SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VICTOR ABERNATHY, JR.,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 58221-0-II
Pierce County No. 22-1-01080-2

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, VICTOR ABERNATHY, JR., by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Abernathy seeks review of the December 24, 2024, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. Abernathy requested copies of his discovery, informing trial counsel he needed to see the evidence so that he could participate in his defense. When he did not receive copies, he brought his concern to the court at the readiness hearing. Counsel indicated he would put in an expedited request for copies, and the court guaranteed Abernathy he would have them for trial. Abernathy did not receive copies of discovery until after most of the State's evidence had been presented at trial. Did this

delay deny him his due process right of a meaningful opportunity to participate in his defense?

2. Prior to trial the court excluded all evidence regarding gang affiliation, because there was no evidence such affiliation was connected to the charged crimes. Where the State's key witness violated this ruling and used Abernathy's gang name, did the court err in denying his motion for a mistrial?

3. The court imposed six consecutive 60-month firearm enhancements, stating it had no discretion to do otherwise. Where the statute, properly applied, permits modification of firearm enhancements through an exceptional sentence, is remand for resentencing required?

4. Abernathy raised issues in his statement of additional grounds for review which should be addressed by this Court.

D. STATEMENT OF THE CASE

The statement of the case at pages 2-21 in the Brief of Appellant is incorporated herein by reference.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether the failure to provide Abernathy copies of his discovery in a timely manner deprived him of his due process right to meaningfully participate in is defense is a significant constitutional question this court should address.

A defendant in a criminal case has a fundamental state and federal constitutional right to the assistance of counsel. *State v. Ulestad*, 127 Wn. App. 209, 214, 111 P.3d 276 (2005); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The constitutional right to the assistance of counsel "carries with it a reasonable time for consultation and preparation," and a denial of that right is "a denial of due process of law" in violation of article I, section 3 of our state constitution. *State v. Hartwig*, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). Moreover, the Fourteenth Amendment and fundamental fairness require that criminal defendants be given a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994)

(citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct 2528 81 L. Ed. 2d 413 (1984)).

In Washington, CrR 4.7 governs discovery in criminal cases. This rule is designed to enhance the search for the truth and must be applied to ensure a fair trial for all concerned. *State v. Boyd*, 160 Wn.2d 424, 432, 158 P.3d 54 (2007).

> In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national security.

State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). The denial of access to copies provided for in the rules does not accord with these policies. *Boyd*, 160 Wn.2d at 433-34.

Under this rule, the defendant is entitled to redacted copies of discovery materials provided to his attorney. CrR 4.7(h)(3) ("a defense attorney shall be permitted to provide a copy of the [discovery] materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or

order of the court."). The purpose of providing the defendant with copies is to allow him or her to participate in preparation of the defense. *See State v. Cunningham*, 18 Wn. App. 517, 523-24, 569 P.2d 1211 (1977) (delay in transporting defendant's personal papers did not constitute denial of right to participate in his defense because he was able to obtain the papers in time for use during trial), *review denied*, 90 Wn.2d 1001 (1978).

Despite repeated requests, Abernathy did not receive copies of his discovery until well after trial had begun, impacting his ability to participate in the preparation of his defense. Abernathy made it clear to his attorney that he wanted copies of his discovery so that he could understand the evidence against him and be prepared for trial. When counsel had failed to provide copies as of the pretrial readiness hearing, Abernathy presented his concerns to the court and asked whether trial would be continued if he did not receive the materials by the scheduled

trial date. 14RP[1] 4-6. Defense counsel admitted he had not followed through with Abernathy's request but stated he would submit a request for expedited redacted copies. 14RP 4. The court said it would not continue the trial but "guaranteed" Abernathy he would have the copies. 14RP 5-6. Despite the representations of counsel and the court's guarantee, Abernathy did not receive his copies of discovery until after most of the State's evidence had been presented at trial. 13RP 24-25.

