68679-8

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NO. 68679-8-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

ROBIN L. DAVIS,

Appellant

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

Salvador Valdez, his wife Rachel, and their children, including J.V. (DOB 2-15-95) lived in Texas from sometime in 2009 until July 2010. At that time they moved to Washington State, settling in Mount Vernon and Lake Goodwin. Prior to coming to Washington Mr. and Mrs. Valdez purchased two cars; a red Ford Explorer that Mr. Valdez typically drove and an Expedition that Mrs.

Valdez drove. Mrs. Valdez was in charge of making payments on both cars. 1 RP 92-93, 134-37, 211.

On September 10, 2010 Mr. Valdez and J.V., along with Mr. Valdez's niece and sister, picked J.V. up from a football game at Mount Vernon High School around 6 to 7 p.m. On the way home Mr. Valdez went to the drive through at the Kentucky Fried Chicken store for his son to get something to eat. While in the drive through lane Jeffery Saunders approached Mr. Valdez's car, yelling at Mr. Valdez and directing him to pull forward. As he followed the drive through lane Mr. Valdez saw a big truck. The lights on the truck were shining directly at Mr. Valdez's car. The truck was positioned so that there was only room for one car to pass by. Mr. Valdez saw Saunders, Robin Davis, the defendant, and Chet Davis standing by the truck. Those men were all directing him to get out of the car. Mr. Valdez did not converse with any of the men. He did not hear any of the men state that the car was being repossessed and he was not shown any paperwork for repossessing the car. Mr. Valdez was not aware at the time that Mrs. Valdez had been late on the car payments. Mr. Valdez then drove off going over a curb as he quickly left the area. He did not hit any of the men who were standing by the truck at the drive through exit. He did not call the

police because he thought the episode was over. 1 RP 103, 109-11, 116-20, 128, 228-31; 2 RP 397-400; 3 RP 538-41, Ex. 10, 12, 14, 15, 17.

Mr. Valdez drove to his sister's home in Mount Vernon where he dropped his sister and niece off. He then went toward Stanwood to go to his in-laws' home at Lake Goodwin. On his way he stopped at a Burger King located in Arlington. As he was entering the parking lot he saw the defendant's truck driving slowly behind him. Saunders and Robin Davis quickly got out of the truck and ran toward Mr. Valdez's car. Robin Davis pointed a shotgun at the Valdez's. Both Davis and Saunders swore and ordered Mr. Valdez and J.V. out of the car at gunpoint. Either Saunders or Davis noticed Amber Spady and Janessa Rhodes in the parking lot. They yelled to the two women that they were "bounty hunters." While Ms. Spady and Ms. Rhodes quickly left the area they called 911 because they were concerned for the Valdez's safety. 1 RP 63-74, 94-99, 121-122, 126, 194-99; 2 RP 410-12; 3 RP 545-551.

After Saunders and Robin Davis got Mr. Valdez and J.V. out of the Explorer, Saunders ordered Mr. Valdez to put his hands on the car. Saunders then patted Mr. Valdez down looking for weapons. Saunders took Mr. Valdez's wallet, looked inside it, and

then gave it to Robin Davis, telling him to "hold this in case he runs." Saunders told Mr. Valdez that he was going to jail. Saunders got into the driver's seat of the Explorer and ordered Mr. Valdez into the passenger seat. He asked Mr. Valdez where the other car was located. Saunders threatened Mr. Valdez if Mr. Valdez did not tell Saunders where the other car was. Saunders did not tell him that the cars were being repossessed. Rather Mr. Valdez thought that he was being car-jacked. 1 RP 100-105, 215-17, 221; 2 RP 410-11, 416; 3 RP 552.

J.V. was ordered into the truck at gunpoint. Mr. Valdez asked if J.V. could ride with him in the Explorer, but the men refused to let Mr. Valdez and J.V. ride together. Robin Davis then drove J.V., following the Explorer driven by Saunders. 1 RP 215-220; 2 RP 417-18; 3 RP 551.

Mr. Valdez is a diabetic. When his blood sugar is too low he has seizures. After Saunders got Mr. Valdez in the Explorer Mr. Valdez told Saunders about his condition. Mr. Valdez stated that he thought he was going into diabetic shock and that he might have a seizure. Saunders said he did not want Mr. Valdez having a seizure in the car. He drove to a Shell gas station located about one mile from the Burger King and stopped. There Saunders

allowed Mr. Valdez to get out and get something to drink. 1 RP 93-94, 104-06; 2 RP 416, 420.

