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Division III
State of Washington

31701-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN A. CASTRO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred by denying the defense motion for mistrial after a detective intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Mr. Castro could not get a fair trial.

2. The prosecutor committed misconduct by requesting that Mr. Castro's wife, Dyneshia Sleep, be excluded from the courtroom as a potential witness when the State had no intention whatsoever to call her at trial.

3. The court erred by sentencing Mr. Castro to life without the possibility of parole as a persistent offender because the second strike, *i.e.*, conspiracy to deliver a controlled substance with a deadly weapon enhancement, did not qualify as a most serious offense.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied a motion for a mistrial after a detective made a singular remark about reviewing a video with gang detectives during trial and after the trial court precluded mentioning gangs or gang affiliation during trial?

2. Did the trial court abuse its discretion by excluding the defendant's wife (a subpoenaed and percipient witness) from the

courtroom during presentation of the case after both parties agreed to exclude witnesses at the beginning of trial?

3. Does a conspiracy to deliver a controlled substance with a deadly weapon finding qualify as a most serious offense under RCW 9.94A.030(33)(t)?

III. STATEMENT OF THE CASE

The defendant was charged by amended information in the superior court on March 28, 2013, with murder in the second degree of John Solis; several counts of second degree assault; felony riot; and first degree unlawful possession of a firearm for crimes occurring on November 27, 2011. CP 77.

The matter proceeded to jury trial, and the defendant was convicted on April 25, 2013 of second degree murder with a firearm enhancement; felony riot with a firearm enhancement; and first degree unlawful possession of a firearm. CP 165-178.¹ The Honorable Kathleen O'Connor sentenced the defendant to life in prison without the possibility of parole as a persistent offender. CP 211; CP 206.

¹ After a motion by the defense and before presentation of the defense case, the trial court dismissed the second degree assault counts based on insufficiency of evidence. RP 1436-1550.

A. Ichiban restaurant/bar.

A group of family members and friends drove from Moses Lake to Spokane and congregated at the Ichiban (a local restaurant/bar) in November 2011. RP 747-49; RP 779; RP 802; RP 868. The purpose for the trip was a birthday party taking place at the Ichiban. RP 802. A rap concert was scheduled for the evening. RP 749. The concert lasted until approximately 1:30 a.m. RP 749. The defendant was observed in the parking lot of the restaurant that evening. RP 781-82. A fight started at the entrance to the restaurant and it closed for the evening. RP 806; RP 807; RP 845. The fight involved the defendant and another male, Stafone Fuentes – both from Spokane. RP 806; RP 1271. Security abruptly stopped the fight. RP 807.

B. Quality Inn.

From the Ichiban, the group eventually met at the Quality Inn located in Spokane. RP 753. There was an after-hours party on the sixth floor containing a large group of people mostly from Moses Lake. RP 784; RP 808. Victim Solis was among the group. RP 784.

Sometime during the evening, the defendant and his friends came uninvited to the party on the sixth floor. RP 808. Thereafter, the group, including the defendant, was asked to leave the room. RP 808.

Around 2:00 a.m., there was an altercation on the fourth floor of the motel. It consisted of yelling and screaming. RP 754-55. RP 785. Several individuals from the sixth floor, including Mr. Solis, went downstairs. RP 785. On the fourth floor, a large group of people were fighting. RP 786.

At some point, Jazman Quarles² (from the Moses Lake group) was on the outside walkway of the motel and was struck with a bottle. RP 810; RP 854. Her ear began to bleed. RP 756; RP 757; RP 811. The injury required between eleven and thirteen stitches leaving a scar. RP 971-73. There were approximately fifteen people in the hallway. RP 770. A number of people assaulted Giovanni Powell (from the Moses Lake group) who was protecting Jazman. RP 786-87. The fight grew out of control. RP 881; RP 883. The group was throwing bottles. RP 970. The brawl momentarily stalled and then restarted. RP 812-13.

During the clash, the defendant was holding a handgun. RP 759-60. No other person was observed with a handgun. RP 760. The free-for-all lasted between five and ten minutes. RP 788.

