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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No. 103625-6

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

RIGO ROBERTO CORTEZ,

Petitioner.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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A. ARGUMENT IN REPLY IN SUPPORT OF GRANTING REVIEW

The State opposes this Court granting Mr. Cortez's petition for review on any of the issues. The State, however, requests that if this Court grants review on either (1) the harmless error issue related to the ER 404(b) violation or (2) the double jeopardy issue, this Court should grant review of related issues. The Court should do so as to the first issue related to ER 404(b), but not as to the second issue of "invited error" related to double jeopardy.

1. The Court should grant review on the substantive issue of whether the trial court erred in admitting prejudicial "other acts" evidence under ER 404(b).

The State argues that if the Court grants review on whether the trial court's admission of "other acts" evidence under ER 404(b) was "harmless error," this Court should also review whether the trial court actually erred in doing so. The Court of Appeals assumed without deciding that the trial court erred.

Mr. Cortez does not disagree with the State’s request to review the substantive issue on whether the trial court erred in admitting prejudicial “other acts” evidence. The issue was briefed by both parties and was the focus of oral argument in the Court of Appeals.¹

Mr. Cortez framed this issues as follows in his opening brief:

Evidence is inadmissible to prove propensity to commit an act. For purpose of “intent” and to rebut a claim of accident or mistake, the court admitted evidence that Mr. Cortez once touched his accuser at his cabin and that she threatened to call the police. The court also admitted a claimed kissing incident to show lack of mistake or accident. Mr. Cortez’s defense was not mistake or accident, it was denial. And the cabin incident was so dissimilar to the charged incidents that it did not show intent and only had a propensity purpose. Was the evidence improperly admitted?

Br. of App. at 5-6.

¹ <https://tvw.org/video/division-1-court-of-appeals-2024061212/>

In short, the issue is whether the trial court erred in admitting “other acts” under ER 404(b) to prove intent or lack of mistake or accident?

2. The Court should deny review of the State’s “invited error” argument on the double jeopardy issue because the Court of Appeals impliedly rejected it and the issue does not merit review.

On Mr. Cortez’s claim that the jury instructions constituted constitutional error because the instructions permitted the jury to convict him of the same offense in violation of double jeopardy, the State argued the Court of Appeals should reject this argument on an “invited error” theory.

Mr. Cortez explained why the State was wrong about invited error in his reply brief. Reply Br. of App. at 10-15. In short, the double jeopardy problem was created *by the State* through instructions it proposed. In contrast, the instructions Mr. Cortez proposed did not create the double jeopardy problem. Reply Br. at 11-15 (citing *State v. Weaver*, 198 Wn.2d

459, 465, 496 P.3d 1183 (2021); *State v. Tatum*, 23 Wn. App. 2d 123, 128, 514 P.3d 763 (2022); *State v. Juarez*, noted at 19 Wn. App. 2d 1015, 2021 WL 4281319 at *5 (2021) (unpublished); *State v. Harmon*, noted at 20 Wn. App. 2d 1076 (2002) 2022 WL 365757 at *5 (unpublished).

The Court of Appeals was not shy in its ruling against Mr. Cortez on his double jeopardy claim. The Court, however, did not adopt the State's invited error argument, which it bore the burden of proving. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Indeed, the Court apparently found it so meritless the Court did not even mention it in the opinion. Impliedly, the Court of Appeals rejected the State's invited error argument. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.").

The invited error argument does not merit review. It is frivolous. The Court should grant review on the double

jeopardy issue and deny the State's request to add a distracting invited error issue to it.

B. CONCLUSION

This Court should grant Mr. Cortez's petition for review. Mr. Cortez agrees that the Court should grant review of the substantive ER 404(b) issue in addition to the underlying issue of prejudice. The Court should also grant review on the double jeopardy issue, but deny the State's request to add an invited error issue which the Court of Appeals impliedly rejected as frivolous.

This document contains 762 words and complies with RAP 18.17.

Respectfully submitted this 24th day of December, 2024.



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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 103625-6**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 24, 2024

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