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COURT OF APPEALS NO. 71823-1-I

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

STATE OF WASHINGTON

V.

RODOLFO JEREZ-SOSA,

Appellant.

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

The Honorable Bruce E. Heller, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES (CONT.)

FEDERAL CASES

RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. Trial irregularity deprived appellant of his right to a fair trial.

2. The court erred in denying the motion for a mistrial.

Issue Pertaining to Assignments of Error

In the state's prosecution against appellant for first degree robbery of a taxi cab driver, the state's key witness testified appellant also robbed a liquor store and was shot while committing other robberies. Where the court had reserved ruling on the admission of other prior bad acts evidence and expressly admonished the witness to steer clear of any other alleged wrongdoing by appellant, did the court violate appellant's right to a fair trial by not granting his motion for a mistrial when the state's witness blurted out appellant committed prior robberies?

B. STATEMENT OF THE CASE

Appellant Rodolfo Jerez-Sosa is appealing his conviction for first degree robbery while armed with a firearm, allegedly committed against Fasil Berhanu on September 7, 2012. CP 16-17. Jerez-Sosa was charged after another man, Asuan Santos-Valdez, implicated him during a police interview approximately five

days later. RP 145, 257-58. Police were investigating Santos-Valdez for numerous other crimes, including murder. RP 258-59.

In return for his testimony against Jerez-Sosa and others Santos-Valdez implicated in other crimes, Santos-Valdez received a plea deal which reduced a first degree murder charge to second degree murder and eliminated firearm enhancements for four robbery charges and dismissed an assault charge.[1] RP 148-50.

The state alleged Jerez-Sosa acted as Santos-Valdez's accomplice when Santos-Valdez displayed a firearm and took cash and a credit card from Berhanu, who picked the men up in his taxi. CP 1-12; Supp. CP __ (sub. 89, State's Trial Memorandum, 1/2/14). Jerez-Sosa asserted he acted under duress. CP 22.

1. State's Agreement Not to Introduce Prior Bad Acts Eivdence in its Case-in-Chief

The defense moved pretrial to prohibit Santos-Valdez from alleging prior instances of misconduct of Jerez-Sosa:

> And then D is the motion to exclude evidence of prior bad acts. And in our interview of Mr. Santos-Valdez, who is the Co-Defendant in this matter, he mentioned a number of times purported criminal behavior that my client had participated in prior to these allegations that we're here for today. He didn't really offer a lot of specifics, but he cast my client in a particularly unfavorable light.

[1] Santos-Valdez pled guilty to robbing Berhanu prior to Jerez-Sosa's trial. Supp. CP __ (sub. no. 34, Order of Continuance, 6/5/13).

> And I think without a strong admonition from the State, that he would be inclined to do that, particularly upon vigorous cross-examination.

RP 15.[2] Alternatively, defense counsel asked the court to conduct the four-part test required for admission of prior bad acts evidence under ER 404(b). RP 15.

In response, the state clarified what Santos-Valdez's testimony potentially could touch on:

> Mr. Asuan Santos-Valdez said in the interview that actually he was afraid of Mr. Jerez-Sosa, that Mr. Jerez-Sosa had beaten him and whipped him with a gun before, that Mr. Jerez-Sosa was involved in robberies with a group of other Cuban men who had essentially dragged Mr. Asuan Santos-Valdez along with them.

RP 16.

The prosecutor argued such testimony potentially could become relevant in rebuttal, if, as anticipated, Jerez-Sosa put on a duress defense. RP 16. The prosecutor indicated he did not intend

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[2] In its trial brief, the defense noted:

> The State has not indicated any specific events or evidence to be admitted under ER 404(b). Asuan Santos-Valdez, the co-defendant in this case and a State's witness, suggested in an interview that Mr. Sosa habitually engaged in criminal behavior, including but not limited to drug use and sales and robberies. To admit this evidence, even though from a highly questionable source, would visit extreme prejudice on the defendant. Therefore if the state seeks to admit such evidence the court must engage in an inquiry.

CP 20.

to solicit this evidence on direct: "I think it would be inappropriate for me to ask any of these questions of Asuan Santos-Valdez until a duress defense is actually formally offered[.]" RP 16. The state therefore proposed the court hold an evidentiary hearing following Jerez-Sosa's testimony. RP 17.

