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FILED
June 17, 2016
Court of Appeals
Division I
State of Washington

NO. 74261-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL ESPINOZA REYES,

Appellant.

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

The Honorable Alicea Galvan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information omitted an essential element of robbery, in violation of the appellant's right to due process.

2. The trial court erred in denying the appellant's motion for a mistrial following a serious trial irregularity.

Issues Pertaining to Assignments of Error

1. For a robbery to occur, as a matter of law, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property. This is an essential, implied element of robbery. State v. Richie, 191 Wn. App. 916, 365 P.3d 770 (2015). Where the information omitted an essential element of robbery, in violation of the appellant's right to due process, should his robbery conviction be reversed?

2. The trial court ruled that evidence suggesting a motive for the robbery was inadmissible under the rules of evidence. But, while testifying, the State's primary witness repeatedly referred to the excluded evidence such that the excluded motive evidence was abundantly clear to jurors. Although the trial court later gave a limiting instruction, the irregularity was so serious, pervasive, and central to the issues in the case that any instruction was incapable of curing the prejudice. Did the trial court therefore err in denying the appellant's motion for a mistrial?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Israel Espinoza Reyes (Espinoza) with a robbery alleged to have occurred August 21, 2014. CP 3, 28. The charge was elevated to the first degree based on an allegation that he injured the complainant, Damaris Amaya, a front desk clerk at the hotel where Espinoza also worked. CP 28 (amended information); RCW 9A.56.190; RCW 9A.56.200(1)(a)(2); see also CP 1-7 (original charging document). The State also charged Espinoza's wife, Tara Hasme, with the crime, although she pleaded guilty and therefore was not tried with Espinoza. CP 1, 93.

A jury convicted Espinoza as charged. CP 78. The court sentenced him to a low-end standard range sentence based on an offender score of zero. CP 105-12.

2. Order excluding evidence of other bad act (motive evidence).

Before trial, the State announced that it wished to introduce evidence that Espinoza and his wife Hasme, who also worked at the hotel, were suspected of taking money from the cash register and that hotel management had therefore withheld their paychecks shortly before the

¹ This brief refers to the verbatim reports as follows: 1RP – 1/7 and 7/20/15; 2RP – 9/17, 9/21, and 9/22/15; 3RP – 9/23/15; 4RP – 9/28/15; 5RP – 9/29/15; and 6RP – 9/30 and 10/30/15.

alleged robbery occurred. 2RP 28-29. Amaya apparently believed Hasme had lured her from the front desk, leaving Espinoza in charge. 2RP 30, 137. Later, Amaya noticed \$100 was missing from the cash drawer. 2RP 30, 137-38. The State argued that the evidence should be admitted to show Espinoza and Hasme's motive for robbing the hotel. 2RP 29, 138. Espinoza's attorney argued, however, that Amaya's suspicions had not been corroborated, and she pointed out that the State did not intend to call anyone from hotel management about withholding paychecks. 2RP 30, 139. The court reserved ruling. 2RP 31-32, 124-27, 139.

After additional argument, the court ruled that Amaya's suspicions were largely based on speculation, rendering any testimony Amaya could provide more prejudicial than probative. 3RP 151-52; see also 3RP 145-54 (additional argument and ruling). The court believed, however, that evidence that paychecks were withheld could provide a motive. Yet, the court noted, the State was not planning to present testimony from hotel management. 3RP 152-53. The court observed the State *could* introduce such evidence if it wished, but not through Amaya. 3RP 153. Ultimately, Amaya was the only hotel employee who testified.

3. Trial testimony

A number of responding police officers testified regarding their interactions with Amaya, Espinoza, and Hasme. Police received a report

of a robbery at the Sandstone Inn, located at the 19200 block of International Boulevard in SeaTac. 4RP 308, 320, 335. When officers arrived, Amaya, the front desk clerk, was shaking and crying. 4RP 321. Amaya believed she knew who robbed her, although she had not seen the robbers' faces. 4RP 322, 327. She said she recognized the robbers by their voices, builds, and shoes. 4RP 357; 5RP 408.

Deputy Andy Conner responded to the area of the hotel and waited for the other police officers to broadcast a description of the robbers. 4RP 335. Meanwhile, Conner spoke with a woman standing nearby. She had recently seen a man running south on International Boulevard. 4RP 335.