² To avoid confusion, Tera Quarles and Jazman Quarles will be referred to by first name.

C. The shooting of Mr. Solis.

Ashley Hix was with a group of people (including the defendant) the night of the incident. RP 1080-81; RP 1082. At the time of the altercation, the defendant was in Ms. Hix's room. RP 1084. There was yelling and screaming outside. RP 1084. The defendant and Stafone Fuentes went outside. RP 1084-85. After the defendant and Mr. Fuentes left the room, approximately five minutes passed and Ms. Hix heard a gunshot. RP 1085-86. Afterward, Mr. Solis came into her room and he collapsed onto his stomach. RP 1085; RP 1086.

Several individuals heard the gunshot. RP 761; RP 788; RP 810; RP 813.

During the brawl, Tera Quarles observed Mr. Solis and two other males walking toward the fight. RP 1278. Thereafter, Tera observed the defendant involved in the fight and saw him with a gun. RP 1277-78. Mr. Solis engaged in the quarrel. RP 1287. A gun was discharged and everyone ran. RP 1278. Tera was approximately six to eight feet from Mr. Solis when the gun was fired. RP 1279. Tera explained on the witness stand: "I was kinda standing by him [defendant Castro], I'm not too sure if Junior [Mr. Solis] hit him or what happened, but the gun went off, Junior got shot." RP 1279. She continued: "He [defendant Castro] just lifted up

his hand and pointed the gun,³ then shot Junior [Mr. Solis].” RP 1280. After the gun was fired, Tera observed a large cloud of gun powder smoke. RP 1280.

After Tera checked on Mr. Solis, she ran outside, grabbed the defendant by his arm, and queried: “[W]hy did you do that? Why did you do that?” RP 1280; RP 789; RP 814. He did not respond. RP 1280. The defendant ran from the scene. RP 1281; RP 817. Jeremy Flores observed the defendant with his hand in his pocket as he ran for the elevator. RP 789. The defendant was in the area of the gunpowder smoke. RP 817.

Jazman also heard the gunshot. RP 974. She went outside and observed Mr. Solis run by and drop to the ground. RP 976. Shortly thereafter, Jazman observed the defendant down the hallway where he tossed the gun to another person. RP 976-77. She observed Tera yelling at the defendant exclaiming something similar to “why did you shoot him.” RP 977.

D. After the shooting of Mr. Solis.

Jacqueline Montano was outside the motel when she observed a white Cadillac Escalade back into another car and then accelerate forward at a high speed. RP 871-72. Tera also observed the defendant and several

³ During the investigation, Tera described the pistol as a black gun with medium frame. RP 1205.

others jump into the Cadillac Escalade. RP 1281. The defendant entered the vehicle through the driver's side door. RP 1283.

Officer Amy Ross observed the white SUV leaving the motel at a high rate of speed. RP 1145.

The defendant was later apprehended and detained at 5th and Sherman. RP 1153-54; RP 1189; RP 1191.⁴

Several days after the murder, Casey Bazano found a pistol on the roof of her car. RP 1099; RP 1103; RP 1104; RP 1113.⁵ The Quality Inn is approximately two blocks from her residence. RP 1006.

The defendant took the stand and denied his involvement in the fight at the Ichiban the night of the incident. RP 1597. He also claimed he was not involved in the brawl at the motel. RP 1614. He further maintained he ran from the motel because of the gunshot. RP 1615. After the shooting, the defendant claimed Mr. Fuentes entered the driver's side of the white Escalade and people were yelling to the defendant to get in.

⁴ A palm print lifted from the driver's side of the suspect vehicle was identified by forensics as belonging to the defendant. RP 1211.

⁵ The weapon was later identified as a .44 caliber Smith & Wesson revolver. RP 1362. DNA expert Allison Pierce analyzed various pieces including the recovered handgun. RP 1253. The defendant could possibly be excluded as a DNA contributor. RP 1254-55. She discussed potential factors which could have degraded or prevented transfer of DNA to the weapon. RP 1255. She stated it is a rare circumstance in which DNA will be transferred to a handgun and produce interpretable results. RP 1256.