In keeping with the prosecutor's suggestion, the court ruled: "at least in its case in chief, the State's witnesses will not refer to any 404(b) material with respect to Mr. Jerez-Sosa." RP 17. In other words, the court ruled: "there should be no surprises in terms of witnesses talking about 404(b) material." RP 17.

To prevent any such surprises, the prosecutor and court advised Santos-Valdez not to address any alleged prior misconduct of Jerez-Sosa, before the state called Santos-Valdez as a witness:

> Mr. Santos-Valdez, I know you've testified before in some other cases, but I wanted to tell you what the scope of testimony is and what we can and can't talk about.
>
> At least for now, I'm not going to ask you any questions about any other alleged crimes that Mr. Jerez-Sosa was involved in. The case I'll be asking you about is the robbery of the taxi cab driver in Beacon Hill, and I will be asking you some questions about how the Defendant knows Lazaro Valle-Matos and how he knows Oreste Duanes-Gonzalez. But I won't be asking, at least at this point, about other robberies or other crimes that Mr. Jerez-Sosa is allegedly involved in.

So I would ask that you not volunteer that information or tell that information to the jury. And if there's any questions or concerns about something I've asked or Counsel's asked, you can look to the Judge or me and we can see whether we can bring that up or not. Does that make sense, sir?

MR. SANTOS-VALEZ: Yes, sir.

MR. DOYLE [prosecutor]: Okay.

THE COURT: And Mr. Santos-Valdez, do you have any questions about what the Prosecutor just indicated to you?

MR. SANTOS-VALDEZ: No, I think it's pretty clear.

THE COURT: All right. So no mention of other alleged crimes that Mr. Jerez-Sosa was involved with unless we take up that matter outside the presence of the jury and I tell you specifically that you can say something about those other areas, okay?

MR. SANTOS-VALDEZ: All right.

RP 119-120.

2. State's Case and Motion for Mistrial Based on Santos-Valdez's Violation of Court's Ruling

Berhanu testified he was driving a Yellow Cab on the night of September 7, 2012. RP 68-70. Around 10:30 p.m., Berhanu drove to Safeco Field where a Mariner's game had just ended and picked up a man he described as "white and Spanish" and wearing a black jacket. RP 70. The man in the black jacket directed Berhanu to the

other side of the street to pick up another man, who was wearing a striped shirt. RP 71. The man in the black jacket directed Berhanu to drive them to Beacon Hill. RP 71.

While Berhanu drove, the men spoke in Spanish to each other. RP 73. Berhanu said the man in the striped shirt got on the phone and spoke to someone in Spanish, which Berhanu did not understand. RP 74, 76-77.

Berhanu's cab was equipped with a camera. RP 69. At trial, the state offered still images of the men he picked up from Safeco Field. RP 74-75; Ex 1. When Santos-Valdez testified, he identified himself and Jerez-Sosa from the stills. RP 132.

When Berhanu reached the intersection of 13th Avenue South and Beacon Avenue, the man in the black jacket directed Berhanu to turn left and park. RP 77. Once parked, the man in the black jacket said: "Just give me everything, you know, whatever you have it[.]" RP 78. Berhanu testified that when he turned around, the man in the black jacket punched him in the face with a gun, below his right eye. RP 78.

Berhanu testified the man in the striped shirt exited the cab from behind the driver's seat and opened Berhanu's door. RP 79. Berhanu testified he did not hear the man in the black jacket

threaten or raise his voice at the man in the striped shirt as he exited and opened the driver's door. RP 79. However, when the man in the striped shirt opened Berhanu's door, the man in the black jacket told him to "[t]ake everything." RP 81. Berhanu testified he gave the man in the striped shirt his wallet. RP 79.

Berhanu testified he gave the man in the black jacket his wedding ring and watch. RP 83. According to Berhanu, the man in the striped shirt thereafter got in the front passenger seat, took two phones and Berhanu's cab bag, containing his "for hire license," GPS and Good to Go pass. RP 84-85.