Investigating officers eventually broadcast that the robbers were two "disgruntled" employees.² 4RP 335. The woman suspected of being involved had distinctive hair, in that it was dyed an unnatural shade of red. 4RP 336.

Conner saw a man and a woman walking south on International Boulevard. The woman had hair as described. 4RP 337. He had, however, been sent to investigate another couple. After ruling out that

² Later, Conner again described the employees as "disgruntled." 3RP 340. Afterward, defense counsel notified the court that she had made a strategic decision not to object, in order to avoid highlighting the testimony. But she urged the State to remind its witnesses not to mention the excluded motive evidence. Otherwise, she told the court and the State, she would move for a mistrial. 4RP 361.

couple, Conner contacted the first couple, Espinoza and Hasme, near the bus stop at International Boulevard and South 208th Street. 4RP 338. Twenty-five minutes had passed since Amaya's 9-1-1 call reporting the robbery. 4RP 325. Conner recalled that Espinoza was somewhat sweaty even though it was not particularly hot out. 4RP 353.

At one point, Conner asked to check Hasme's purse for weapons. She opened her purse and tilted it toward Conner as if trying to hide something in the interior. 4RP 342. Despite this, a wad of cash³ and a gun (which turned out to be a toy) were clearly visible. 4RP 342. There was also what Conner described as a "heroin kit" in Hasme's purse. 4RP 342. Espinoza was also searched, but he had nothing suspicious on his person. 4RP 358.

Espinoza told another police officer that he and Hasme had found the money and toy gun lying on the street. Espinoza urged Hasme to leave the gun and keep the money, but Hasme insisted on keeping the gun. 4RP 368, 370. Espinoza denied robbing the hotel. 4RP 371.

Defense counsel acknowledged in closing that Espinoza's story about finding the money was implausible. Espinoza was, however,

³ Deputy Travis Brunner counted \$181 in Hasme's purse. 5RP 417. After consulting with the hotel employees, he calculated that \$135 was missing from the cash register. 5RP 398-99, 410. The State appeared to have a theory to explain the discrepancy, but following hearsay objections by the defense, the State was not allowed to present it to the jury. 5RP 402-05.

attempting to protect his wife, who was clearly involved with drugs and other unsavory activity. 4RP 302-03 (opening statement); 6RP 530-31 (closing argument).

Police officers eventually drove Amaya to view Espinoza and Hasme, and Amaya confirmed they were the coworkers she had in mind. Amaya noted, however, that Espinoza was not dressed like the male robber. 4RP 324, 341, 357.

Amaya testified. 5RP 421. A front desk clerk, she had worked with Espinoza and Hasme on occasion. 5RP 422-25. Espinoza and Hasme lived near the hotel⁴ and Amaya often saw them together. 5RP 425. Hasme was “close to,” but shorter than, Amaya’s five foot seven inch height, but Hasme was very slender. 5RP 425. Espinoza was only slightly shorter than Amaya, but he was significantly heavier than Hasme. 5RP 426.

Amaya was working the 2:00-10:00 p.m. shift on August 21. 5RP 426. Hasme came in around 4:00 p.m. to pick up her paycheck. 5RP 427. Amaya explained that, “They – [Hasme] was not – whatever management had resolved with them about not getting a paycheck –” 5RP 427. Defense counsel objected, and the court sustained the objection. 5RP 427.

⁴ They lived with Espinoza’s parents in a residence adjacent to the hotel property. 4RP 353; 5RP 413, 446.

Amaya continued her testimony, stating that Hasme had come into the hotel and had “dealt with” a manager. 5RP 427.

Hours later, the robbers came in wearing masks. 5RP 428. While the woman—whom Amaya believed was Hasme—was pointing the gun, the male told Amaya he wanted her phone. 5RP 429. He took the phone and punched her behind her ear and on the back of her neck. 4RP 429. Amaya thought she lost consciousness for a short period. 5RP 429; but see Ex. 12 (Amaya does not appear to lose consciousness and remains standing after the blows). After being shown the video at trial,⁵ Amaya acknowledged she was hit in the head *before* the phone was taken. 5RP 430, 439-40. Amaya believed the man spoke to her, even though his voice is not audible on the recording. 5RP 440; Ex. 12.