The Court of Appeals rejected Abernathy's argument that he was denied due process by the delay, reasoning that his attorney had received all relevant discovery and was prepared for trial. Opinion, at 7. Abernathy had made it clear, however, that he intended to participate in his defense and felt his personal review of the evidence was necessary to that participation. He

[1] The Verbatim Report of Proceedings is contained in fourteen volumes, designated as follows: 1RP—3/28/23; 2RP—3/29/23; 3RP—3/30/23; 4RP—4/3/23; 5RP—4/4/23; 6RP—4/5/23; 7RP—4/6/23; 8RP—4/7/23; 9RP—4/11/23; 10RP—3/27/23 (trial); 11RP—6/23/22; 12RP—8/8/23; 13RP—5/12/23; and 14RP—3-17/23.

was allowed by rule to have copies of discovery materials in furtherance of this right. *See* CrR 4.7(h)(3). Whether his right to meaningfully participate in his defense was impacted, despite counsel's preparation for trial, is a significant constitutional question this court should address. See RAP 13.4(b)(3).

2. Whether the court should have granted Abernathy's motion for a mistrial when the state's key witness violated the ruling excluding all gang evidence is a question appropriate for review.

Gang evidence can be problematic. Even suggesting a criminal defendant is a gang member "raises the concern he or she will be judged guilty based on negative stereotypes as opposed to actual evidence of wrongdoing. Accordingly, the State's use of gang evidence requires close judicial scrutiny." *State v. Mancilla*, 197 Wn. App. 631, 637, 391 P.3d 507, *review denied*, 188 Wn.2d 1021 (2017); *see also State v. DeLeon*, 185 Wn.2d 478, 491, 374 P.3d 95 (2016) (gang evidence is often highly prejudicial and must be tightly constrained to comply with the rules of evidence).

To admit gang evidence, the State must show a connection between gang membership and the charged crimes. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192, *review denied*, 175 Wn.2d 1011 (2012); *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995)). The parties here agreed that this connection could not be established, and the court excluded all references to gang affiliation. 10RP 44-45, 48. The court's rulings in limine made clear that references to gang names were excluded as well. 10RP 87.

Nonetheless, the State's key witness violated this ruling and testified to Abernathy's gang name, calling him "Havoc." 2RP 292. The court instructed the jury to disregard the witness's testimony, but the defense moved for a mistrial. 2RP 292-94. The court was concerned that the witness had disregarded the court's ruling but felt that her improper reference to Abernathy's gang name did not warrant a mistrial. 2RP 297. The court's refusal to declare a mistrial was error.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. *See State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial."). Denial of a motion for mistrial must be overturned when there is a substantial likelihood the prejudice from the trial irregularity affected the verdict. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

The trial irregularity here was violation of the court's in limine ruling excluding all reference to gang affiliation. The irregularity succeeded in placing inadmissible, excluded character evidence before the jury and thus was extremely serious. While the court made it clear that all evidence of gang affiliation was excluded, the witness referred to Abernathy by his

gang name, "Havoc." The Court of Appeals reasoned that the irregularity was not serious because the witness referred to "Havoc" as Abernathy's nickname, rather than gang name. Opinion, at 8. The trial court had ruled that even such sanitized testimony was excluded as unduly prejudicial, however, and there is no reason to think the jury would not recognize it for what it was, evidence of Abernathy's gang affiliation. Because such evidence can lead to conviction based on negative stereotypes rather than actual evidence, this was a serious trial irregularity. *See Mancilla*, 197 Wn. App. at 637.

There is no dispute that the error was not cumulative. The Court of Appeals reasoned that the likelihood of prejudice was slight because no one else mentioned Abernathy's nickname. Opinion, at 8. What the court overlooks, however, is that because the court excluded all evidence of gang affiliation, the only gang evidence at trial was tied to Abernathy. Contrary to the Court of Appeals's reasoning, this factor weighs in favor of mistrial.