Santos-Valdez testified he and Jerez-Sosa robbed Berhanu. RP 123-24, 132. Despite the court's pre-trial ruling, Santos-Valdez testified the initial plan was to rob a liquor store because Jerez-Sosa reportedly claimed he had "got away with robbing liquor stores before:"

> Q [prosecutor] Okay. So you were talking about looking for a victim to rob; is that correct?
>
> A [Santoz-Valdez] We was looking for a victim to rob since – first of all, the gun was not even – it didn't even belong to me, it belonged to them, and we was going to – the plan – well, we actually came up with a plan first. We wanted to – I'm kind of confused here, because I don't know if I supposed to say this, but we was actually going to rob something different.

Q Okay.

A Site. We was going to –

MR. FELKER [defense counsel]: Objection.

THE COURT: Overruled.

THE WITNESS: Okay. He wanted to rob the liquor store and I didn't agree. He said that he got away with robbing liquor stores before and was successful at it, but –

MR. FELKER: Objection.

THE COURT: Overruled.

THE WITNESS: We end up not doing it. So somebody mentioned in the van the taxi.

RP 127.

Santos-Valdez claimed that the taxicab plan was hatched earlier, while he was riding in a van with Jerez-Sosa, Oreste Duanes-Gonzalez, Lazaro Valle-Matos and someone named "Jorge." RP 124-25. According to Santos-Valdez, the men knew each other since they were teens. RP 125. Santos-Valdez claimed everyone in the van was broke and decided to rob a taxi driver, because "the Mariners was playing, so it's pretty busy, they got money." RP 127; see also RP 131. Santos-Valdez alleged the

group conspired to drop off Santos-Valdez and Jerez-Sosa at Safeco Field. RP 127.

Santos-Valdez claimed the plan was to direct the cab driver to the Lago Vista apartments on Beacon Hill, "where there is a really dark street where they park in the top hill." RP 128. According to Santos-Valdez, "[t]here's stairs, so we could actually rob them, rob the taxi cab there, take his keys, his phones, whatever, and then run towards the stairs, which really dark." RP 128. Santos-Valdez claimed: "So that's what we did." RP 128.

In contrast to Berhanu, Santos-Valdez testified he was the one who got Berhanu's wallet, as well as his phone. RP 135.

Santos-Valdez testified he got the gun from Duanes-Gonzalez. 128-29. According to Santos-Valdez, Jerez-Sosa called and verified the other men were at the designated spot on top of the stairs, before Santos-Valdez pulled out the gun. RP 128, 130.

Santos-Valdez claimed he never pointed the gun at Jerez-Sosa or threatened him in order to force him to participate in the robbery. RP 134. Santos-Valdez testified that after fleeing the taxi, he and Jerez-Sosa ran up the stairs to the van. RP 139.

On cross-examination, defense counsel established that Santos-Valdez was sitting in the back passenger side of the taxi.

RP 152. Defense counsel attempted to establish that the cab driver would not have been able to see the gun, if Santos-Valdez was holding it with his right hand, as was established, "down by his side." RP 152. Valdez-Sosa said he did not remember, but that he pulled the gun out. RP 152.

Defense counsel then asked: "And isn't it true, Mr. Santos-Valdez, that you pointed that gun at my client?" RP 153. Santos-Valdez responded, "That's not true." RP 153. At this point, defense counsel asked: "You knew my client had been shot in the past; right? He's got a mark on his neck where he's been shot." RP 153. Santos-Valdez answered non-responsively: "From committing robberies, yes." RP 153.

At the next break, the state argued the defense question about Jerez-Sosa being shot in the neck opened the door to questions about how Jerez-Sosa was shot, i.e. while committing an alleged robbery. RP 156. The state argued such evidence was relevant because the defense expert witness, psychologist Delton Young, would testify that because Jerez-Sosa was shot in the neck, he has a heightened sense of alarm around firearms. RP 156.

The court inquired why it would matter, how Jerez-Sosa was shot: "Why would it matter, the circumstances of whether he got

shot committing a robbery or under any other circumstances in terms of the trauma that Dr. Young is going to testify to?" RP 156. The state proposed that it would be impeachment. RP 156. According to the prosecutor, Jerez-Sosa told Dr. Young he was shot by a stranger in a store. RP 157.

