 73142-4

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Division I
State of Washington

NO. 73142-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE DETENTION OF

DAVID LYNN DeSPAIN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Under review for either a constitutional violation or a trial irregularity, a new trial is compelled because the court and witness testimony improperly introduced Mr. DeSpain's criminal history into the trial.**

Because evidence of prior criminal history runs a high risk of prejudicing the jury against the defendant, the admissibility of such evidence is highly circumscribed. E.g., State v. Roswell, 165 Wn.2d 186, 198, 196 P.3d 705 (2008) (noting "highly prejudicial" danger that jury that learns of prior conviction for "the very same type of crime" will infer propensity); State v. Oster, 147 Wn.2d 144, 147-48, 52 P.3d 26 (2002) (noting prejudicial effect of evidence of prior offenses and citing authorities discussing same); ER 404; see Op. Br. at 12 (discussing authority). To ensure a fair trial and to limit the risk of unfair prejudice, the parties agreed before jury selection that only one prior theft conviction would be admissible at trial and only if Mr. DeSpain testified. 1RP 12-13. But at the outset, while instructing the prospective jurors, the court read charging language that included the aggravating factor that some of Mr. DeSpain's offenses would go unpunished due to his high offender score. 1RP 18-19; CP 111-12. Then, Mrs. Faltys testified she knew that Mr. DeSpain had "several other[]" convictions, including one for theft. 2RP 258.

"There was nothing trivial, formal or merely academic about th[ese] error[s]." State v. Christopher, 20 Wn. App. 755, 759, 583 P.2d 638 (1978). Contrary to the State's assertion, these were not mere "errant statement[s]." Resp. Br. at 7. Rather, the criminal history information communicated twice was "highly prejudicial." Roswell, 165 Wn.2d at 198. "If the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically." Alan D. Hornstein, Between *Rock* and a Hard Place: The Right to Testify and Impeachment by Prior Convictions, 42 Vill. L.Rev. 1 (1997). "[P]rior conviction evidence is inherently prejudicial" because it tends to shift the jury's attention "from the merits of the charge to the defendant's general propensity for criminality." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 420, 554, 782 P.2d 1013 (1989). The double broadcasting of Mr. DeSpain's voluminous criminal history was at least a "serious irregularity," such as that found by this Court in State v. Young, 129 Wn. App. 468, 476, 119 P.3d 870 (2005). More likely, twice presenting Mr. DeSpain's jury with prejudicial information on his criminal history "violated [his] fundamental constitutional right" to a fair trial. Christopher, 20 Wn. App. at 759.

The State seeks to minimize the attendant prejudice by reviewing each error separately. *See* Resp. Br. at 11. The errors here, however, revealed similar, otherwise-excluded evidence. The errors thus compounded each other because the witness's testimony corroborated the court's instruction. Both told the jury Mr. DeSpain was a serial offender. While reversal is compelled on either improper revelation when viewed in isolation, the full effect of the errors can only be measured when viewed collectively and in light of the trial as a whole.

The State also unbelievably claims the jurors would not have understood that "the Defendant's high offender score results in some of the current offenses going unpunished" means that Mr. DeSpain has committed previous crimes. Resp. Br. at 11-12. The term "high offender score" alone likely rang the bell for the jury—Mr. DeSpain is a prior offender. But, even if "high offender score" did not register with all the jurors, the language that the court read to the jury contrasted "high offender score" with the "*current* offenses." 1RP 18-19 (emphasis added). This language made clear that Mr. DeSpain's *prior* offenses had an effect on his current trial. In fact, the effect was not just on his current trial, but the court told the jury these prior

offenses affected his current "punish[ment]." Id. The State's argument that the jury would not have understood this phrase is belied by common sense.

The State's attempt to minimize the impact of Mrs. Faltys' testimony is likewise unavailing. The State claims that Mrs. Faltys "could have been referring to any number of issues" when she testified she learned "later" of Mr. DeSpain's prior theft conviction "and several others." Resp. Br. at 16; 2RP 258. However, Mr. DeSpain's prior theft conviction was the only topic at issue during that portion of the testimony. Mrs. Faltys' response plainly pertained to prior convictions.