Finally, although the court instructed the jury to disregard the improper testimony, it would have been extremely difficult for the jury to ignore the fact that Abernathy was known as "Havoc," a word that means wide and general destruction or devastation.[2] This information was likely to impress itself upon the minds of the jurors, despite an instruction to disregard. *See State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968)) (prejudice from witness's reference to police report predicting defendant would commit crime could not be cured by instruction).

The improper reference to Abernathy as "Havoc" certainly implanted the idea that Abernathy was the type of person who would commit the charged crimes. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *Miles*, 73 Wn.2d at 70. The Court of Appeals decision to the contrary conflicts with prior Washington decisions and

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[2] https://www.merriam-webster.com/dictionary/havoc.

presents an issue of substantial public importance this Court should review. RAP 13.4(b)(1), (2), (4).

3. Whether the court had discretion to impose an exceptional sentence downward with regard to the firearm enhancements is an issue of substantial public importance.

The Court of Appeals declined to address this issue, concluding that Abernathy had invited the error by assenting to and materially contributing to the court's decision to impose consecutive firearm enhancements. Opinion, at 10. The invited error doctrine is meant to prohibit a party from "'setting up an error at trial and then complaining of it on appeal.'" *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999) (quoting *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996)). This Court considers whether a party "affirmatively assented to the error, materially contributed to it, or benefited from it." *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009).

Here, the prosecution gave its sentencing recommendation, including a total of 360 months on the six firearm enhancements. 13RP 6. Defense counsel then argued that an exceptional sentence downward was appropriate. Counsel suggested that, because the statute required the court to run firearm enhancements consecutively, the court should impose no confinement on the convictions. 13RP 19-21. The court then stated that it had no discretion and must impose six consecutive firearm enhancements of 5 years each. It imposed an exceptional sentence below the standard range on the convictions, however. RP 34-35.

Defense counsel did not make any argument regarding the court's discretion when imposing firearm enhancements. He acknowledged the statutory language and the way it has been interpreted, but he did not argue that the court should not exercise discretion. Counsel's argument cannot be interpreted as setting up an error for appeal. Nor did he assent, contribute to, or benefit from it in any way. No one at the sentencing hearing addressed

whether the exceptional sentence provisions could apply to the firearm enhancements. Abernathy did not invite the error he complained of on appeal.

This Court recently addressed whether sentencing courts can impose concurrent firearm enhancements as part of an exceptional sentence. *State v. Kelly*, 102002-3 (12/19/24). In *Kelly*, this Court upheld *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), concluding that under the plain language of RCW 9.94A.533(3)(e), firearm enhancements must be run consecutively, and the sentencing court does not have discretion to impose an exceptional sentence with respect to firearm enhancements. *Kelly*, at 10-11. Abernathy maintains that *Brown* was wrongly decided and respectfully requests that this Court reconsider the issue.

The Legislature has provided that

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or

> deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

Despite this statutory language, the statute does not say the length of time imposed for a firearm enhancement cannot be modified under the exceptional sentence provisions of RCW 9.94A.535. This makes it different from the restrictive language used by the Legislature in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain offenses "shall not be varied or modified under RCW 9.94A.535." RCW 9.94A.540(1).

The lack of this similar language in the firearm enhancement provisions indicates that the length of enhancements can be modified under the exceptional sentence provisions. *See State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015) ("the legislature's choice of different language indicates a different legislative intent"). Indeed, this different language creates ambiguity on whether concurrent sentences are permitted. *State v. McFarland*, 189 Wn.2d 47, 54, 399 P.3d 1106

(2017). And even if there are other reasonable interpretations, the rule of lenity requires the interpretation most favorable to the defendant be applied, meaning that concurrent sentences are allowed. *Conover*, 183 Wn.2d at 711-12; *see McFarland*, 189 Wn.2d at 55.