Defense counsel responded he did not open the door to testimony about how Jerez-Sosa may have been shot. Rather, as defense counsel put it: "Mr. Santos-Valdez kicked it open, Your Honor. I asked a question and he violated the pretrial agreement by bringing up a 404(b) accusation of prior misconduct." RP 157. Defense counsel moved for a mistrial. RP 157.

The court agreed defense counsel asked a yes or no question: "Mr. Doyle [prosecutor], it was a yes or no question, do you know that he had a mark on his neck. It didn't ask for any other explanation." RP 157; see also RP 159.

The prosecutor suggested the court shelve the issue until after Jerez-Sosa and Dr. Young testified to see if the evidence would become admissible. RP 160.

Defense counsel adamantly objected:

> We're not willing to table this issue, Your Honor. The bell has been rung, the milk is out of the carton. Regardless of my knowledge of what Mr.

> Santos-Valdez said in an interview, he was expressly told not to say what he did say. I'm afraid that the prejudice has been done. I didn't stop to object to his testimony because I didn't want to bring more notice to it than had already been occurred. But you can't unring the bell. The elephant is out of the cage, Your Honor.

RP 160.

The court initially agreed:

> Well, I'm inclined to grant the mistrial based on the significant prejudice that I think would be caused by the jury knowing that he had committed prior robberies. I can't think of anything more prejudicial.

RP 161.

The court also indicated it should have sustained defense counsel's earlier objection to Santos-Valdez's testimony Jerez-Sosa said he robbed liquor stores and got away with it:

> . . . But then he has Mr. Jerez-Sosa saying, He said he got away with robbing a liquor store and was successful at it. Mr. Felker [defense counsel] objected. I overruled the objection, but I was troubled by it. And in reading – listening to that testimony, it's clear to the Court that the objection should have been sustained, although I'm not – the damage was done at that point, as well, when Mr. Jerez-Sosa indicated that – or Mr. Santos-Valdez indicated that Mr. Jerez-Sosa had gotten away with robbing liquor stores.
>
> So Mr. Doyle [prosecutor], how do we cure that problem?

RP 162.

The prosecutor argued the robbery allegations could become relevant in rebuttal, assuming the defense proceeded with a duress defense. RP 164. He asked for a recess to brief the issue. The court granted the prosecutor's request. RP 165.

When court reconvened, the court denied the motion for mistrial, but without prejudice to the defense re-raising it at the conclusion of the case. The court reasoned it could not gauge the seriousness of the irregularity until the end of trial. RP 183-84.

When jurors returned, the court gave the following instruction:

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

RP 202.

The prosecutor re-called Santos-Valdez to clarify he had no personal knowledge of whether Jerez-Sosa had in fact successfully robbed a liquor store, or whether Jerez-Sosa had been shot during the course of a robbery. RP 203. Rather, Santos-Valdez clarified he heard these claims from Jerez-Sosa. RP 203.

3. Defense Case

When the state rested, the defense renewed the mistrial motion. RP 279. Defense counsel indicated he was prepared to proceed, but the prejudice had already occurred. RP 279. The court gave the same ruling as before. RP 279.

Jerez-Sosa testified that on September 7, 2012, he was living in Tacoma with his girlfriend and working as a mechanic. RP 282, 285-86. That day, he changed a water pump for a friend. RP 285.

Later in the evening, Jerez-Sosa decided to go to Seattle to buy some pain killers (Percocet), because his neck hurt. RP 286. Jerez-Sosa explained he had been shot twice. RP 283. Once, while walking near 23rd Avenue and Cherry Street, he was shot in the neck. He was living in the Central District at the time, and there was a shooting. RP 284. He spent fifteen days in the hospital and has noticeable scars from the shooting. RP 284, 368.

Thirty days after he was shot in the neck, Jerez-Sosa was shot in the foot in a store, in the same area. RP 284. Jerez-Sosa never discussed how he was shot with Santos-Valdez or claimed to have robbed a liquor store. RP 284, 338. In fact, Jerez-Sosa barely knew Santos-Valdez, although he knew Santos-Valdez spent his time with drug dealers in Seattle. RP 282.