Police responded to the 911 call made by Ms. Spady and Ms. Rhodes within minutes. They located Saunders and the Davis' at the Shell station. Saunders was still in the driver's seat of the Explorer. Robin Davis was driving the truck, with J.V. in the front passenger seat and Chet Davis in the back seat. Everyone was removed from the vehicles and handcuffed pending an investigation. Mr. Valdez was also handcuffed as he walked out of the station. 1 RP 108-09, 225; 2 RP 259-66, 273-76.

Officer Paxton searched Robin Davis and found three rounds of ammunition in his front pocket. Davis asked the officer what was going on. When she told him that she was trying to figure out why they kidnapped people, he asserted that they were just giving the Valdez's a ride home. Officer Paxton challenged that assertion, stating that was not the case when they ordered the Valdez's into the vehicles a gunpoint. Robin Davis responded by chuckling and saying, "yeah, I've been working with him on that, trying to work on that." Davis then explained that they were repossessing the car. Davis did not ask the officer to arrest Mr. Valdez. 2 RP 291-92.

Police also searched the truck. They found a pistol and a shotgun on the back seat on the driver's side. Both firearms were tested and determined to be operable. 2 RP 315-16, 342.

Robin Davis was charged with two counts of kidnapping second degree and two count of assault second degree. Each count alleged that he was armed with a firearm. 1 CP 111-112. [1] Saunders and Robin Davis were tried together. At trial Saunders testified that he owned Allstar Recovery, a vehicle repossession business. In addition he performed fugitive recovery, although he was not licensed for that in Washington. On the date of this offense, Saunders, Robin Davis, and Davis' son Chet Davis were in Western Washington delivering a vehicle that had been repossessed when they were hired to repossess the Valdez's cars. Robin Davis testified similarly. 2 RP 385-391; 3 RP 524-531.

Saunders testified that they located the Explorer in the Kentucky Fried Chicken drive-through in Mount Vernon. He said that he approached the car and informed the occupants that the car was wanted out of Texas. He said he saw the driver make a hand

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[1] Jeffery Saunders was charged by amended information with second degree kidnapping (Salvador Valdez victim), first degree kidnapping (J.V. victim), second degree assault (2 counts), and unlawful possession of a firearm. Counts 1-4 carried firearm allegations. No. 68771-9-I, 1 CP 70-71.

movement that was consistent with putting the car in gear. The car accelerated out of the drive through as he jumped back. Robin Davis also testified that he parked their truck at the end of the drive though. He saw the Valdez car come around the corner and stop. Suddenly it turned, jumped the curb and sped off. Saunders did not call the police at that time because he perceived the police were biased against repossession agents. 2 RP 399-404; 3 RP 539-541.

Saunders and Robin Davis testified that they were on their way to repossess the Expedition when they spotted the Explorer again. They decided to make a second attempt at repossessing the Explorer when it pulled into the Burger King parking lot. Saunders stated that he and Chet Davis got out of the truck. While Saunders approached the Explorer it accelerated. The driver nearly ran Chet Davis down. Robin Davis grabbed his shotgun, pointed it at the Explorer and ordered Valdez to stop. At that point Saunders decided to arrest Mr. Valdez for attempted vehicular assault. When Mr. Valdez stopped Saunders approached the Explorer and ordered Mr. Valdez and J.V. out of the car. Saunders ordered Mr. Valdez to put his hands on the car and then Saunders patted Mr. Valdez down for weapons. Saunders pulled Mr. Valdez's wallet out of his pocket and handed it to Robin Davis.

Saunders told Mr. Valdez that he was going to jail. While he was doing that he heard a shotgun racking, turned, and saw Robin Davis pointing a gun at the Explorer. 2 RP 404-413; 3 RP 545-548.

Saunders testified that Mr. Valdez then became emotional and said he was going into diabetic shock. Saunders then changed his mind about arresting Mr. Valdez. Instead he decided to take him to the Shell station to let him get something for his diabetes. Before leaving the Burger King Saunders directed J.V. to get in the truck with Robin Davis to follow them. 2 RP 415-420.

The jury found the defendant guilty as charged. 1 CP 41, 44, 46, 48. It also found the defendant had been armed with a deadly weapon as to each count. 1 CP 39, 42, 45, 47.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY A FIRST AGGRESSOR INSTRUCTION.