RP 1602-03. Defendant claimed after the police became involved chasing the SUV that he ran from the Escalade because he was intoxicated. RP 1603. The defendant further asserted that he was highly intoxicated but still able to jump a six foot fence while police were chasing him. RP 1602; RP 1611.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT DECLARING A MISTRIAL AFTER THE DETECTIVE MADE A STRAY REMARK DURING CROSS-EXAMINATION.

Standard of review regarding a denial for a mistrial.

The standard of review for denial of a motion for a mistrial is abuse of discretion. *State v. Perez–Valdez*, 172 Wn.2d 808, 858, 265 P.3d 853 (2011); *State v. DeLeon*, 185 Wn. App. 171, 195, 341 P.3d 315, 328 (2014).

“A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). Stated alternatively, when reviewing a trial irregularity, an appellate court asks whether, when viewed against the backdrop of all the evidence, the irregularity so prejudiced the jury that the defendant did not

receive a fair trial. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

Determining whether an irregularity during trial is so prejudicial as to warrant a mistrial depends on (1) the seriousness of the irregularity, (2) whether the statement was cumulative of other properly admitted evidence, and (3) whether the irregularity could be cured by an instruction. *Perez-Valdez*, 172 Wn.2d at 818. The trial court is in the best position to determine if a trial irregularity caused prejudice. *Perez-Valdez*, 172 Wn.2d at 819.

During pretrial motions, and, specifically with respect to ER 404(b) evidence regarding the defendant's gang membership⁶ and his motivation to commit the crimes charged, the trial court excluded any evidence of gang affiliation or gang membership at the time of trial. RP 272-279.

⁶ It was unclear at the time of motion whether the defendant was an active or former member of the Deuce Avenue Crips. RP 275.

At the time of trial, the Detective Kip Hollenbeck was on the witness stand, and, during cross-examination, the following exchange took place between the defense attorney, Kari Reardon and the detective:

Q. Okay. And then you heard Mr. Powell testify, and I asked him some questions about this. Mr. Powell actually identified Jason St. Mark in a photograph.

A. Yes.

Q. You've just shown you us all sorts of video. Where was Mr. St. Mark?

A. The first day, the day of this incident, I was reviewing videos with gang experts.

MS. REARDON: Objection.

THE COURT: Ladies and gentlemen, you will disregard the witness's last answer. If you would answer the question, detective.

THE WITNESS: Yes. We were viewing the video and Anthony Fuentes was seen on the video. And the image, you could see the faces are not -- they're very grainy, it's hard to tell faces. Most of the identities are based on the image on the face, the clothing, the body styles, the walks, everything else. And in that case, Jason St. Marks actually could be almost a twin of Anthony Fuentes. So he was -- the first few days or week of the case, we misidentified Mr. Anthony Fuentes as Jason St. Marks. If you were to compare their photos, they look very similar.

RP 1382 – 1383.

Thereafter, the defense brought several motions to include a motion to dismiss based upon the remark made by Detective Hollenbeck

during cross examination. CP 121.⁷ After argument, the Honorable Kathleen O'Connor made the following ruling:

Now the next issue raised in this motion to dismiss is the situation that occurred yesterday. I am very dis -- well not guess, I know. I am very disappointed. I have a very experienced detective who has been sitting here through all the rulings I made on gangs and everything, and just -- and as far as I could tell what he was referring to, I said just answer the question because he should have just answered the question. But the question was, you know, essentially, how can you make out all these people on the video. What he was referring to, and I know about this because it came up during my 404(b) motions on the gang issue, picked out all the people that the task force recognized, which was virtually everybody, as far as I could determine, at least up here, and from Officer Roberge's testimony. In the sense he was not answering the question because, he did not need to say that. But that is