Accordingly, when Jerez-Sosa ran into Santos-Valdez that night in South Seattle, Jerez-Sosa told him he was looking for pills or powder cocaine. RP 287. Santos-Valdez suggested they go to Beacon Hill, where Santos-Valdez would help Jerez-Sosa find what he sought. RP 288. Jerez-Sosa had no idea Santos-Valdez had a gun or intended to commit robbery. RP 288, 293.

On the cab ride to Beacon Hill, Jerez-Sosa spoke in Spanish to Santos-Valdez because they are both from Cuba. RP 288. Jerez-Sosa also telephoned his girlfriend to tell her what time he would be home. RP 324, 327.

Jerez-Sosa testified that Santos-Valdez started asking the cab driver "weird" questions about how much money he made. RP 290. When the cab stopped, Santos-Valdez pulled out a gun, told the driver to give up his wallet, hit him in the face and then turned

the gun on Jerez-Sosa and directed: "And you watch the front. Check, check the front." RP 290.

Jerez-Sosa felt he was staring death in the face and did not want to disobey Santos-Valdez. Afraid of being shot, Jerez-Sosa went to the front of the taxi, put what he could find in a black bag and handed it to Santos-Valdez. RP 291, 327. While Jerez-Sosa was checking the front, Santos-Valdez kept the gun pointed at him and Berhanu. RP 292.

After handing over the bag, Jerez-Sosa ran away, up the stairs. RP 292. Santos-Valdez followed him but went a different way at the top. RP 292. Jerez-Sosa ran to a nearby light rail station and caught a train to Tukwila and then a bus to Federal Way, where his friend picked him up. RP 292-93.

Psychologist Delton Young evaluated Jerez-Sosa while he was awaiting trial. RP 294. Jerez-Sosa told Young about being shot in the past and his continuing nightmares, fears and pain. RP 294, 338, 368. Young spoke with Jerez-Sosa's stepmother who confirmed Jerez-Sosa suffered greatly, both mentally and physically after he was shot. RP 363, 365.

In addition to interviewing Jerez-Sosa and his stepmother and reviewing the police reports, Young administered two

psychological tests, one of which has internal validity scales, which heighten its accuracy. RP 355-57, 370-71.

The test showed Jerez-Sosa was neither deceptive nor malingering. RP 373. In Young's opinion, Jerez-Sosa has suffered from post traumatic stress disorder (PTSD) since he was shot, including the date of the instant offense. RP 375. Young recognized anyone would be terrified by having a gun pointed at him or her, but opined Jerez-Sosa would have experienced heightened terror as a result of his PTSD. RP 376.

Before cross, the court ruled the state would be allowed to ask if Young's diagnosis of PTSD would change if Jerez-Sosa was shot while committing a robbery, instead of by a stranger as an innocent bystander. RP 346.

On cross, Young testified Jerez-Sosa told him he was shot by a stranger in a store. RP 397. The prosecutor asked whether Jerez-Sosa's hyper-vigilance and other PTSD symptoms would be consistent with someone who was shot while committing robbery. RP 402. Young could not definitively say. He hypothesized a participant also could be traumatized if he or she were shot, but suspected the trauma might be worse for an innocent bystander. RP 402-03.

On cross, Young also testified that inconsistent descriptions of trauma could affect his PTSD diagnosis, but he would want to know the reason behind the inconsistency, i.e. whether the event was fiction or poorly recalled. RP 404.

4. Post Trial Motion for Mistrial

Following the jury's verdict, the defense moved for a new trial; the court granted the defense leave to essentially renew its mistrial motion in the event of conviction. RP 434.

In response, the prosecutor argued Jerez-Sosa's alleged statements to Santos-Valdez were relevant to show willing participation. RP 512. According to the prosecutor, the statements were not prejudicial because Young testified to worse behavior in Jerez-Sosa's past, such as drug and alcohol abuse and domestic violence. RP 513; see RP 362, 365.

Defense counsel countered there could be nothing more prejudicial in a robbery case than for the jury to hear the defendant committed robbery in the past. RP 513-14.

The court found that the reported liquor store statement was relevant to Jerez-Sosa's state of mind, to show willing participation. RP 521. But the court was troubled by Valdez-Santos's statement Jerez-Sosa was shot while committing other robberies. RP 521.