> Q All right. So when he was telling you that he'd never done anything like this before, did he indicate that he'd been convicted of theft in 2009?
>
> A Not then. I learned that later.
>
> Q Okay.
>
> A That and several others.

2RP 258 (emphasis added). "That" plainly referred to the 2009 theft conviction, such that "several others" logically could not have referred to anything but prior convictions. In fact, Mrs. Faltys' testimony left the impression that Mr. DeSpain had multiple theft convictions (the

charge at issue here), not just one theft conviction and other convictions for different crimes.

Moreover, contrary to the State's assertion, this evidence was not cumulative. Resp. Br. at 16-17. While the jury learned of Mr. DeSpain's 2009 theft conviction, it would not have heard that Mr. DeSpain had other criminal convictions absent the court's reading of the aggravator and Mrs. Faltys' testimony that Mr. DeSpain had "several others."

In the face of this prejudicial testimony and the court's recitation of the aggravator for crimes going unpunished, the court did not specifically instruct the jury to disregard this extrinsic evidence. As the State admits, the trial court did not specifically ask, or specifically instruct, the jury on how to treat the erroneous information that came to light. Resp. Br. at 13, 17.[1] At the end of trial, the court merely

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[1] Mr. DeSpain argues here that the trial court's general instruction did not cure the error under the Young factors. Young and related cases do not require the defendant to have requested an instruction; this factor merely looks to whether an instruction could have cured the error. See Resp. Br. at 18 (arguing DeSpain invited error); Young, 129 Wn. App. at 473, 476-77; State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853 (2011) (third factor in test is "whether the irregularity could be cured by an instruction"). Here, the trial court did not provide any such instruction and Mr. DeSpain contends no instruction could have cured the errors. For that reason, Mr. DeSpain moved for a mistrial. His argument here is simply that, in line with

provided the same general instruction found insufficient by this Court in Young. Compare 2RP 266; CP 83, 90 with Young, 129 Wn. App. at 476-77.[2] The general instruction is insufficient here just as it was in Young.[3]

Finally, the State relies extensively on State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989). That case is distinguishable on several grounds. In Hobson, one witness mentioned that the defendant "went to the penitentiary the last time." 113 Wn.2d at 284. The witness did not provide the jury with information on the number or type of prior convictions and the evidence was cumulative of that presented by the defense expert. Id. 284-87. Here, the jury received information

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Young, no instruction presented below actually cured the prejudicial errors. The invited error doctrine is inapplicable.

[2] In the Garcia case discussed by the State, the trial court corrected an instructional error by withdrawing the incorrect instruction, reading the jury the corrected version, informing the jury they previously had been provided an incorrect instruction, informing the jury they now had the correct instructions and instructing the jury to disregard the improper instruction. State v. Garcia, 177 Wn. App. 769, 773-75, 781-83, 785, 313 P.3d 422 (2013). Even if those steps could have cured the two broadcasts of prejudicial information in Mr. DeSpain's trial, the trial court undertook none of them.

[3] When Mr. DeSpain renewed his motion for a mistrial outside the presence of the jury after Mrs. Faltys had testified he had "several other[]" criminal convictions, the trial court could not recall Mrs. Faltys testimony. 2RP 264. Because the trial court did not have the prejudicial testimony in mind when it ruled on Mr. DeSpain's motion, the court's denial of a mistrial should not be granted deference on review by this Court.

that Mr. DeSpain had multiple prior convictions and the extrinsic evidence derived from two sources on two independent occasions. Further, the evidence in this case was not cumulative.

In Hobson, the trial court also ordered the jury to disregard the remark. 113 Wn.2d at 287. As discussed, that did not happen here and could not have cured the effect of the repeated prejudicial errors.

There is another glaring distinction between Hobson and this case. In Hobson, the jury had "overwhelming evidence favoring conviction." 113 Wn.2d at 286. The defendant conceded he committed the crime but argued diminished capacity. Id. This case, on the other hand, came down to a credibility contest. The State had no physical evidence connecting Mr. DeSpain to the burglary and theft. Critically, Mrs. Faltys was not able to identify Mr. DeSpain in the courtroom, until she was prompted by the prosecutor. 2RP 168. When asked to identify this man she was accusing, Mrs. Faltys first pointed out a man "at the back of the courtroom." Id. She was then prompted by prosecutor's question "So at the table to my right[,]" at which point she clarified, "Oh! I'm sorry. I'm looking all the way through. Yes. No, that's-- He looks-- He looks like him, as a matter of fact. Except for the glasses. . . . No, he is seated at that table. I'm sorry." Id. Nonetheless,

Mrs. Faltys testified that Mr. DeSpain purportedly admitted the burglary and returned jewelry. Mr. DeSpain, on the other hand, testified that he neither committed the acts nor admitted to them.