⁷ On appeal, the defendant attempts to bolster his argument with reference to a supposed KHQ blog comment from someone purporting to have been a juror in the trial claiming: "I was a juror on this trial, and yes, they were all a bunch of gang members. I saw it firsthand. I was blown away by their cocky attitudes, and pure lack of respect towards the attorneys and the judge. He is exactly where he should be." CP 186. The defense did not attach a copy of the alleged comment from the KHQ website to their post-trial motion as would be expected, but rather included the alleged statement in a certificate by defense counsel attached to their post-trial motion. CP 186. Notwithstanding the unknown motivation, author, or correctness of the purported comment claimed to be from the KHQ website, the law presumes a jury is contaminated when jurors "pass from the sterility of the court's control and . . . separate or disperse and mingle with outsiders." *State v. Zwiefelhofer*, 75 Wn. App. 440, 444, 880 P.2d 58 (1994). "A jury simply can no longer function as a jury after the court has received and recorded the verdict and discharged the jury." *Zwiefelhofer*, 75 Wn. App. at 440; *State v. Badda*, 68 Wn.2d 50, 61, 411 P.2d 411 (1966).

what the question -- I think that is where the question led to, is basically how can you pick all these people out or who knows who, and trying to compare people or get confused, because there is a bunch of relatives there, there are a bunch of brothers as well. And there are some people who look like some other people, apparently, especially on a video where you are not really looking at their faces and getting that kind of good look that you would like to see. So there are people that physically look like each other.

Having said all of that, I understand what happened. I'm extremely disappointed. I think that experienced law enforcement officer, we have gone through all kinds of witnesses, both lay and law enforcement in this case, and everybody has adhered to my order 100%. So the question is, what am I going to do about it? I excluded the gang evidence because primarily, as I tried to make myself clear, there just is no nexus between, in my view, gang involvement and what happened here. The fact that these people were gang members, and I made a ruling that I felt Mr. Castro was a gang member, the fact that they were gang members did not make this melee that happened in the Quality Inn inherently a gang issue. In my view, there was no such nexus in order to put that together and that is why I denied it. To date, I still have not heard anything that remotely would tell me that, other than these people, you know, got into a big fight, which all started -- I think we are all pretty clear about how it started, and just went downhill from there. That has not changed.

How does this potentially affect a jury? The reason it would be prejudicial is an argument that this all came about to promote gangs, to promote turf, to promote standing in the gang community, however you want to put it. That just is not here. That just is is. This particular statement simply indicated he had used the task force in order to -- when he was trying to identify individuals. So I sustained the objection and I told the jury to disregard the witness's last answer, i.e. to disregard Detective Hollenbeck's last answer. I have been thinking about this because I knew I was going to get this motion. As the night

follows the day, we were going to get it. I have thought about it for some time. In the overall scheme of things in how this case has -- how the testimony has flowed, how the case has been delivered, if you will, to the jury, I do not see it as so prejudicial as to cause a mistrial. I have told them to disregard it so they assume to follow my instructions. In addition, this comment, nor has testimony to date, generated any specific gang value, if you will, to having this fight that would promote the gang or that sort of thing. The jury has -- in my view, has the ability to evaluate the evidence without -- and there would be no reason to conclude that all of this happened because of somebody wanting to promote some sort of gang. It is pretty clear as the testimony has developed that most of this happened because of this fight that got started, and sort of quit then did not quit. Of course the main injuries and the main charges arise out of when it revised itself. That is my feeling in the matter, counsel, so I am going to deny the motion to dismiss at least at this point. I am assuming that is not going to happen again on the part of anyone. So far the witnesses have, as I say, been good, law enforcement has been good. The state has rested its case in chief and the defense is going to be on guard with their witnesses. Really in fairness to the lawyers, I have not heard from any of my counsel, all four of you, nobody has really asked questions that would kind of generate this kind of response, even inadvertently, or kind of awkward questions that might get this sort of an answer. So the lawyers have been good, the witnesses have been good. I expect that to continue, and this will be the only time that it occurred. So obviously if it occurred again, I would have to think about it. But I assume that it is not going to occur again and nobody is going to generate a question that is going to have that type of response.

RP 1423-1427.

In consequence, the trial court fully considered the effect of the comment on the case as a whole.