Amaya was then dragged to the floor while the woman continued to point the gun at her. 5RP 429. Amaya heard, but did not see, the man

⁵ The incident was recorded by hotel security cameras, and the recording has both video and audio components. In the recording, which was shown to the jury and narrated by a police officer, Amaya, is standing at the counter. 5RP 405-06. The two robbers enter the hotel. 5RP 406. They wear dark clothing, and their faces and hair are covered. Ex. 12. The female robber points what appears to be a revolver at Amaya and screams at her. 5RP 406. Both robbers go behind the front desk. 5RP 407. While the female continues to point the gun at Amaya, the male punches Amaya in the back of the head, and she is forced to the floor. 5RP 407. The male takes items from the cash drawer and enters the office located behind the counter. 5RP 407, 420. The male soon leaves the office, signals to the woman, and both leave the hotel. 5RP 407. The male’s voice is not audible on the recording. 5RP 440; Ex. 12.

trying to get money from the safe in the back office, although he was not ultimately successful.⁶ 5RP 429, 458-62. After the robbers left, Amaya called 9-1-1. 5RP 429.

Regarding her identification, the State asked Amaya when she realized the robbers were Hasme and Espinoza. She responded,

A. When they entered the door.

Q. When they entered the door?

A. Um-hum.

Q. You knew right then?

A. Um-hum.

Q. Okay, how did you know?

A. *Because they had a motive.*

Q. Let's – okay.

A. *I know that –*

Q. Let's not –

A. *– we are not supposed to talk about what happened before, – let's just say that I know that they were –*

THE COURT: Counsel?

A. *– mad with the owners.*

Q. (By [the State]) Just answer the questions that I ask.

A. Okay.

[Defense counsel]: Your honor, I think we should be heard outside the presence of the jury.

THE COURT: Okay, not at this time. We will take your record later.

Q. (By [the State]) So just answer the questions that I ask. Okay?

⁶ Amaya acknowledged Espinoza worked at the front desk on occasion, but she was uncertain whether he knew how to open the office safe. 5RP 458-62.

A. Okay.

Q. As succinct as you can.

When they walked in the door is when you said you recognized them?

A. Um-hum.

5RP 442 (emphasis added).

Amaya then explained that she recognized Hasme's voice and build, although her distinctive hair was covered. 5RP 442, 463. She recognized Espinoza based on his size relative to Hasme and the fact that he was always with Hasme. 5RP 442-43. Amaya's testimony continued:

Q. Okay, and are you sure today that he was -- the male in that video?

A. Yes.

Q. Why?

A. Because his body build was the same. I heard his voice. I heard his voice when he said that he wanted the phone.

For other reasons that I mention --

Q. Okay --

A. -- and --

Q. Based on his appearance?

A. His appearance.

Q. His height?

A. His height.

Q. His build?

A. His build.

Q. His voice, you are saying -- how sure are you that it was him?

A. It's just --

Q. So do you know it was him or do you know?

A. I do know it was him.

Q. Okay.

A. *It's just -- you know, the situation, everything, how it was going on.* I was able to recognize that it was him under the circumstances.

SRP 444 (emphasis added). Even though Espinoza had apparently removed his hat, mask, and sweater, she believed he was wearing the same shorts when police took her to view him. SRP 445.

On cross-examination, Amaya admitted she had previously stated that her identification was only about 70 per cent certain. SRP 463. When asked if she recognized the robbers individually, or because they were a man and a woman together, she stated that “I can’t remember at the time if I recognize one or the other . . . [but] in my mind I knew they were probably these two people.” SRP 463. Amaya’s phone was never found. SRP 464.

Espinoza presented evidence that the shorts and shoes he was wearing did not match those worn by the robber. SRP 484-91; 6RP 540.

4. Motion for mistrial

As soon as was feasible, defense counsel moved for a mistrial based on Amaya’s repeated statements in violation of the court’s ruling. SRP 472-73. Counsel had, after Deputy Conner testified that the suspects were “disgruntled” employees, reminded the State to instruct its witnesses about the court’s rulings. SRP 473; see also 4RP 361 (explaining lack of objection to Conner’s testimony and reminding court and prosecutor that such evidence was excluded). Counsel argued that a mistrial was warranted because, in particular, Amaya had revealed that Hasme had had

an issue with management regarding a paycheck. 5RP 472-73, 175. Moreover, she had testified that Hasme and Espinoza were always together. 5RP 475. Highlighting this testimony further, Amaya had testified that she was not supposed to discuss the matter. 5RP 476.