Over the defendant's objection the trial court gave the following instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight,

then self-defense or defense of another is not available as a defense.

1 CP 84.

The defendant argues there was insufficient evidence to support giving this instruction. Because there was evidence from which a jury could have concluded that either the defendant either alone or in conjunction with his co-defendants were the initial aggressors, the court properly gave the instruction.

An aggressor instruction is properly given to the jury when "(1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon." State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). Words alone are insufficient to justify the instruction. State v. Riley, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). However, where words are accompanied by some act the instruction may be given, even when there is conflicting evidence regarding the events leading up to an assault.

In Anderson the daughter of the defendant's girlfriend saw the couple arguing. The girlfriend was sitting in a chair while the

defendant was standing with his hands on the arms of the chair. He was leaning into his girlfriend's face, yelling at her. The Court found under these circumstances the defendant's conduct consisted of more than just words. Thus there was sufficient evidence to support the aggressor instruction. Anderson, 144 Wn. App. at 89-90.

In Riley the victim's and witness's testimony conflicted with the defendant's testimony regarding who made the first aggressive move. The defendant testified he had joked with the victim about his supposed gang affiliation. The victim responded angrily and threatened to shoot the defendant. The defendant thought the victim was reaching for a gun when the victim moved, so the defendant shot him. In contrast the witness testified the defendant approached the victim and witness and pointed a gun at the victim demanding to know where the gun was. When the victim looked up the defendant shot the victim. Because there was evidence the defendant drew his weapon first and aimed it at the victim the first aggressor instruction was properly given. Riley, 137 Wn.2d 909-910.

Similarly the instruction was properly given when there was evidence the defendant made some coarse statements to the

victim, and then prevented the victim from leaving by blocking the doorway. There was evidence from which a jury could conclude the defendant precipitated the fist fight between the defendant and victim which ended when the defendant shot and killed the victim. State v Heath, 35 Wn. App. 269, 666 P.2d 922, review denied, 100 Wn.2d 1031 (1983).

The instruction was improperly given when the uncontroverted evidence showed the victim had been the first aggressor. State v. Douglas, 128 Wn. App. 555, 116 P.3d 1012 (2005)(The victim entered and remained in the defendant's home without permission. He was verbally and physically confrontational toward the defendant), State v. Stark, 158 Wn. App. 952, 244 P.3d 433 (2010), review denied, 171 Wn.2d 1017 (2011) (Although the defendant had obtained a restraining order and a gun before having contact with the victim in the home they had previously owned together, the defendant had retreated into the kitchen and the victim had chased after her there and appeared to reach for a knife before she shot the victim.)

The defendant justified pointing a gun at the Valdez's in the Burger King parking lot on the basis that he was defending his son Chet. 4 RP 751-753. There was conflicting evidence regarding

whether Mr. Valdez did anything to warrant the defendant taking such action. The defendant testified that when Saunders and Chet Davis got out of the truck to approach the Valdez car, Mr. Valdez looped around and accelerated toward Chet Davis. Because he was concerned for Chet he pulled a shotgun out of the truck and pointed it at the Explorer's grill. 3 RP 545-549.

In contrast to Mr. Davis's testimony both the Valdez's and Ms. Spady testified Mr. Valdez drove slowly in the parking lot. Ms. Rhodes described the two vehicles entering the parking lot at the same time, not driving toward one another. J.V. testified that they stopped as soon as they saw the truck. Both of the bystanders and both of the victims testified that once the defendants pulled into the Burger King lot they immediately got out of the truck and approached the Valdez's car pointing one or two guns at them and demanded that the Valdez's get out of the Explorer. 1 RP 66-68, 94-97, 194-196, 212-215.

Even if the jury accepted the defendant's account of Mr. Valdez's driving, there was evidence from which it could have reasonably determined that the defendant and Mr. Saunders had provoked that reaction. When Mr. Valdez and J.V. were at the Kentucky Fried Chicken drive through they were approached from

behind by Mr. Saunders. Mr. Saunders walked around the Valdez's car. The Valdez's could not tell what Mr. Saunders was saying, but he was yelling at them and motioning them forward. Mr. Saunders did not show Mr. Valdez any paperwork or tell him the car he was driving was subject to repossession. Mr. Davis and his son Chet were around the corner so Mr. Valdez could not see them. 1 RP 116-119, 228, Ex. 14.