Justice Madsen's concurring opinion in *Houston-Sconiers*, joined by Justice Johnson, supports the finding that courts have the discretion to run firearm enhancements concurrently as part of an exceptional sentence. *State v. Houston-Sconiers*, 188 Wn.2d 1, 12-13, 391 P.3d 409 (2017). In *Houston-Sconiers*, the Supreme Court reversed and overruled *Brown* as it relates to juvenile sentences. *Id.* at 21 & n.5. The Court reasoned that in light of Eighth Amendment jurisprudence, the statutes must be read to allow trial courts discretion to impose mitigated downward sentences for juveniles. *Id.* at 21, 24-26.

Justice Madsen agreed this was the right result, but reasoned this was because "the discretion vested in sentencing courts under the Sentencing Reform Act of 1981 (SRA) includes

the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." *Id.* at 34 (Madsen, J., concurring). Her analysis would apply to all defendants.

Justice Madsen explained that because the legislature did not expressly forbid exceptional sentences downward for firearm enhancements but forbade exceptional sentences in other circumstances, exceptional sentences for firearm enhancements are proper. *Id.* at 36. The language of RCW 9.94A.533 also does not mandate a contrary result because it "does not exclude the enhanced sentences from modification under the exceptional sentence provision." *Id.* at 37.

Reading additional prohibitions into RCW 9.94A.533(3)(e) is improper. The legislature was silent about whether the length of firearm enhancements could be modified as part of an exceptional sentence. RCW 9.94A.533(3)(e). As RCW 9.94A.540(1) shows, the legislature knows how to prohibit this but did not. Accordingly, RCW 9.94A.533(3)(e) should not

be read to deprive sentencing courts of their discretion to impose exceptional sentences when there are firearm enhancements.

"Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." *McFarland*, 189 Wn.2d at 57. But mandatory consecutive sentences for firearm enhancements has "robbed judges of the discretion that the legislature, through the SRA, expressly gives them in order to fulfill the purposes of the act." *Houston-Sconiers*, 188 Wn.2d at 39 (Madsen, J., concurring). This creates firearm sentences that "may be as long as or even vastly exceed the portion imposed for the substantive crimes." *Id*. at 25. This is a "travesty." *Id*. at 40 (Madsen, J., concurring).

Unless the firearm enhancements provisions are subject to modification through an exceptional sentence, unconstitutional cruel punishment is the sure result. The state and federal constitutions forbid cruel punishment. U.S. Const. amend. VIII; Wash. Const. art. I, § 14. Washington's constitutional provision has frequently been independently interpreted to provide greater

protection than its federal analog. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 311-13 & n.6, 482 P.3d 276 (2021); *State v. Gregory*, 192 Wn.2d 1, 15, 427 P.3d 621 (2018). Absent express language stating that firearm enhancements are not subject to modification or departure through an exceptional sentence, firearm enhancements remain subject to such modification or departure.

Here, the sentencing court was frustrated by its perceived lack of discretion. It was clearly not comfortable with that conclusion, saying "That doesn't mean I have to feel good about it." 13RP 19-20. It stated that it was troubled by what it must do, which is impose a minimum of 30 years with no discretion. 13RP 32. It stated it had to impose six sentence enhancements of five years each, running consecutively, because it had no discretion, no authority to amend that. 13RP 34. It then imposed a downward exceptional sentence and the six 60-month firearm enhancements to run consecutively to each other and to the underlying sentence. 13RP 37. Had the court known the

legislature provided it with authority to run some or all of the firearm enhancements concurrently as part of the exceptional sentence, it surely would have done so. The proper interpretation of these statutory provisions is an issue of substantial public importance this Court should address. RAP 13.4(b)(4).

4. This court should review issues raised in the statement of additional grounds for review.

Abernathy raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Abernathy convictions and sentence.

I certify that this document contains 3203 words as calculated by Microsoft Word.

DATED this 22nd day of January, 2025.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 24, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VICTOR DONNELL ABERNATHY, Appellant.	No.58221-0-II UNPUBLISHED OPINION

MAXA, J. – Victor Abernathy appeals his convictions of six counts of first degree assault, drive by shooting, and unlawful possession of a firearm. He also appeals his sentence that included six consecutive 60 month firearm enhancements.