Arguing against a mistrial, the prosecutor assured the court he had reminded Amaya not to reveal such evidence. He also argued that a mistrial was unwarranted because he had stopped her before she revealed anything prejudicial to Espinoza. 5RP 473-74.

The court denied the mistrial motion. Although Amaya had mentioned the word “motive,” the paycheck incident she described involved Hasme, not Espinoza. 5RP 474. In addition, the court noted that the testimony was vague, referring only to an “issue” with a paycheck rather than *withholding* a paycheck. 5RP 474; *cf.* 5RP 427 (testimony referring to “whatever management had resolved with them about not getting a paycheck”). In any event, the court noted—incorrectly—that it had told the jury to disregard the testimony. 4RP 475. The court also stated it would give a limiting instruction if Espinoza wished. 5RP 475.

The court later instructed the jury “[s]tatements made by any witness as to motive and as to Tara Hasme’s interactions with hotel management are stricken and not to be considered by you as evidence in this matter.” CP 60 (Instruction 6).

C. ARGUMENT

1. THE INFORMATION OMITTS AN ESSENTIAL ELEMENT OF ROBBERY, AND REVERSAL IS THEREFORE REQUIRED.

The charging document in this case omitted an essential element of robbery. Reversal is therefore required.

- a. Robbery includes a non-statutory element that the victim has an ownership, representative, or possessory interest in the property taken.

Essential elements of a crime are those that the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). In determining the essential elements, this Court first looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9A.56.190 defines robbery as follows:

A person commits robbery when [he] unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

With regard to taking property from a person's *presence*, the language of the statute does not require that the person have an ownership, representative, or possessory interest in the property.

However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find non-statutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with non-statutory elements that are implied by “a near eternity of common law and the common understanding of robbery.” Id.

In 1909, the state Supreme Court established that robbery includes an element that “the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it.” State v. Hall, 54 Wash. 142, 143-44, 102 P. 888 (1909). The Court held that an information alleging robbery was defective because it alleged the taking of property belonging to an entity from the immediate presence of a particular person, without alleging any connection between the person and the property. Id.

This Court adopted the requirement of ownership, representative capacity, or possession in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). There, this Court stated that in order for the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property

taken, or (3) actual possession of the property taken. Latham, 35 Wn. App. at 864-65.

In Latham, two defendants assaulted a car owner and a passenger as they stood beside the car, and then the defendants stole the car. Id. at 863-64. The defendants were charged with, and convicted of, two counts of robbery, one relating to the owner and one relating to the passenger. Id. This Court held that the passenger could not be the victim of robbery because he was not the owner of the car, had no authority from the owner to act regarding the car, and was not in possession of the car at the time of the robbery. Id. at 866. Accordingly, the Court reversed each defendant's robbery conviction relating to the passenger. Id.

In State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), the Supreme Court approved of the characterization of the robbery element adopted in Hall and Latham. The Court stated:

Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an ownership or representative interest in the property or have dominion and control over it. [Hall, 54 Wash. at 143-44]. The court rejected the argument that a conviction could be upheld where "title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken." [Id. at 143] . . . Thus, in order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the

property. [Id. at 143-44]; see also [Latham, 35 Wn. App. at 864-66].

Tvedt, 153 Wn.2d at 714.

As Division Two of this Court recently held in Richie, “Hall, Latham, and Tvedt all make it clear that a defendant cannot be convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken. *Accordingly, we hold that this requirement is an essential, implied element of robbery.*” Richie, 191 Wn. App. at 924 (emphasis added).

In Richie, Richie entered a Walgreen’s store, removed two bottles of brandy from the shelves, and walked toward the front of the store, holding one bottle by the neck in each hand. As Richie approached, Gouveia—a store employee in line at a register, not yet on the clock, and who still wore a coat covering her uniform—took a few steps back from the checkout counter. Richie walked between the checkout counter and Gouveia. Gouveia told Richie he needed to pay and reached for the bottles. Richie hit Gouveia on the head with one of the bottles. Gouveia then grabbed for the other bottle, and Richie ran out of the front door dragging Gouveia, who was still holding on to the bottle in Richie’s hand. Richie eventually broke away from Gouveia and drove off. Based on

these events, the State charged Richie with first degree robbery and second degree assault. Id. at 920-21.