In *State v. Escalona*, the victim testified about the defendant's criminal record in violation of an order in limine. *Escalona*, 49 Wn. App. at 252–53. The trial court denied the defendant's motion for a mistrial and Division One of this court reversed. *Escalona*, 49 Wn. App. 257. The court reasoned the victim's statement was “extremely serious” because: (1) generally a defendant's prior crimes are excluded from evidence, (2) there was a lack of other credible evidence against the defendant, and (3) the victim's key testimony contained several inconsistencies. *Escalona*, 49 Wn. App. at 255. The court viewed the statement as inherently prejudicial, not curable by an instruction to the jury, and “difficult, if not impossible, in this close case for the jury to ignore.” *Escalona*, 49 Wn. App. at 255–56. The court reasoned that the jury would use the “seemingly relevant fact” to conclude that Escalona was acting in conformity with his previous offenses. *Escalona*, 49 Wn. App. at 256. No such conclusion can be drawn in the present case.

This case is similar to *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031 (1994), where a witness three times alluded to the fact that the defendant had been in jail. Division One of this court affirmed the trial court's denial of Condon's motion for mistrial, concluding that the irregularity was not incurably prejudicial. The court distinguished *Escalona* on the basis that the

improper statement in that case “indicated that the defendants had committed crimes similar or identical to the crimes for which they were on trial,” so that the jury likely would conclude the defendant had a propensity for committing that type of crime. *Condon*, 72 Wn. App. at 649.

By contrast, the statement that Condon had been in jail “was much more ambiguous,” because the jury was equally likely to conclude he was in jail for a minor offense, or that he was detained but not convicted, than that he was imprisoned for commission of the crime charged, murder. *Id.* By striking the comments and instructing the jury to disregard them, the court alleviated any prejudice they might have caused.

As in *Condon*, the reference here to a “gang”⁸ officer reviewing photographs during the investigation was ambiguous, and is not detailed enough for the jury to infer the defendant was gang affiliated or a gang member. There were numerous individuals involved in the rumble at the motel.

The trial court’s analysis of the lack of any harm is instructive. The court made a finding that the “[p]articlar statement simply indicated [the detective] used the task force in order to ... identify individuals.”

⁸ This remark was isolated and not repeated by any other witness as noted by the trial court.

RP 1425. The trial court further reasoned that it told the jury to disregard the statement. RP 1425. The court further found that neither the “gang” statement nor any testimony had any specific gang significance. RP 1426. Summing up its ruling, the court found: “[N]obody has really asked questions that would kind of generate this kind of response, even inadvertently, or kind of awkward questions that might get this sort of an answer. So the lawyers have been good, the witnesses have been good. I expect that to continue, and this will be the only time that it occurred.” RP 1427.

As the trial court found, the comment could have been interpreted as law enforcement determining whether gang affiliation or gang members were even involved in the fracas. The comment was not determinative as to whether gangs were involved, much less whether the defendant was a gang member or affiliated with a gang. At the time the comment was made, Detective Hollenbeck was answering a question by defense counsel regarding the detective’s attempt to identify individuals at the motel. As far as anyone noticed, the remark could have been referring to the victim or his friends.

The trial court instructed the jury to disregard the statement. An appellate court presumes a jury followed the court’s instructions absent

evidence to the contrary. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). There is no evidence to the contrary in this case.

Finally, defense counsel did not request any additional curative instructions, a decision an appellate court generally treats as tactical to avoid highlighting the negative testimony. *State v. Barber*, 38 Wn. App. 758, 771 n. 4, 689 P.2d 1099 (1984), *review denied* 103 Wn.2d 1013 (1985). Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747, 785 (1994). It is apparent the defense did not request a curative instruction because there was no error to cure.

The trial court did not abuse its discretion by denying the defendant's motion for a mistrial.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE DEFENDANT'S WIFE (A SUBPOENED PERCIPIENT WITNESS) FROM THE COURTROOM DURING TESTIMONY AS BOTH PARTIES AGREED TO EXCLUDE WITNESSES AT THE BEGINNING OF TRIAL.