Once the Valdez car turned the corner they saw Saunders and the two Davis's standing in front of their truck blocking the Valdez exit from the drive through. They demanded that the Valdez party get out of their car. Mr. Valdez was scared. He escaped by jumping the curb and driving over the sidewalk. 1 RP 118-120, 229-231, Ex. 14-18.

After the Valdez escaped from Saunders and the Davis's they believed the matter was over. When Mr. Valdez saw them again in the parking lot of the Burger King he was concerned enough that he did not stop. J.V. stated they stopped as soon as they noticed the truck. 1 RP 94-97, 212-213.

The defendant argues the instruction was unwarranted because Saunders did nothing at the Kentucky Fried Chicken drive through that warranted the instruction. He relies on evidence

presented through the defense that Saunders made it clear that he was repossessing the car when he initially approached Mr. Valdez in Mount Vernon, and again at the Burger King in Smokey Point. He argues that repossession is not conduct reasonably calculated to cause a situation in which they would have to defend themselves. BOA at 11-12.

The defendant's argument does not take into account the conflicting evidence presented through Mr. Valdez. Mr. Valdez testified that at the time he was not aware that they were behind in the car payments. He had no idea why the defendant, Robin Davis, and Saunders confronted them at Kentucky Fried Chicken or why they had followed him to Snohomish County. Mr. Valdez stated that he thought it was a car-jacking. Saunders did not tell him the car was subject to repossession, and did not show him any paperwork regarding repossessing his car. According to Harlow Cody, an experienced repossession agent, it is not consistent with industry standard to repossess a car that is occupied. Nor is it a standard industry practice to order people out of their cars, or to use intimidating or coercive tactics to repossess a car. Mr. Valdez had a car repossessed in the past. From his reaction and Mr. Cody's testimony the jury could reasonably believe Mr. Valdez when he

testified that he did not know that the defendant and Saunders were trying to repossess his car.

The defendant also argues that the first aggressor instruction denied him a defense because it improperly allowed the jury to disregard the defendant's theory of the case. BOA 12. The jury was also instructed on the use of lawful force. 1 CP 82. The first aggressor instruction was given based on conflicting evidence. The jury was free to accept as credible or reject as not credible any of that evidence. If the jury had found the defendant and Saunders' testimony credible, the jury would have found the use of force lawful, and would not have applied the first aggressor instruction. Thus the defendant was not denied a defense when the court gave the first aggressor instruction.

B. REBUTTAL EVIDENCE WAS PROPERLY ADMITTED.

Jeffery Saunders testified that he had been in the vehicle repossession business since 1997. He said that he was familiar with the law as it related to vehicle repossessions from on the job training. He stated the Uniform Commercial Code applied to vehicle repossessions, however there was no specific law relating to that profession in Washington. 2 RP 445-447. On direct and cross examination Saunders explained his actions in part by reference to

what he understood were the standards were for the auto repossession industry as follows:

1. Saunders testified that it was "standard in the industry" to repossess the car that the vehicle owners were using the most. 2 RP 394-95. On cross-examination he testified that this was standard with his company. 2 RP 451-52.

2. When explaining where the defendant parked the truck when they first located the Valdez's vehicle Saunders said that "in this industry" they could not block people. 2 RP 398. On cross-examination he clarified that standard applied to his company because he did not want to be accused of false imprisonment. 2 RP 454-55.

3. Saunders' attorney asked him if he contemplated calling the police after their unsuccessful attempt to repossess the Valdez car at Kentucky Fried Chicken. Saunders responded, "[y]ou know, that's not a yes or no answer, because in this industry, so many things happen. And usually when you call the police, they show up, and unfortunately, it's a biased attitude against us, because we're the ones that showed up there and created the problem." 2 RP 403-04.

4. Saunders' attorney asked him if he was planning on arresting Valdez when they approached him in the Burger King parking lot. Saunders explained that they did not intend to do that because "[i]t's just not standard in this industry, I guess." 2 RP 407.

5. Saunders' attorney asked him to explain why he had J.V. ride with Robin Davis after Saunders decided to not arrest Valdez. Saunders stated "Well, it's standard in the industry, whenever we repossess a vehicle, that—if there's more than two people and there's—You don't want somebody sitting behind you." Saunders clarified that he did not leave J.V. at the Burger King because it would not be "polite." 2 RP 417-18. On cross examination Saunders stated this was standard with his company. 2 RP 452.