On appeal, Richie argued there was insufficient evidence to prove all essential elements of first degree robbery because the State did not prove that Gouveia had an ownership, representative, or possessory interest in the liquor bottles that Richie stole. Id. at 924. Division Two of this Court disagreed as to the sufficiency claim. The State had presented evidence that Gouveia was a Walgreens employee and she was acting in that role when she tried to stop the theft. Id. at 925-26. Viewing the evidence in light most favorable to the State, the jury could have found beyond a reasonable doubt that, at the time of the robbery, Gouveia was acting in a representative capacity on behalf of Walgreens. Id. at 926.

The Court found, however, that the to-convict instruction, despite corresponding to the pattern instruction, WPIC 37.02,⁷ omitted the essential element of the crime. Richie, 191 Wn. App. at 927-29. The Court found the error was not harmless beyond a reasonable doubt, observing that “the evidence was ambiguous” on the issue of whether Gouveia had an ownership, representative or possessory interest in the stolen property. While the evidence was sufficient to find Gouveia was

⁷ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 37.02, at 667 (3d ed. 2008).

acting as a representative of Walgreens, there also was evidence that Gouveia was not on duty and should be treated like a customer rather than an employee. As a result, the instructional error was not harmless. Id. at 929-30.

- b. The charging document omitted an essential element of robbery, and reversal is therefore required.

Like a to-convict instruction, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);⁸ State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An “essential element is one whose specification is necessary to establish the very illegality of the behavior[.]” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: “(1)

⁸ U.S. Const. amend. VI provides that “[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation” Const. art. I, § 22 provides in part that “[i]n criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation.”

do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced . . . ?” Kjorsvik, 117 Wn.2d at 105-06.⁹ If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry as to prejudice. McCarty, 140 Wn.2d at 425, 428 (in prosecution for conspiracy to deliver methamphetamine, charging document, “liberally construed and subject to the Kjorsvik two-prong test, fails on its face to set forth the essential common law element of involvement of a third person outside the agreement to deliver drugs.”).

Here, the charging document does not contain or imply all necessary elements. Espinoza was accused of

unlawfully and with intent to commit theft tak[ing] personal property of another, to wit: money, from the person and in the presence of Damaris Amaya, against her

⁹ In Kjorsvik, the Court found that “intent to steal,” an essential element of robbery, could be inferred from an information that charged that Kjorsvik unlawfully, with force, and against the named complainant’s will, took money while armed with a deadly weapon. “It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money.” Kjorsvik, 117 Wn.2d at 110. That case, while involving a robbery charge, involved a different omitted element and does not control the outcome in that respect. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“[Courts] do not rely on cases that fail to specifically raise or decide an issue.”).

will, by use or threatened use of immediate force, violence,
or fear of injury

CP 28 (amended information); see also CP 1 (original information). The information thus omitted the element that the person from whom the property was taken have an ownership, representative, or possessory interest in the property. See Hall, 54 Wash. at 143 (reversing based on inadequate charging document where information charged only that “the property of the Spokane Merchants’ Association . . . was taken by [Hall] from the immediate presence of” an individual).

Admittedly, Hall predates the Kjorsvik test, which permits charging documents to be construed liberally when an omission is pointed out for the first time on appeal. Thus, the State might argue that the information was adequate under a liberal reading, in that it suggested that a possessory interest (“tak[ing] . . . from the *person* . . . of”) might be required. CP 29.

The State would be incorrect. In this respect, the information was actively misleading. One could just as easily surmise from the information that it was *not* necessary that Amaya have any possessory interest in any property taken. Indeed, based on the information, *any* property not owned by Espinoza, taken from the person or *presence* of the named complainant, would suffice.

This Court should find that the missing essential element, acknowledged in Richie, cannot be implied from such misleading and/or incomplete language.