The defendant next complains the prosecutor committed misconduct by requesting all witnesses (including the defendant's wife,

Dyneshia Sleep) remain excluded from the courtroom during trial. Ultimately, Ms. Sleep was not called to testify.⁹

It is unclear how the State “prevented” a witness’ entry into the courtroom during trial when it is the trial court that is vested with the authority to exclude witnesses. Nevertheless, at the beginning of trial, the following exchange took place:

THE COURT: ... [L]et me go through a couple of other things before we get to the actual motions. One of the things I had on my list is, it was not clear to me, from looking at the motions, that either side had asked for a general witness exclusion. Then I got, this morning, the prosecutor's proposed instruction to witnesses on exclusion. Of course nobody asked me for exclusion so I am presuming that someone is going to ask me for exclusion of witnesses.

MR. GARVIN: So moved. I think that had been addressed, but so moved, your Honor.

THE COURT: I don't remember it, and it is not in the response.

⁹ The deputy prosecutor had advised the court the reason during trial why Ms. Sleep was a percipient witness: “Ms. Sleep was in this room, in the hotel room where the -- when this fight breaks out. She goes out. She's a witness to some of the events in the hallway. And then she's also a witness to the photo shoot itself, and was present there. And subsequent to the photo shoot, ... Ms. Sleep was calling Mr. Fechter saying the police are on the way, get rid of the pictures.” RP 928. During a later motion, the deputy prosecutor stated: “Ms. Dyneshia Sleep is under subpoena. She was a percipient witness to these events, she was present in hotel room 412 when the fight goes on, so she is a potentially significant witness. Now, that said, it is true, and I've been candid with counsel, that it is my hope to get through the trial without calling her. The reason I think is fairly obvious; she's the defendant's wife.” RP 1044.

MS. REARDON: It's in my general motions in limine. And I believe the state had just –

THE COURT: Normally I do it, but there are times when people do not ask for it for whatever reason. At any rate, Mr. Garvin had prepared court's witness instructions. I have never done that before, I have always relied on counsel to talk to the witnesses. I do not particularly have a problem with it. Does the defense have any issues with what is being proffered? No?

MS. REARDON: No. I think Mr. Garvin and I have done it in a prior trial, and it worked very well because all the witnesses just had it.

THE COURT: Then what I will do is say, I think it is fine, I do not have a problem with it. Then you folks will take it upon yourselves to make sure that each of your witnesses has a copy of this document. And the only thing I would suggest on this document is that there be a place for me to sign it so that it does not say it is the court's, it has my signature on it. She is going to add a signature line to the one you gave me.

RP 327-28.

With the agreement of the State and the defense, the court signed an order regarding witness protocol. CP 128. The order, in part, excluded all witnesses from the courtroom during the taking of testimony at the time of trial. CP 128.

Thereafter, and, during trial, the defense attorney, Ms. Reardon, lamented that the defendant's wife, Ms. Sleep, was not allowed into the

courtroom. RP 1043-44.¹⁰ Ms. Reardon asserted that the deputy prosecutor had remarked he did not want Ms. Sleep in the courtroom. RP 1044. The deputy prosecutor told the court that Ms. Sleep was under subpoena and that she had witnessed some of the percipient events the night of the murder. RP 1044-45. The trial court held:

THE COURT: ... [I] do not want to change my rules with regard to witness exclusion. Counsel, the state is entitled to try their case just like you are entitled to try your case. I would say, however, that I think [Ms. Sleep] has a lawyer and that it really -- I would agree that it is not fair to a witness who may want a lawyer to say something on their behalf, to have to be kept waiting for days and days and days. So I think that perhaps a compromise from that aspect would be that the state would indicate if they were going to actually call her, approximately when that would be, so that she doesn't have to have a lawyer with her all the time. That seems like an expense that I don't know if she's paying for it or the counsel is, but neither the county nor the witness should have to pay for it.

MR. GARVIN: I'd be happy to have her work with Lori Sheeley and have her on a standby situation so she doesn't need to be down here.