We hold that (1) Abernathy was not deprived of his right to participate in his defense when he did not receive discovery by the start of trial because his attorney received all discovery, reviewed it with Abernathy, and advised the trial court that he was ready for trial; (2) the trial court did not err when it denied Abernathy's motion for a mistrial after a witness referred to Abernathy by a nickname; (3) we decline to address whether the trial court erred when it ruled that it lacked discretion to reduce the six mandatory 60 month statutory firearm enhancements on Abernathy's sentence because Abernathy invited any error; and (4) Abernathy's claims raised in a statement of additional grounds (SAG) cannot be considered, were waived, or lack merit.

Accordingly, we affirm Abernathy's convictions and sentence.

FACTS

Background

On March 27, 2022, Melinda James, Dartanion Killian-Horace and James's four children went grocery shopping. Killian-Horace's sister has two children with Abernathy. As James and Killian-Horace were exiting the grocery store, they noticed a red Mustang convertible with a beige top driving past them.

Abernathy was driving the red Mustang. He dropped off his then-fiancée Moriah[1] at the grocery store entrance at the same time Killian-Horace and James exited the store. While James was loading groceries into her vehicle, Abernathy parked nearby and got out of his car. Abernathy and Killian-Horace got into an argument, and said they wanted to fight each other.

At one point, Killian-Horace ducked behind a nearby car. Killian-Horace told James that Abernathy had grabbed a gun from his car and charged at him. Eventually, Abernathy drove away.

While James and Killian-Horace were driving home with the children, they saw a red Mustang with the top down driving behind them. It was the same Mustang that Abernathy had been driving at the grocery store. The Mustang followed James and Killian-Horace. At some point, the Mustang drove into the lane next to James' car and the driver fired gunshots into the car. James quickly drove away. No one in the car was physically injured by the bullets, but James' children were crying and screaming while the shooting occurred. James's daughter confirmed that the shooter was the same person from the grocery store parking lot. James called 911 when she got home at 7:10 P.M.

[1] Victor and Moriah were married before trial. Because Moriah and Victor share the same last name, we will refer to Moriah by her first name. No disrespect is intended.

Abernathy picked Moriah up from the grocery store at 7:28 P.M. Moriah did not know where Abernathy had been while she was grocery shopping.

The State charged Abernathy with six counts of first degree assault and six counts of second degree assault, all while armed with a firearm, drive-by shooting, and second degree unlawful possession of a firearm.

Pretrial Proceedings

At a trial readiness hearing, Abernathy asked, "So if my discovery isn't in by then, are we still gonna have to go on with the trial?" Rep. of Proc. (RP) (Mar. 17, 2023) at 4. Abernathy's attorney explained that Abernathy had requested a copy of the police reports in the case, and "that fell through the cracks on my end. I'm going to be asking [the Department of Assigned Counsel] to expedite a redaction of that evidence. Other materials have been reviewed with Mr. Abernathy." RP (Mar. 17, 2023) at 4. Abernathy asked if the delay would be the basis for a continuance of the trial. The trial court said no, and that the documents "will be available to you. I guarantee it." RP (Mar. 17, 2023) at 5. Both parties acknowledged that discovery was complete and that they were ready for trial.

Abernathy filed a motion in limine to prohibit the State from calling him any inflammatory names, including gang names. The trial court granted the motion in part. Before trial, the court emphasized the importance of the parties avoiding any references to gang affiliation:

> Allow me to be clear: There will be no reference to Crips, Bloods, any other gang affiliation – I think I have made that clear – in toto, whether it's – in toto. Not under any circumstances will there be a reference to Crips and the Bloods, or gang affiliation of Mr. Abernathy, if he has any, gang affiliation of anybody else that's involved in this case as witnesses, period. I don't know how I can make that any more clear other than just saying that for the number of times.