State v. Naillieux is instructive in this respect. 158 Wn. App. 630, 241 P.3d 1280 (2010). There, the accused was charged with attempting to elude a pursuing police vehicle, and, in particular:

fail[ing] or refus[ing] to immediately bring his . . . motor vehicle to a stop and dr[iving] his . . . vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle appropriately marked after being given visual or audible signal by a uniformed police officer.

Id. at 644.

The attempt to elude statute had been amended, however, and the charging document reflected pre-amendment language. For example, the words “reckless manner” had replaced the phrase “manner indicating a wanton or willful disregard for the lives or property of others.” Id. (citing Laws of 2003, ch. 101, § 1). And “[r]eckless manner’ does not mean a ‘willful or wanton disregard for the lives or property of others.’” Naillieux, 158 Wn. App. at 644 (citing State v. Ratliff, 140 Wn. App. 12, 14, 164 P.3d 516 (2007)). Rather, it meant means “‘a rash or heedless manner, with indifference to the consequences.’” Naillieux, 158 Wn. App. at 644 (citing Ratliff, 140 Wn. App. at 16) (quotation marks and

citations omitted). “We, then, cannot infer ‘reckless’ from ‘willful and wanton.’” Naillieux, 158 Wn. App. at 644.

The Court also held the requirement that the pursuing police vehicle be equipped with “lights and sirens” could not be inferred from the charging document, even though it included a requirement that the vehicle be “appropriately marked showing it to be an official police vehicle.”¹⁰ Id. at 645. The Court therefore reversed the attempt to elude conviction. Id.

Naillieux establishes that, even under a liberal reading, misleading or inaccurate language, even if it is arguably related to a missing essential element, provides insufficient notice. Cf. State v. Zillyette, 178 Wn.2d 153, 160, 307 P.3d 712 (2013) (where delivery of only certain substances supports charge of controlled substances homicide, information alleging accused delivered a controlled substance in violation of RCW 69.50.401 held to be inadequate because it alleged both prohibited and “noncriminal” behavior). This Court should reject any argument that the missing element may be inferred from the “person or presence of” language.

In summary, an “essential element is one whose specification is necessary to establish the *very illegality* of the behavior[.]” Johnson, 119 Wn.2d at 147 (emphasis added). Even under a liberal reading, the

¹⁰ This language was also taken from the prior version of the attempt to elude statute. Former RCW 46.61.024 (1982); Laws of 2003, ch. 101, §1.

charging document failed to apprise Espinoza of all the essential elements of robbery. Because the information fails the first Kjorsvik test, reversal is required.

2. THE COURT ERRED WHEN IT DENIED THE APPELLANT'S MISTRIAL MOTION FOLLOWING REPEATED, PREJUDICIAL REFERENCES TO EXCLUDED MOTIVE EVIDENCE.

The court ruled that evidence regarding Espinoza and Hasme's motive for the robbery could not be introduced unless the State presented evidence from hotel management rather than Amaya. The State presented no such evidence. In her testimony, however, Amaya repeatedly referred to the excluded evidence. Contrary to the court's ruling, motive was abundantly clear from the illicit references, and the evidence demonstrated that it was inextricably tied to Amaya's identification of Espinoza. Although the court later gave a limiting instruction, the trial irregularity was so serious and pervasive that any limiting instruction was incapable of curing it. Reversal is, therefore, required.

Under ER 404(b), 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." State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other

purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

“[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” State v. Powell, 126 Wn.2d 244, 249, 893 P.2d 615 (1995). The Powell court defined motive as, “Cause or reason that moves the will . . . An inducement, or that which leads or tempts the mind to indulge a criminal act . . . the moving power which impels to action for a definite result . . . that which incites or stimulates a person to do an act.” 126 Wn.2d at 259 (quoting State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

ER 404(b) must be read in conjunction with ER 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fuller, 169 Wn. App. 797, 830, 282 P.3d 126, 143 (2012) (citing State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)). Thus, “[t]o justify the admission of prior acts under ER 404(b), there must be a showing that the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect.” State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008) (citing State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003)).