The court noted that in the cases allowing similar prior bad acts evidence to impeach a duress defense, the evidence involved a conviction, not a mere accusation. See United States v. Hunter, 672 F.2d 815, 817 (10th Cr. 1982) (evidence of prior bank robbery admissible to undermine duress defense when "very close to the one at issue in point of time and in method of commission"), overruled on other grounds by United States v. Call, 129 F.3d 1402, 1404 & n.2 (10th Cir. 1997).

The court questioned whether, had Santos-Valdez not testified about Jerez-Sosa being shot during a robbery in the state's case-in-chief, the state would have been permitted to call Santos-Valdez in rebuttal to contradict the description Jerez-Sosa gave to Young. RP 522. The court noted that while such testimony might be relevant to impeach Jerez-Sosa's credibility, it was also incredibly prejudicial. The court was uncertain it would have admitted the evidence for impeachment. RP 524.

The court granted the motion for a mistrial, reasoning:

> I'm going to grant the mistrial. And I'm doing that because I'm ultimately persuaded that when you have these types of extremely prejudicial statements, that it is not – it is unrealistic to expect a jury to make the distinction between the statement that's being admitted solely for the purpose of showing Mr. Sosa's state of mind, and the natural inclination of the jury is

> to say, if this person said he engaged in this kind of conduct, other armed robberies, then he must be guilty of this crime. I simply cannot eliminate that as a significant possibility here.
>
> And while I think there are certainly ways that lawyers can understand the distinctions, I think that the reason why – and Mr. Doyle [prosecutor], I'd appreciate if you kept your own emotions to yourself while I'm announcing my decision. I understand you may disagree with them, but –
>
> MR. DOYLE: I'm sorry, Your Honor.
>
> THE COURT: And I also believe, and this has nothing to do with the reasons for my ruling, that it may be in the interest of all concerned, including the State, that if there's going to be a retrial, it ought to happen now, as opposed to when this case goes through the appellate process.
>
> And frankly, I think there's a significant possibility, if the Court were to deny the motion for mistrial, that an appellate court would see it differently. And so I'm going to grant the motion for mistrial.

RP 527-528.

The state thereafter moved for reconsideration, citing State v. Watkins, 53 Wn. App. 264, 270, 766 P.2d 484 (1989). There, in evaluating the denial of a motion to sever, court held proof that Watkins committed the car robbery without duress tended to negate her duress defense to the convenience store robberies and was cross-admissible. Supp. CP __ (sub. no. 108, State's Motion to Reconsider, 2/24/14). The state argued that under Watkins, it is

not unduly prejudicial to admit evidence a defendant committed the exact same crime as the one charged to rebut a duress defense. RP 533.

The defense responded there was no proof Jerez-Sosa committed a prior robbery: "The acts of robberies that Mr. Santos-Valdez testified to were not found by any court to have been committed, by a preponderance or otherwise." CP 82. Also, any probative value of the evidence was far outweighed by its potential for prejudice. RP 546.

The court questioned how it could find by a preponderance of the evidence that the statements in question were made. RP 547-48. The prosecutor argued the court could evaluate the relative credibility of Santos-Valdez and Jerez-Sosa. RP 548. Without resolving the question, the court refocused on whether any of the evidence could have been admitted in a different manner. RP 550.

First, the court proposed the state could have asked Jerez-Sosa on cross whether he was a willing participant. RP 550. Assuming he said no, the court indicated the state would have been permitted to ask Jerez-Sosa whether he suggested robbing a liquor store. RP 550. Assuming Jerez-Sosa said no, the court held the

state would have been permitted to call Santos-Valdez in rebuttal to impeach Jerez-Sosa on that point. RP 551. The court concluded Santos-Valdez's first statement was admissible to show lack of duress. RP 551.

Second, the court proposed that if Santos-Valdez had merely confirmed he knew Jerez-Sosa had been shot, and the defense asked whether Santos-Valdez therefore perceived Jerez-Sosa as particularly vulnerable, Santos-Valdez would have been permitted to give context. In other words, Santos-Valdez could have testified he did not pull a gun on Jerez-Sosa or perceive him as vulnerable, as Jerez-Sosa told him he was shot during robberies. RP 553.