RP at 87. The court also noted that "the prejudice is ameliorated by use of the word 'nickname' as opposed to street name, gang affiliation name." RP at 87.

Jury Trial

Two witnesses testified that they witnessed a drive by shooting take place on May 27, 2022. They testified that the shooter was driving a red Mustang with its top down. One of the witnesses testified that the car was weaving in and out of traffic, and that the driver shot at a dark colored vehicle near them. That witness called 911 at 6:59 P.M.

James also testified on behalf of the State. During cross-examination, Abernathy's attorney and James engaged in the following colloquy:

> Q: Now, in the parking lot of the [grocery store], you had two conversations with Dartanion. In each one of them, he told you, "That person is Victor Abernathy," correct?
> A: It wasn't exactly like that, but, yes, basically.
> Q: "That's Victor, Nese's baby daddy."
> A: Well, he didn't tell me it was "Victor." He told it was "Havoc," which that's his nickname.

RP at 292. Abernathy objected. The trial court told the jury that James' answer was nonresponsive and instructed the jury to disregard her response.

Abernathy moved for a mistrial because the jury could construe his nickname as a gang name and because the parties had agreed to avoid references to gang affiliations before trial. The State argued that there was no reason for the jury to believe that "Havoc" was a gang name.

The trial court said,

> I don't think that we are at the point of such a level of prejudice that a mistrial is warranted. However, I do think I'm going to bring Ms. James in and inform her more directly of the Court's order that there's no reference to gang monikers or anything at all that could be slightly inferred to be referenced to gangs on anybody involved in the case, defendant, witness, anybody.

RP at 297. The court held James in contempt of court, and ordered her not to violate the order again.

Abernathy asked the trial court to give a limited instruction or tell the jury to disregard James' testimony. The court said, "I think I already did that. If you don't believe it is enough, I feel like maybe we're in danger of overemphasizing it. I've indicated on the record that they're to disregard that last answer." RP at 304.

Jury Verdict and Sentencing

The jury found Abernathy guilty of six counts of first degree assault and six counts of second degree assault, and found that he had been armed with a firearm during the commission of the crimes. The jury also found him guilty of drive by shooting and second degree unlawful possession of a firearm. The trial court subsequently vacated the second degree assault convictions because they merged into the first degree assault convictions.

During a sentencing hearing, the State requested an exceptional sentence below the standard range for a total of 600 months, which included 360 months of firearm enhancements.

Abernathy requested that the trial court impose an exceptional sentence downward of zero months on the six first degree assault counts and only impose the required firearm sentencing enhancements. Abernathy stated,

> And, yes, the legislature has removed from the courts the discretion with regards to enhancements and how to run those based upon the jury's specific interrogatory findings in this case. The imposition of the firearm enhancements of five years each, six of those to run consecutive, does result in a 30-year sentence and that is flat time.

RP (May 12, 2023) at 19. He pointed out that if the court sentenced Abernathy to 30 years, that would amount to an exceptional sentence downward and stated "by operation of our legislature that [the trial court] does not have any discretion." RP (May 12, 2023) at 19.

In his statement before sentencing, Abernathy stated that he did not receive the discovery he had requested until the day before the jury began its deliberations.

The trial court sentenced Abernathy to 60 months on the each of remaining eight convictions to be served concurrently, which was an exceptional sentence below the standard range. The court also imposed 60 months on each firearm sentencing enhancement to be served consecutively, for a total of 360 additional months.

Abernathy appeals his convictions and sentence.

ANALYSIS

A. RIGHT TO PARTICIPATE IN DEFENSE

Abernathy argues that he was deprived of his right to participate in his defense when the trial court allowed the trial proceed before he had received certain discovery documents pursuant to CrR 4.7(h)(3). We disagree.