This Court reviews the trial court's denial of a motion for mistrial for abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In considering whether a motion for mistrial should have been granted, this Court considers (1) the seriousness of the claimed irregularity; (2) whether the information imparted was cumulative of other properly admitted evidence, and (3) whether admission of the illegitimate evidence could be cured by an instruction to disregard. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (where witness revealed forbidden evidence that accused had committed a similar crime in the past, reversal was required despite curative instruction). When testimony is improper because it violates a pretrial order excluding certain evidence, the question is whether the improper testimony, when viewed in the context of all the evidence, deprived the defendant of a fair trial. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010) (citing State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Here, the trial court correctly excluded the motive evidence as too speculative if offered via Amaya's testimony. This Court defers to a trial court's discretion to bar the evidence as irrelevant or unduly prejudicial. State v. Perez-Valdez, 172 Wn.2d 808, 815, 265 P.3d 853 (2011).

But the trial court then erred in denying the mistrial motion after Amaya repeatedly referred to the excluded evidence. A mistrial was warranted because Espinoza can satisfy each of the three Escalona factors.

First, the irregularities were repeated and serious. The stage was set when Deputy Conner twice referred to the robbery suspects as disgruntled employees. 3RP 335, 340. The jury was alerted, at that point to a potential motive for the robbery. The motive was fully revealed once Amaya testified. First, she told jurors that, hours earlier, Hasme had not received a paycheck and had had to “deal[] with” hotel staff about it. 5RP 427. Then, Amaya said she knew Hasme and Espinoza were the robbers in part because “they had a motive,” but she was not supposed to talk about it. 5RP 441-42. Finally, Amaya told jurors that she recognized Espinoza in part due to “the *situation*.” 5RP 444 (emphasis added). By this point, jurors would have been well aware of the *situation*: That Espinoza’s wife (or more likely, “they”¹¹) had been denied a paycheck, and therefore that both Hasme and Espinoza had a motive to take the money via self-help. Such evidence bolstered Amaya’s comparatively weak identification of Espinoza, whom she identified primarily based on her belief that Espinoza and Hasme were often together. E.g. 5RP 442-43, 444.

¹¹ 5RP 427, 441-42 (referring to “they” and “them”).

The trial court surmised that any motive evidence related to Hasme only, and therefore it was not prejudicial to Espinoza. 5RP 474. The court was patently incorrect. Amaya referred to “they” and “them” in reference to paychecks. But let us assume for the sake of argument that the jury somehow ignored Amaya’s use of those pronouns. While the defense had attempted to direct the blame at Hasme as an independent actor based on her drug use, 4RP 302-03, a dispute between hotel management and Hasme about her paycheck would also supply *Espinoza* an impulse to rob the hotel. See Powell, 126 Wn.2d at 249 (“[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.”). After all, a husband would likely feel anger if his wife was denied her paycheck. The trial court therefore failed to recognize the prejudice to Espinoza inherent in Amaya’s statements.

The next question is whether the invalid testimony was cumulative of properly admitted evidence. Escalona, 49 Wn. App. at 255. It was not. The court exercised its discretion and excluded the evidence. This factor therefore weighs in favor of mistrial.

The final question, whether a curative instruction was sufficient to cure the prejudice, also weighs in favor of a mistrial. Id. The curative instruction was incapable of curing the enduring prejudice created by

Amaya's repeated references to motive. While it is presumed that juries follow a court's instructions to disregard testimony, see Weber, 99 Wn.2d at 166, no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Escalona, 49 Wn. App. at 255 (alteration in original) (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)); see also State v. Babcock, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (curative instruction held to be inadequate based on the nature of stricken evidence); State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) (so holding).

Escalona and Miles recognize that the admission of evidence concerning commission of a crime similar to the charged offense is inherently difficult to disregard. See Escalona, 49 Wn. App. at 255-56; Miles, 73 Wn.2d at 71 (analyzing effect of stricken testimony that defendant had committed robbery similar to charged crime).

This case, however, does not involve the introduction of evidence regarding the prior commission of an act similar to the charged crime. It is, therefore, more like Suleski and Babcock.

In Suleski, the defendant was charged with unlawful possession of burglary tools and with attempt to obtain a narcotic drug by fraud, deceit, misrepresentation, or subterfuge, and/or alteration of a prescription. 67

Wn.2d at 47. The charges were consolidated for trial, and any motions to suppress were to be decided based on the evidence presented at trial. At the conclusion of the State's case, the trial court suppressed the evidence relating to the burglary tools charge because it was obtained through an unlawful search and seizure. The trial court then dismissed the related charge. But it denied the defendant's motion for mistrial and instead simply instructed the jury to disregard the evidence relating to the burglary tools charge. Id. at 49.

