison last time. 2014.

The defense objected to the answer and the court instructed the jurors to disregard the

testimony. The defense then moved for a mistrial, which the court denied.

Later, Officer Sean Davidson testified about arresting Nava Martinez Jr. and Nava in Escondido, California. Officer Davidson explained that he was able to identify Nava Martinez Jr. through facial recognition software on his cell phone that can identify people "as long as the person has been in jail in San Diego County." The defense did not object to this testimony but later renewed its motion for a mistrial, which the court again denied.

Citing State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), Nava argues that "[i]mproper references" to Nava Martinez Jr.'s "prior prison sentence and jail term suggested he—and Nava by association—were criminal types, likely to commit the robbery that resulted in Burley's death." In that case, the State charged Escalona with second degree assault for threatening the victim with a knife. Escalona, 49 Wn. App. at 252. At trial, the victim testified that Escalona " 'already has a record and had stabbed someone.' " Escalona, 49 Wn. App. at 253. We held this testimony was prejudicial propensity evidence because a jury could conclude that Escalona "acted on this occasion in conformity with the assaultive character he demonstrated in the past." Escalona, 49 Wn. App. at 255-56.

Unlike Escalona, no witness here testified that Nava Martinez Jr. was in custody for a similar crime. As for Dailey's comment about meeting Nava Martinez Jr. some years earlier in prison, the trial court properly instructed the jury to disregard the testimony. We presume jurors follow a trial court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). And as to Officer Davidson's explanation of the

facial recognition software, the testimony was fleeting and indirect. Nava fails to show that the testimony was so prejudicial as to require a mistrial.[6]

Prosecutorial Misconduct

Nava argues that the prosecutor "impermissibly vouched for its two key witnesses by eliciting evidence in its case-in-chief of their formal agreements to 'testify truthfully.' " The State claims Dailey and Evans' testimony was proper to "rehabilitate" them. We agree with the State.

We review allegations of prosecutorial misconduct for an abuse of discretion. Stenson, 132 Wn.2d at 718. The defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). We determine whether the defendant was prejudiced under one of two standards of review. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct led to prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the defendant did not object at trial, we deem the defendant to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Stenson, 132 Wn.2d at 726-27.

Whether a witness has testified truthfully "is entirely for the jury to determine." State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks,

[6] Because we conclude that the testimony was not worthy of a mistrial, we do not address Nava's argument that any prejudice to Nava Martinez Jr. also prejudiced him "by association."

508 F.3d 1205, 1210 (9th Cir. 2007)). Improper vouching generally occurs if the prosecutor (1) expresses his or her personal belief as to the veracity of the witness or (2) suggests that evidence not presented at trial supports the witness' testimony. Ish, 170 Wn.2d at 196.

"[E]vidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State's case in chief." Ish, 170 Wn.2d at 198. But where the defense attacks the witness' credibility, the State is within its rights to "rehabilitate" its witness by introducing the details of a plea agreement that requires truthful testimony. See State v. Petrich, 101 Wn.2d 566, 574, 683 P.2d 173 (1984), abrogated on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). And it is reasonable for the State to "anticipate the attack and 'pull the sting' of the defense's cross-examination." State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997) (quoting United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986)).

Here, both Nava Martinez Jr. and Nava attacked Dailey and Evans' credibility in opening remarks. And before Dailey testified, Nava Martinez Jr. made clear that he intended to examine Dailey about "why he entered this agreement, what his motives were, and how they're explained by his prior conduct in being a liar and a cheat and a schemer. Because that goes to his credibility, and it goes to his state of mind." Nava agreed that "Dailey has been given a very good deal in order to — in exchange for his testimony here, and it's important that we get to explore all of those issues and let the jury decide what's important and what's not." As a result, it was reasonable for the prosecutor to elicit testimony about the witnesses' agreements to testify truthfully during questioning on direct to "pull the sting" out of the defense attack on their credibility

during cross-examination. LeFevour, 798 F.2d at 983. The prosecutor did not commit misconduct.

Evidentiary Errors

Nava claims the trial court erred by admitting testimony (1) that Nava had "access to a gun, without adequate evidence of its connection to the crime," and (2) that "unknown people" coerced Dailey to make statements exonerating Nava Martinez Jr. and Nava. We disagree.

Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Ashley, 186 Wn.2d 32, 38-39, 375 P.3d 673 (2016). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or reasons. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Admissible evidence must be relevant. ER 402; State v. Scherf, 192 Wn.2d 350, 386-87, 429 P.3d 776 (2018). Evidence is relevant if it has a logical nexus to the fact to be established. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999); see ER 401. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). But even relevant evidence is not admissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403; State v. Briejer, 172 Wn. App. 209, 226, 289 P.3d 698 (2012). Evidence is unfairly prejudicial if it is likely to elicit an emotional response from the jury rather than a rational decision. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Unfair prejudice is caused by evidence of " 'scant or cumulative probative force, dragged in by the heels for the sake of its

prejudicial effect.' " Carson v. Fine, 123 Wn.2d 206, 223, 867 P.2d 610 (1994)[7] (quoting United States v. Roark, 753 F.2d 991, 994 (11th Cir. 1985)).

Firearm Evidence

Nava contends testimony that he had access to Beston's firearm was unduly prejudicial because there was not "adequate evidence of its connection to the crime." He is incorrect.[8]

We have routinely excluded as unfairly prejudicial evidence of weapons having "no relation to" or " 'nothing to do with the crime charged.' " State v. Freeburg, 105 Wn. App. 492, 501 n.22, 501, 20 P.3d 984 (2001) (citing Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967)) (quoting United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977)). When the State tries to sway the jury into believing a defendant is a "bad man" or inherently dangerous because he owns or possesses weapons, the trial court should exercise its discretion to exclude such evidence. See Moody, 376 F.2d at 532; State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

Nava cites Freeburg to support his position that admitting evidence of access to Beston's firearm unfairly prejudiced him. In that case, officers arrested Freeburg more than two years after he committed murder. Freeburg, 105 Wn. App. at 495-96. At trial, the State introduced evidence that Freeburg was carrying a handgun when officers arrested him. Freeburg, 105 Wn. App. at 496. The State agreed that Freeburg did not use the weapon in the underlying crime and instead argued that possession of the gun

[7] Internal quotation marks omitted.

[8] We disagree with the State that Nava waived his challenge to the firearm evidence for failing to object below. At trial, the testimony of the State's ballistics expert cast doubt on whether the shooter used a .38 caliber Beretta to kill Burley. Nava Martinez Jr. then moved to strike Beston's testimony that Nava had access to her gun. Nava joined the motion. The motion to strike preserved the issue for appeal. See ER 103(a)(1).

evidenced flight and consciousness of guilt. Freeburg, 105 Wn. App. at 500, 497. We concluded the trial court erred by admitting the evidence because it was unrelated to the murder:

> [T]he gun was not the gun used in the shooting of Rodriguez, the arrest occurred more than two years after the shooting, and the presence of the gun does not by itself indicate a consciousness of the serious offense [Freeburg] faced.

Freeburg, 105 Wn. App. at 500.

In contrast, the State elicited testimony that Beston's gun could have been the firearm used to kill Burley. Beston testified that she owned a small, .38 caliber, black and silver Beretta handgun during the time that she and Nava lived together. She discovered the gun was missing after the murder. The WSPCL determined a .38 caliber bullet killed Burley. Schram testified that the gun used during the robbery was a silver handgun with a long barrel. And Dailey testified that Nava Martinez Jr. was holding a small "silver or chrome" handgun when he returned to the Durango after Burley was shot. The jury could conclude from this evidence that the shooter used Beston's gun to kill Burley. As a result, Nava's access to the gun was probative as to who killed Burley.

Nava argues this evidence was unduly prejudicial because there was also testimony tending to show that the gun had no connection to Burley's murder. For example, Schram testified that the gun pointed at her during the robbery had a long barrel, while the barrel of Beston's Beretta was short. And the WSPCL ballistics expert said that in her opinion, "it's not probable" that Beston's gun matched the fired bullet jacket recovered from Burley. But the expert also testified that she could not "conclusively eliminate" the Beretta. That there was competing evidence on whether the shooter used Beston's gun to kill Burley does not render the testimony inadmissible.

It is the province of the trier of fact to weigh evidence and judge the credibility of witnesses. See State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). The jury was free to weigh the competing evidence and consider inferences in reaching its verdict. The trial court did not abuse its discretion by admitting evidence that Nava had access to Beston's gun.