1. Legal Principles

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. The constitutional right to effective assistance of counsel includes a reasonable time for preparation and consultation. *State v. Schlenker*, 31 Wn. App. 921, 935, 553 P.3d 712 (2024). It includes "the opportunity for private and continual discussions between the defendant and his attorney at least during critical stages of the prosecution." *Id.*

CrR 4.7 governs pretrial discovery procedures. Former CrR 4.7(h)(3) (2007), titled "Custody of Materials" states,

> Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may

> agree or the court may provide. Further, a defense attorney *shall be permitted* to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(Emphasis added).

We review discovery decisions based on CrR 4.7 for abuse of discretion. *State v. Vance*, 184 Wn. App. 902, 911, 339 P.3d 245 (2014).

2. Analysis

Former CrR 4.7(h)(3) states that defense counsel has permission to give redacted copies of discovery materials to defendants after approval by the prosecuting authority. However, the rule does not state that defendants have a right to access these materials. Rather, it emphasizes the importance of discovery materials remaining in the custody of the attorney and being used only for the purposes of the party's case.

In this case, Abernathy's attorney received all relevant discovery as required by CrR 4.7, confirmed during the omnibus hearing that he was ready for trial, and presented a complete defense. While there may have been a delay in getting discovery materials to Abernathy, he reviewed other evidence with his attorney and his attorney believed that he had sufficient discovery to proceed with trial. Accordingly, we reject his argument.

B. DENIAL OF MOTION FOR MISTRIAL

Abernathy argues that the trial court erred when it denied his motion for a mistrial after James referred to him by the nickname "Havoc" during cross examination. He argues that the testimony violated the court's exclusion of all evidence of gang affiliation. We disagree.

1. Legal Principles

We review for abuse of discretion the trial court's decision to grant or deny a mistrial. *State v. Gogo*, 29 Wn. App. 2d 107, 114, 540 P.3d 150 (2023). "A trial court's denial of a

mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict." *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013). The determinative issue is whether the defendant has been so prejudiced that a new trial is required to treat the defendant fairly. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

In evaluating whether a trial irregularity warrants a mistrial, we consider three factors: (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard the evidence. *Id.* We take a balancing approach in assessing the factors, which are designed to determine whether there is a substantial likelihood that the irregularity affected the jury's verdict. *Garcia*, 177 Wn. App. at 783. And these factors are considered with deference to the trial court because the trial court is in the best position to discern prejudice. *Id.* at 776-77.

2. Analysis

First, we evaluate the seriousness of the irregularity. The trial court ruled that the parties could not reference any gang affiliation. However, the court noted that prejudice could be "ameliorated by use of the word 'nickname' as opposed to street name [or] gang affiliation name." RP at 87. During her testimony, James referred to Abernathy as "Havoc" and said that it was his "nickname." RP at 292. James' testimony was not a serious irregularity because she referred to Havoc as Abernathy's nickname, and not as his gang name.

Second, James' testimony about Abernathy's nickname was not cumulative of other evidence. Nobody else mentioned Abernathy's nickname.

Third, we evaluate whether the irregularity could be cured by an instruction to disregard the remark. The trial court immediately instructed jurors to disregard James' testimony as non-responsive. And we presume that the jury follows such instructions. *Emery*, 174 Wn.2d at 766.

Based on these factors, we conclude that there is not a substantial likelihood that the mention of Abernathy's nickname affected the jury's verdict.

Abernathy argues that this case is similar to that in *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). In that case, a witness improperly testified that the defendant had a criminal record and previously had stabbed someone. *Id.* at 253. The court held that a curative instruction given to the jury was insufficient to ensure a fair trial. *Id.* at 256. The court stated that the improper statement was very serious because it described propensity behavior similar to the charged crime and was likely to impress itself on the minds of the jurors. *Id.* at 255-56. The court also highlighted the "paucity of credible evidence" against Escalona, noting that the witness's testimony was essentially the State's entire case, and contained inconsistencies. *Id.* at 255.