On appeal, the Supreme Court reversed and remanded, holding that Suleski's right to a fair trial was irretrievably prejudiced by the admission of the burglary tools evidence, curative instruction notwithstanding. Id. at 51-52. The inherently prejudicial impact of such evidence was not easily overcome, and, as a result, Suleski did not receive a fair trial. Id. at 51 (“We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.”).

In Babcock, the defendant was originally charged with sexually abusing two young girls, M.B. and A.T. 145 Wn. App. 157-58. At trial, the State introduced hearsay statements of A.T. through five witnesses. Id. at 161-62. Then, when the State called A.T., she refused to testify. Id. at 162. As a result, the trial court ruled that A.T.'s previous statements were inadmissible, and it dismissed the charges as to A.T. Id. The trial

court, however, refused to grant a mistrial as to the remaining charges, and instead gave an instruction instructing jurors to disregard the evidence relating to A.T. Id. The Court of Appeals reversed because the acts relating to A.T. were so similar to those relating to M.B. that it would be inherently difficult for the jury to disregard the testimony. Id. at 165-66.

Here, as in those cases, the prohibited motive evidence was such that an instruction could not have erased it from the jurors' minds. The motive evidence pervaded the entire trial, starting with Deputy Conner's comments regarding "disgruntled" employees. Motive evidence further permeated Amaya's testimony. Distinct from mere words that could easily be wiped from jurors' minds, the evidence penetrated into the central issue, identification of the male robber. It was clear that the "situation," as Amaya described it, provided a significant basis for her identification of Espinoza.

Without the unauthorized testimony, this was a case of guilt by association. With it, the jury became attuned to a clear motive—the driving impulse—for the robbery. Suddenly, Amaya's sketchy identification of Espinoza fit within a larger narrative of disgruntlement and retribution.

In summary, despite the court's later curative instruction, the motive evidence—a veritable evidentiary harpoon—would have been

exceedingly difficult for jurors to extricate from their consideration of the remaining evidence. Introduction of the evidence therefore deprived Espinoza of his right to a fair trial, Allen, 159 Wn.2d at 10, and no instruction was capable of erasing its effect. Because the third factor also weighs in Espinoza's favor, the court erred in denying his motion for a mistrial.

Reversal is therefore required. Escalona, 49 Wn. App. at 255.

3. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL

As a final matter, if Espinoza does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. Espinoza is a father with child support and childcare obligations. He also has a history of significant health problems. CP 81-91 (defense presentence report and appendices).

Moreover, at sentencing, the court imposed only mandatory fines, waiving other costs. CP 107. The trial court then found Espinoza to be indigent and found that he could not contribute anything to the costs of appellate review. CP 122-24 (Order of Indigency); see also CP 118-19 (Motion and Affidavit for Order Allowing Appeal in Forma Pauperis). Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (citing RAP 15.2(f)).

Finally, Espinoza has significant restitution obligations related to this case. Supp. CP ___ (sub no. 79, order setting restitution). The court did not waive interest on LFOs in this case. CP 107. Thus, any payments Espinoza can make toward LFOs will first be paid toward his substantial restitution debt, RCW 9.94A.760, allowing the any appellate costs debt to balloon over time due to interest. Blazina, 182 Wn.2d at 836.

In summary, in the event that Espinoza does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the

record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

D. CONCLUSION

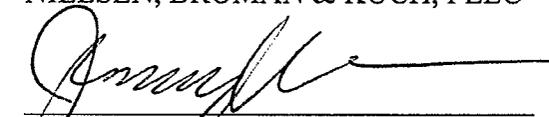
This Court should reverse Espinoza's conviction based on the inadequacy of the charging document. Reversal is also required based on the erroneous denial of his mistrial motion following a series of serious trial irregularities.

Should Espinoza not prevail on appeal, however, this Court should decline to award the costs of appeal based on Espinoza's indigence.

DATED this 7TH day of June, 2016.

Respectfully submitted,

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Containing a copy of the opening brief, re Israel Espinoza -Reyes
Cause No. 74261-2-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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06-17-2016
Date
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