6. On cross-examination Saunders stated that he was familiar with the term "breach of the peace." To him it meant "In the industry anyways, it means that if there's a conflict, then the repossession stops." 2 RP 448.

At the conclusion of the defense case the State sought to introduce testimony from an expert in the field of vehicle repossessions. The State argued that Saunders testimony was offered to show that he and the Davis's were conducting a lawful repossession. That evidence tended to show that Mr. Valdez acted

inappropriately, and the defendants did not provoke a belligerent response. 3 RP 610-614. The defendant objected on the basis that it was not relevant to his own case, and in any event it was not proper rebuttal because it related to a collateral matter. 3 RP 611.

The court allowed the expert testimony but limited it to the specific conduct Saunders had testified was standard in the industry, and generally that there were laws in Washington that governed vehicle repossessions in Washington. 3 RP 614. The defendant argues this ruling was in error because the evidence related to a collateral matter and was prejudicial. BOA at 18-19.

Rebuttal evidence is admissible to enable the State to answer a new matter presented by the defense. State v. White, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). The evidence must relate to a material rather than a collateral matter. 5A Wash. Prac., Evidence Law and Practice § 607.19 (5th ed.) "The notion that a witness cannot be contradicted on a collateral matter is simply another way of saying that rebuttal evidence is subject to exclusion as a waste of time under Rule 403 when the rebuttal evidence relates to factual issues that have only a remote, indirect connection to the central issues at trial." Id.

The trial court's decision to permit rebuttal evidence is reviewed for manifest abuse of discretion. Id. at 395. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A court acts on untenable grounds when the factual findings are unsupported by the record. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 22 (1995), review denied, 129 Wn.2d 1003 (1996). It has acted for untenable reasons if it has used an incorrect standard or the facts do not meet the requirements for the correct standard. Id. It has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standards. Id.

Rebuttal evidence was held to be properly admitted in State v. Smith, 2 Wn. App. 769, 470 P.2d 214, review denied, 78 Wn.2d 994 (1970). There the defendant was charged with murder during the course of a bar fight. He alleged he acted in self defense. The defendant introduced evidence that he habitually kept his gun in his dresser. In rebuttal the State was permitted to introduce evidence the defendant brought his gun into a tavern on a prior occasion. In affirming the defendant's conviction the Court said "[a]ppellant

created the issue and may not complain of efforts by the state to rebut the evidence he introduced." Id. at 772.

In contrast, rebuttal evidence was not properly admitted in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). There the defendant was charged with rape of a child for sexually assaulting the daughter of a former wife. The trial court permitted the State to introduce evidence the defendant had abused his other children for the limited purpose of rebutting a challenge to the victim's credibility on the basis of her delayed disclosure. The Court held evidence the defendant physically abused his current stepchildren was improperly admitted as rebuttal evidence because it was not relevant; the type of abuse was different from that charged, and because it allegedly occurred after the victim's mother broke up with the defendant it did not tend to explain her delay in reporting. Id. at 750-751.

Here whether the defendant and his co-defendant's actions regarding attempts to repossess the Valdez car were reasonable and lawful directly related to the self defense claim. Both the defendant and Saunders testified regarding their experience as repossession agents. 2 RP 391-394, 445-448; 3 RP 521-524. The defense introduced this evidence to show that their actions at

Burger King were a justified response when in the course of fleeing Valdez nearly struck either Saunders or Chet Davis. Whether or not Saunders and the defendant's conduct were consistent with how vehicle recovery was generally conducted was relevant to assess whether their actions had provoked a belligerent response, and in turn whether their use of force was lawful.

The evidence was also relevant to assess Mr. Valdez's credibility, as well as Saunders and the defendant's credibility when Valdez testified that he did not know what was going on when Saunders and the defendant approached him. Both Saunders and the defendant testified that Saunders made it clear to Mr. Valdez what was happening. Since Mr. Valdez had previously had a vehicle repossessed he was familiar with how that operation was carried out. Had the defendant and Saunders been conducting business consistent with industry standards, Mr. Valdez would have been aware that his car was in the process of being repossessed. Had they not been conducting business in accordance with those standards, it was more likely Mr. Valdez's assumption that he was being car-jacked was credible. In turn it was less likely Saunders and the defendant made it clear they were repossessing the car.