Threats to Dailey

Nava asserts the trial court erred in admitting evidence that "some unnamed person told Dailey to contact Nava's and [Nava] Martinez [Jr.]'s mother and tell her they were not involved in the shooting." According to Nava, the evidence was improper because there "was no evidence connecting the threat to Nava or [Nava] Martinez [Jr.]."[9]

Before trial, Nava and Nava Martinez Jr. notified the State that they intended to introduce a recording of a telephone call Dailey made from jail to Nava Martinez Jr. and Nava's mother. In the call to their mom, Dailey explained that Nava and Nava Martinez Jr. did not kill Burley. As a result, the State introduced the recording in its case-in-chief. Nava and Nava Martinez Jr. did not object. The State then elicited testimony from Dailey that he was "getting beat up" in jail and that someone claiming to be Nava Martinez Jr.'s friend told Dailey that if he made the call to Nava Martinez Jr. and Nava's mother, "they'd stop sending people to beat me up." After he made the call, the beatings stopped.

[9] The State argues that Nava waived this issue on appeal. But it provides no legal argument in support of its theory. We need not consider arguments that are not developed in the briefs and for which a party has not cited authority. State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

Citing Bourgeois, Nava argues the "prosecution may not use allegations that someone other than the accused may have threatened a witness to bolster its case when there is no proven connection between the accused and the threat." But Bourgeois, which involved two owners of a market getting shot, addressed testimony from the surviving victim and bystanders who generally were "reluctant to appear in court" or "afraid to testify." Bourgeois, 133 Wn.2d at 393.[10] Our Supreme Court concluded that the testimony about the witnesses' state of mind was not relevant because "no connection was established between Bourgeois and the reluctance of any witness to testify." Bourgeois, 133 Wn.2d at 400.

Here, the evidence that Nava Martinez Jr.'s friends coerced Dailey was relevant to rebut the inference that Dailey willingly exonerated Nava Martinez Jr. and Nava when he called their mother. Because the defense chose to use Dailey's telephone call as evidence that Nava and Nava Martinez Jr. did not shoot Burley, the State could introduce the rebuttal evidence. Unlike Bourgeois, the relevance of the evidence does not turn on whether the threats came from Nava and Nava Martinez Jr. Evidence that someone coerced Dailey to make the call was relevant to Dailey's state of mind, no matter who threatened him. The trial court did not err in admitting the evidence.

Cumulative Error

Nava asserts that cumulative error entitles him to a new trial. Cumulative error "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair

[10] One woman who did not witness the crime testified that she was afraid to testify because the defendant offered her money to lie about his whereabouts during the incident and a friend of the defendant threatened her. Bourgeois, 133 Wn.2d at 395.

trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). As discussed above, Nava establishes no trial error. The cumulative error doctrine does not apply.

DNA Fee

Nava argues the trial court erred by imposing a $100 DNA fee because the state previously collected his DNA as part of his sentence for an unrelated felony conviction. The State concedes the error. We accept the State's concession and remand for the trial court to strike the DNA collection fee.

Because Nava fails to show prejudicial error, we affirm his conviction and sentence, but remand to the trial court to strike the DNA fee.

WE CONCUR:

Appendix B

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

STATE OF WASHINGTON, Respondent, v. NAVA, JOSE ANTONIO, DOB: 12/23/1987, Appellant.	)	No. 80948-2-I ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

Jose Antonio Nava filed a motion for reconsideration of the opinion filed on June 14, 2021. The appellant State of Washington did not file an answer. The panel has determined that the motion should be denied but the opinion amended. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; it is hereby further

ORDERED that the opinion of this court in the above-entitled case filed June 14, 2021 shall be amended as follows:

1. On page 4, the first sentence of footnote 5 that states:

> Detectives later learned that Nava's girlfriend Beston owned a black and silver .38 caliber Beretta and kept it in a lockbox at her home.

shall be deleted and replaced with the following:

> Detectives later learned that Nava's girlfriend Beston owned a black and silver .380 caliber Beretta and kept it in a lockbox at her home.

The remainder of footnote 5 shall remain the same.

2. On page 13, the second sentence of the first full paragraph that states:

> Beston testified that she owned a small, .38 caliber, black and silver Beretta handgun during the time that she and Nava lived together.

shall be deleted and replaced with the following:

> Beston testified that she owned a small, .380 caliber, black and silver Beretta handgun during the time that she and Nava lived together.

The remainder of this opinion shall remain the same.

NIELSEN KOCH P.L.L.C.

August 27, 2021 - 10:27 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80948-2
Appellate Court Case Title:	State of Washington, Respondent/Cr-Appellant v. Jose Antonio Nava, Appellant/Respondent
Superior Court Case Number:	18-1-00636-2

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