The court also held the state could have called Santos-Valdez in rebuttal to contradict Young's assumption Jerez-Sosa was an innocent bystander. RP 554.

The court concluded the challenged testimony therefore was probative and not outweighed by its potential for prejudice. RP 554. Accordingly, the court denied the motion for a mistrial. CP 88.

C. ARGUMENT

TRIAL IRREGULARITY DEPRIVED JEREZ-SOSA OF HIS RIGHT TO A FAIR TRIAL.

The court erred in denying the motion for a mistrial. Evidence Jerez-Sosa claimed to have successfully robbed a liquor store in the past and that he claimed to have been shot during prior robberies was not admissible because the state failed to prove these statements were made by a preponderance of the evidence. Indeed, the court never made such a finding, nor could it, based solely on the say-so of an alleged accomplice to the instant charge.

Moreover, in balancing the probative value of the evidence versus its potential for prejudice, the court wrongly relied on an inapposite case, State v. Watkins,[3] which addressed the propriety of the denial of a severance motion. Under the circumstances of this case, any probative value of the prior bad acts evidence was far outweighed by its potential for prejudice.

When examining a trial irregularity, the question is whether the irregularity so prejudiced the jury that the accused was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity may have had this

impact, the appellate court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); Escalona, 49 Wn. App. at 254.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The underlying questions of law are reviewed de novo. State v. Lord, 161 Wn. 2d 276, 284, 165 P.3d 1251 (2007).

1. Santos-Valdez's Testimony about Prior Robberies Was a Serious Trial Irregularity.

Violation of a pre-trial order is a serious trial irregularity. State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010). As the Supreme Court has noted, testimony related to prior criminal conduct can also be extremely serious. Gamble, 168 Wn.2d at 178 (citing Escalona, 49 Wn. App. 251).

The circumstances in Escalona are analogous to those here. Escalona was charged with second degree assault for stabbing

[3] State v. Watkins, 53 Wn. App. 264, 766 P.2d 484 (1989).

someone. A prosecution witness testified, in violation of a pretrial order, that Escalona already has a record and had stabbed someone. The trial court instructed the jury to disregard the improper statement and denied the defense motion for a mistrial. Escalona, at 253. The reviewing court reversed on grounds the trial court abused its discretion in denying the motion for a mistrial. Escalona, at 255-56. See also, State v. Miles, 73 Wn.2d 67, 68, 436 P.2d 198 (1968) (armed robbery conviction reversed because witness violated in limine ruling by testifying defendants had just committed a similar crime elsewhere); State v. Wilburn, 51 Wn. App. 827, 832, 755 P.2d 842 (1988) (rape conviction reversed because witness violated in limine ruling by testifying the defendant said, Yes, I did it again and I need treatment).

The parties and court recognized the seriousness of Santos-Valdez's accusations and the effect those accusations would have on the fairness of Jerez-Sosa's trial. This is evidenced by the state's agreement not to introduce such accusations in its case-in-chief and the court's admonishment to Santos-Valdez not to mention any alleged prior wrongdoing by Jerez-Sosa. Santos-Valdez's testimony was in direct violation of the court's

admonishment and amounted to a serious trial irregularity of the same sort that required a new trial in Escalona.

2. Santos-Valdez's Testimony Was not Cumulative or Otherwise Admissible to Rebut Jerez-Sosa's Duress Defense.

Contrary to the trial court's ruling, Santos-Valdez's testimony Jerez-Sosa said he successfully robbed a liquor store and that he was shot committing robberies was not otherwise admissible.

The court's reliance on State v. Watkins was in error. Watkins was charged with five counts of robbery: four involving convenience stores and one involving a woman in a car. Watkins, 53 Wn. App. at 266. Watkins raised a duress defense with respect to the convenience store robberies but not to the car robbery. This Court held the trial court properly denied Watkins' motion to sever because evidence of the robberies was cross-admissible. 53 Wn. App. at 270. This Court held that proof Watkins committed the car robbery without duress tended to negate her duress defense to the convenience store robberies. Watkins, at 270-71.