THE COURT: All right. And as far as whether or not she is going to come in, counsel, she is a witness. I realize it is the defendant's wife, but she stands, as far as in trial is concerned, as any other witness. I'm not willing to change the witness exclusion, but I do think that just having her sit outside is not -- if she wants to come and sit outside, she certainly can. But just because she thinks she has to be here does not seem to be very fair, either. So I will -- counsel

¹⁰ Ms. Reardon acknowledged during trial that the State had listed Ms. Sleep on its initial witness list. RP 727.

has indicated that he is hoping not to call her, but once the state has concluded their case in chief, then you can re-bring the motion to have her come in. My assumption is that it would not be likely she would be a rebuttal witness.

MR. GARVIN: That seems unlikely, but....

RP 1045-1046.

On appeal, the defense has offered nothing other than conjecture that the State subpoenaed Ms. Sleep for the sole purpose of excluding her from the courtroom. The fact that the defendant or his lawyer was unhappy with the exclusion at some point during the trial is of no consequence – notwithstanding defense attorney Ms. Reardon’s enthusiastic welcome of the trial court’s witness exclusion order at the beginning of trial. The fact that the defense attorney wanted the trial court to change the rules midstream does not constitute misconduct on the part of the prosecutor.

Moreover, there is no evidence the deputy prosecutor surreptitiously asked the court for this witness’s exclusion from the courtroom or that he had Ms. Sleep under subpoena and listed as a potential witness for a nefarious reason.

The exclusion of witnesses from the courtroom is a matter within the discretion of the trial court, and any decision to exclude witnesses will not be disturbed absent a manifest abuse of discretion. *State v. Johnson*,

77 Wn.2d 423, 462 P.2d 933 (1969); *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1969). Specifically, the exemption of certain witnesses from the exclusion, *State v. Weaver*, 60 Wn.2d 87, 371 P.2d 1006 (1962), the decision regarding whether the later testimony of any witnesses allowed to remain in the courtroom will be admitted or excluded, *State v. Johnson*, *supra*, and even the determination concerning whether witnesses who violated an exclusionary rule and remained in the courtroom may testify, *State v. Grant*, 77 Wn.2d 47, 459 P.2d 639 (1969); *State v. Fairfax*, 42 Wn.2d 777, 258 P.2d 1212 (1953), are all questions within the broad discretion of the trial court.

The defendant attempts to juxtapose exclusion of the defendant's wife as a potential witness from the courtroom into a courtroom closure violating the defendant's right to a public trial. Notwithstanding the defendant's lack of citation to any authority for this proposition, a similar, but colorable claim was summarily considered and dismissed by our Supreme Court in *State v. Gomez*, 183 Wn.2d 29, 33, 347 P.3d 876 (2015).

In *Gomez*, the defendant contended that a remark by the trial court during a change of venue motion that "[w]e do not allow people to come into the courtroom after [it] is in session ..." was tantamount to a

courtroom closure. *Id.* at 32. In denying this claim, the Supreme Court held:

As we discussed in [*State v.*] *Lormor*, [172 Wn.2d 85, 93, 257 P.3d 624 (2011)], the appellant must show that the judge acted to close the courtroom to the public, as opposed to acting to manage the in-court proceedings. As in *Lormor*, the exclusion of only one or a few individuals is a matter of courtroom operations, in which the trial judge possesses broad discretion “to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings.” *Lormor*, 172 Wn.2d at 93–94, 257 P.3d 624. Just as trial court judges are permitted to exclude distracting individuals, they are permitted to impose reasonable restrictions on the public's manner of entry so as to minimize the risk of distraction or impact on the proceedings.

Gomez, 183 Wn.2d at 36-37.

Here, the trial court did not abuse its discretion.

C. THE DEFENDANT’S 2008 UNRANKED FELONY CONVICTION FOR CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE WITH A DEADLY WEAPON FINDING IS A MOST SERIOUS OFFENSE FOR SENTENCING THE DEFENDANT AS A PERSISTENT OFFENDER.

The defendant next argues his conviction for conspiracy to deliver a controlled substance with a deadly weapon *enhancement* cannot be considered a most serious offense for purposes of sentencing him as a persistent offender because he could not receive an enhanced sentence on an unranked felony. He misses the point. The real question is whether a felony with a deadly weapon *finding* is a most serious offense.