Unlike in *Escalona*, James did not testify that Abernathy had been convicted of a similar crime to the one charged. She merely referred to Abernathy by his nickname. And there is not a paucity of credible evidence in this case as there was in *Escalona*. Abernathy and Killian-Horace exchanged words in the grocery store parking lot. Both Abernathy and the shooter drove a red Mustang. James testified that Abernathy followed her in the red Mustang a few minutes after the alteration in the parking lot. Two witnesses saw the driver of a red Mustang convertible shoot into a dark colored car. One witness called 911 at 6:59 P.M., 11 minutes before James called 911 when she got home. James's daughter confirmed that the shooter was the same person from the grocery store parking lot.

We hold that the trial court did not abuse its discretion in denying Abernathy's mistrial motion.

C. CONSECUTIVE SENTENCES FOR FIREARM ENHANCEMENTS

Abernathy argues that the trial court erred when it failed to exercise discretion to impose an exceptional sentence downward with respect to the firearm sentencing enhancements. The State argues that Abernathy cannot make this argument on appeal because he did not object to the issue in the trial court and he invited any error. We agree that Abernathy invited the error.

The invited error doctrine is applicable when the defendant either affirmatively assents to the error, materially contributes to it, or benefits from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). Here, Abernathy's attorney agreed that the mandatory sentencing enhancements had to be served consecutively, acknowledging that the trial court did not have any discretion with regard to the firearm sentencing enhancements by operation of the legislature. Therefore, Abernathy assented to and materially contributed to the alleged error. Accordingly, we decline to address this claim.[2]

D. SAG CLAIMS

1. Spousal Testimony

Abernathy claims that he received ineffective assistance of counsel when defense counsel failed to get his consent to allow Moriah to testify during the trial in violation of RCW 5.60.060.

But this assertion relies on matters outside the record. As a result, we cannot consider it on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). This assertion is more properly raised in a personal restraint petition. *Id.*

[2] In any event, the law is clear that trial courts lack the discretion to run firearm sentencing enhancements concurrently. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999); *Kelly*, 25 Wn. App. 2d at 886-88.

2. Prosecutorial Misconduct

First, Abernathy claims that the State engaged in prosecutorial misconduct when it mentioned his nickname by referring to his email address during closing argument. The State did reference Abernathy's email address in its closing argument while it discussed a declaration that was filed by Abernathy in another case:

> The phone, if you remember, the owner was Vic Abby, and then the primary email address – or one of the email addresses was habivizzle15@gmail.com. You can go ahead, if you're wondering, you can look at State's Exhibit 91(c). You can see that – because this is an e-signed document, that it was sent to havivizzle15@gmail.com, that it was reviewed by havivizzle15@gmail.com, and actually e-signed by Havivizzle15@gmail.com on March 31st, 2022.

RP at 684. But there is no indication that "havivizzle15" was a gang name, and there is nothing about that email address that was inflammatory.

Even if referencing the email address was improper, Abernathy did not object to this statement during the trial. When the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *State v. Zamora*, 199 Wn.2d 698, 709, 512 P.3d 512 (2022) (alterations in original) (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in *incurable* prejudice." *Zamora*, 199 Wn.2d at 709. If a defendant fails to make this showing, the prosecutorial misconduct claim is waived. *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021).

Here, there is no indication that any resulting prejudice was incurable. Again, there was no suggestion that Abernathy's email address suggested a gang name. And if Abernathy had objected, the trial court could have directed the jury to disregard the comment. Therefore, we conclude that Abernathy waived this claim.

Second, Abernathy claims that the State asked Killian-Horace leading questions and misled the jury, preventing a fair trial. It is true that the State asked two leading questions during its direct examination of Killian-Horace. However, defense counsel objected to the questions as leading and the trial court sustained the objections. Abernathy fails to explain how the State otherwise misled the jury or prevented him from receiving a fair trial. Accordingly, we reject his claim.

CONCLUSION

We affirm Abernathy's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

VELJACIC, A.C.J.

J.

GLINSKI LAW FIRM PLLC

January 22, 2025 - 1:40 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Victor Donnell Abernathy, Jr., Appellant
Superior Court Case Number:	22-1-01080-2

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