Watkins is inapposite, however, as it involved a severance motion. More importantly, however, "The court there had the benefit of a previous court making a determination of probable cause to file the case in the non-duress case, thereby fulfilling the

first component of Foxhaven,[4] that there be a preponderance of proof that the prior misconduct actually occurred." CP 84.

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before a trial court may admit evidence of other crimes or misconduct under ER 404(b), it must identify on the record the purpose for which such evidence is admitted. Even when a valid purpose can be identified, evidence of prior misconduct still must be relevant to a material issue, and its probative value must outweigh its prejudicial effect. The trial court must also find by a preponderance of the evidence that the claimed misconduct occurred. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998).

Courts presume that evidence of a defendant's past acts is inadmissible and resolve any doubts on whether to admit the evidence in the defendant's favor. State v. Fuller, 169 Wn. App.

[4] State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007).

797, 282 P.3d 126 (2012) (citing State v. Nelson, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006)).

Here, the state presented no evidence other than Santos-Valdez's say-so that Jerez-Sosa claimed to have successfully robbed a liquor store and that Jerez-Sosa claimed to have been shot while committing robberies. This does not rise to proof by a preponderance of the evidence. Indeed, the court appeared to recognize as much:

> THE COURT: Mr. Doyle, one question for you. Assuming 404(b) applies, on what bases could the Court find by a preponderance of the evidence that the statements were made when you have two witnesses with lengthy criminal records – I assume, at least, that Mr. Jerez-Sosa at least has some criminal history. But assuming that, you know, they both are equally unreliable as witnesses, how can the Court find by a preponderance of the evidence that the statement was either made or not made?

RP 547-48.

And while the prosecutor asserted the court could evaluate the relative credibility of the two, the court never in fact did so. At no time on the record did the court indicate it found Santos-Valdez more credible than Jerez-Sosa or that the state proved the existence of the robbery statements by a preponderance of the evidence. RP 548-555. Indeed, as the jury was instructed,

testimony by an accomplice "should be acted upon with great caution." CP 45.

Not only was there insufficient proof of the alleged robbery statements, but the probative value of such evidence was far outweighed by the danger of unfair prejudice. The court ruled the evidence was relevant to Jerez-Sosa's state of mind, and to provide context for Santos-Valdez's testimony regarding his knowledge Jerez-Sosa had been shot. Assuming arguendo Jerez-Sosa's alleged suggestion to rob a liquor store was relevant to his state of mind, the fact only Santos-Valdez could offer any proof minimized its reliability and therefore its probative value. Moreover, whether Jerez-Sosa previously succeeded in robbing a liquor store shed little light on his state of mind at the time of the charged offense. Similarly, the context in which Santos-Valdez learned Jerez-Sosa had been shot, or how he had been shot, was of little relevance, if any. He was allowed to testify he did not perceive Jerez-Sosa as particularly vulnerable, regardless that he was shot.

On the other hand, the potential for prejudice was exceedingly high, as in the Escalona case, discussed previously. The court therefore erred in holding Santos-Valdez's testimony

about prior robberies would have been otherwise admissible, had he not violated the court's order.

3. A Curative Instruction Was Not Capable of Curing the Irregularity.

Although the court gave a curative instruction and Santos-Valdez was recalled to testify he had no personal knowledge whether Jerez-Sosa actually committed prior robberies, the jury was left to ponder testimony indicating Jerez-Sosa said he did, which is arguably worse than an allegation of prior misconduct by an accomplice.

And because the misconduct at issue was of the same sort as the current accusation, case law supports the conclusion that no curative instruction would have been effective to unring the bell. Escalona, 49 Wn. App. 251 (in state's assault prosecution against Escalona for threatening the complainant with a knife, evidence he stabbed someone else in the past required a mistrial, despite court's curative instruction). This Court should hold in keeping with Escalona and reverse Jerez-Sosa's conviction.

D. CONCLUSION

Because Jerez-Santos was convicted in violation of his right to a fair trial, the robbery conviction must be reversed.

Dated this 31st day of October, 2014

Respectfully submitted

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71823-1-I
	)	
RODOLFO JEREZ-SOSA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCOTBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RODOLFO JEREZ-SOSA
DOC NO. 788450
COYOTE RIGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS31ST DAY OF OCOTBER, 2014.

X Patrick Mayovsky