Standard of review.

An appellate court reviews de novo a trial court's decision to consider a prior conviction a most serious offense for persistent offender purposes. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

Whenever a sentencing court concludes an offender is a "persistent offender," the court must impose a life sentence, and the offender is not eligible for any form of early release. RCW 9.94A.570. A "persistent offender" is someone currently being sentenced for a "most serious offense" who also has two or more prior convictions for "most serious offenses." RCW 9.94A.030(37). RCW 9.94A.030(33)(t) states:

"Most serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies:
(t) Any other felony with a deadly weapon verdict under RCW 9.94A.825.¹¹

For the purpose of finding the defendant was a persistent offender at the time of sentencing, the sentencing court relied on a 2008 conspiracy to deliver a controlled substance¹² charged under RCW 69.50.401¹³ and

¹¹ RCW 9.94A.825 states, in part: "In a criminal case wherein there has been a special allegation and evidence establishing that the accused ... was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused ... was armed with a deadly weapon at the time of the commission of the crime...."

¹² Conspiracy to deliver a controlled substance under Washington law, RCW 69.50.407, is a class C felony. RCW 69.50.401(2)(a); RCW 9A.28.040(3)(c).

RCW 69.50.407,¹⁴ with a finding the defendant was armed with a deadly weapon during the commission of the offense. 5/23/13 RP 25.¹⁵ The trial court found the offense was a most serious offense. Relying on this offense and the defendant's other most serious offense convictions for second degree assault and second degree robbery,¹⁶ the defendant was sentenced to life in prison without the possibility of parole. 5/23/13 RP 43-44.

Although the defendant's 2008 felony conspiracy to deliver a controlled substance conviction is an unranked felony, a finding that the defendant was armed with a deadly weapon during the commission of that

¹³ RCW 69.50.401 provides, in part: "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

¹⁴ RCW 69.50.407 states: "Any person who attempts or conspires to commit any offense defined in this chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." RCW 69.50.407. RCW 9.94A.505(2)(b) states: "If a standard sentence range has not been established for the offender's crime, the court shall impose a determinate sentence which may include not more than one year of confinement...."

¹⁵ The Superior Court Cause No. 07-1-04594-6 documents were not filed after sentencing.

¹⁶ These convictions were served concurrently and consequently not considered separate strike offenses. *See, State v. Morley*, 134 Wn.2d 588, 603, 952 P.2d 167 (1998) (the defendant must have been previously convicted on at least two separate occasions).

offense constitutes a most serious offense. The statute is clear and unambiguous.

In interpreting a statute, the court should assume that the Legislature meant exactly what it said. *King County v. Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985); *State v. Conover*, ---Wn.2d---, 355 P.3d 1093, 1096 (Wash. 2015) (an appellate court's primary objective is to determine and apply the legislature's intent). An appellate court is obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh. *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992).

In *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), this court held a sentencing court lacks statutory authority *to impose a firearm or other enhancement to an unranked offense*. *Soto* does not forbid the trial court or jury from making a finding the defendant was armed with a deadly weapon or firearm during commission of the offense. Accordingly, *Soto* is inapposite to this case. This case involves application of the most serious offense statute, RCW 9.94A.030(33)(t), not the deadly weapon or firearm enhancement statute, RCW 9.94A.533, analyzed under *Soto*.

Hence, the superior court had the statutory authority and duty to make a finding the defendant was armed with a deadly weapon under the defendant's 2008 unranked conspiracy to deliver a controlled substance

conviction. That conviction is a “most serious” offense for sentencing the defendant as a persistent offender.

The trial court did not err.

V. CONCLUSION

The trial court did not abuse its discretion by denying a motion for mistrial and by excluding a percipient witness from the courtroom during trial. This court should affirm the trial court’s determination that the defendant’s 2008 conspiracy to deliver a controlled substance qualified as a most serious offense.

Dated this 7 day of October, 2015.

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN ANTHONY CASTRO,

Appellant,

NO. 31701-3-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 7, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kenneth Kato
khkato@comcast.net

10/7/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)