Particularly because credibility was crucial and physical evidence was lacking, the prejudicial effect of introducing Mr. DeSpain's criminal history—twice—was at its height. Considering the record as a whole, it cannot be said Mr. DeSpain had a fair trial uninfluenced by the court's prejudicial instruction and Mrs. Faltys' testimony about Mr. DeSpain's criminal history.

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

2. **Mrs. Faltys' guess at a replacement value for the stolen property does not prove a market value of $750 to $5,000 beyond a reasonable doubt, requiring reversal and dismissal of the second-degree theft count.**

To prove theft in the second degree, the State had to show that the value of the property was between $750 and $5,000. RCW 9A.56.040(1)(a); CP 97, 102; State v. Clark, 13 Wn. App. 782, 787, 537 P.2d 820 (1975). Value means "market value of the property . . . at the time and in the approximate area of the criminal act." RCW

9A.56.010(21); CP 101. In other words, market value is objectively "the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." State v. Kleist, 126 Wn.2d 432, 434, 438, 895 P.2d 398 (1995); Clark, 13 Wn. App. at 787; accord Resp. Br. at 23. Replacement value is only admissible if it is first demonstrated that the property has no market value. State v. Ehrhardt, 167 Wn. App. 934, 944, 276 P.3d 332 (2012).

Mrs. Faltys "guessed" at the replacement cost of some of the items stolen from her based on the original purchase price, not the current market value. 2RP 194-96, 201-13. Mrs. Faltys had not had the jewelry appraised. 2RP 203. And the State did not provide any other evidence to support the value of the jewelry.

The State's proof was insufficient because the limited evidence did not establish the current market value for the jewelry. Mr. DeSpain's second degree theft conviction must be reversed and dismissed. Ehrhardt, 167 Wn. App. at 946.

3. **The exceptional sentence should be reversed because the evidence of particular vulnerability was insufficient .**

As argued in Mr. DeSpain's opening brief, the exceptional sentence should be reversed on two independent grounds. Op. Br. at

26-32. First, the State did not prove beyond a reasonable doubt that Mrs. Faltys was particularly vulnerable or incapable of resistance. Mrs. Faltys led an active life, drove, tricked Mr. DeSpain, owned at least two pistols, and was an active member of the Rod and Gun Club. 2RP 177-78, 183, 199-200, 214-16, 222. In the light most favorable to the State, the fact that Mrs. Faltys was 81 years old and lived alone does not prove she was particularly vulnerable or incapable of resistance beyond a reasonable doubt. See Resp. Br. at 30, 33 (state's argument to support aggravator calls only upon evidence of Faltys age and domiciliary status); accord Resp. Br. at 34 (showing same argument made at trial).

Additionally, the jury finding does not provide substantial and compelling reasons for an exceptional sentence in a case where Mrs. Faltys was not present at the time of the crime. No reported cases uphold an exceptional sentence based upon victim vulnerability when the victim was not present when the crime occurred. This Court should reverse the exceptional sentence.

B. CONCLUSION

As set forth above and in Mr. DeSpain's opening brief, the theft conviction must be reversed and the charge dismissed because the State

failed to prove value beyond a reasonable doubt. The remaining charge must be reversed and remanded for a new trial either because the repeated introduction of prejudicial prior offense evidence prejudiced Mr. DeSpain's constitutional right to a fair trial or constituted serious trial irregularities necessitating a mistrial. The particularly vulnerable victim aggravator should also be reversed on the two independent bases that it cannot be imposed where the victim was not present during the crime and that the State failed to prove the independent, gun-owning, sociable, and shrewd Mrs. Faltys was particularly vulnerable beyond a reasonable doubt.

DATED this 10th day of March, 2016.

Respectfully submitted,

s/ Marla L Zink

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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