The defendant claims the evidence prejudiced him because it impacted the jury's evaluation of the first aggressor instruction. Evidence that is relevant may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. "Evidence is not excluded because it is 'prejudicial' but because it is unfairly prejudicial." State v. Gentry, 125 Wn.2d 570, 637, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). Evidence that squarely rebuts the defense may prejudice the defendant, but that is not a basis on which to exclude the evidence. State v. Fleetwood, 75 Wn.2d 80, 83, 448 P.2d 502 (1968).

Here the trial court properly exercised its discretion when it permitted evidence regarding laws and industry standards for the vehicle repossession business. The defense introduced evidence that made the rebuttal evidence relevant to the issues at trial. The trial court properly limited rebuttal to those matters covered in the defense case.

C. THE FIREARM ENHANCMENTS DID NOT VIOLATE THE DEFENDANT'S DOUBLE JEOPARDY RIGHT OR CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The jury found beyond a reasonable doubt that the defendant was armed with a firearm at the time he committed each of the charged offenses. 1 CP 39, 42, 45, 47. At sentencing the

court found the kidnapping and assault convictions as to each victim constituted same criminal conduct. 1 CP 22, 111; 4 RP 794-795.

The defendant argued that the court should impose an exceptional sentence of no time on the standard range sentence due to the mandatory length of time he would serve as a result of the firearm enhancements. The court found two mitigating factors justified an exceptional sentence below the standard range. It imposed a sentence of no time on the charges, followed by four 36 months sentences served consecutively. 1 CP 23-24, 37-38; 4 RP 795-797, 801-803.

The defendant argues for the first time on appeal that the consecutive sentences violate his protection against double jeopardy. He argues that not only did the kidnapping and assault convictions constitute same criminal conduct, but they also merged. Thus, he argues that because punishment for each associated crime merged, punishment for more than two firearms enhancements violated his right to be free from double jeopardy. BOA at 28. Alternatively he argues the sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment and Article 1, § 14 of the Washington Constitution.

1. The Right To Be Free Of Double Jeopardy Was Not Violated When The Court Imposed A Sentence For Each Enhancement Found By The Jury Beyond A Reasonable Doubt.

The defendant challenges the sentence enhancements under both the Fifth Amendment and Article 1, § 9 of the Washington Constitution. Both provisions are interpreted identically. State v. Goldsmith, 147 Wn. App. 317, 323, 195 P.3d 98 (2008). The guarantee against double jeopardy protects against multiple punishments for the same offense. Id. However the legislature may constitutionally authorize multiple punishments for the same course of conduct. State v. Harris, 167 Wn. App. 340, 351-52, 272 P.3d 299, review denied, 175 Wn.2d 1006 (2012).

The Court employs a three part analysis to determine whether the legislature authorized multiple punishments. Id. The court first looks to the express language of the statute. Id. If the Legislature clearly intended multiple punishments the inquiry ends. State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010), Missouri v. Hunter, 459 U.S. 359, 368-369, 103 S.Ct. 637, 74 L.Ed.2d 535 (1983), State v. Simms, 151 Wn. App. 677, 691, 214 P.3d 919 (2009), affirmed, 171 Wn.2d 244 (2011).

If the statute is silent on that question, the court will employ one of two tests of statutory construction. The first is the "same

evidence" test, similar to the test set out in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). Harris, 167 Wn. App. at 352, n. 9. Under the same evidence test two statutory offenses are the same if they are identical in law and in fact. "If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally same under this test." State v. Hughes, 166 Wn.2d 675, 682, 212 P.3d 558 (2009).

The merger doctrine is another judicially created tool of statutory construction. In re Fletcher, 113 Wn.2d 42, 50, 776 P.2d 114 (1989). It applies only when the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that a defendant committed that crime, but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

The court need not employ either of these tools for statutory construction because the Legislature has clearly stated that it intended multiple punishments for each firearm enhancement found by the jury. RCW 9.94A.533 provides:

> (3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. ...
>
> (e) 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...

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

The Court has repeatedly said that the firearm enhancement statute clearly indicates the Legislative intent to impose multiple punishments for multiple firearm enhancements. Kelley, supra, Simms, supra, State v. Tessema, 139 Wn. App. 483, 493, 162 P.3d 420 (2007), review denied, 163 Wn.2d 1018 (2008), State v. Nguyen, 134 Wn. App. 836 (2006), review denied, 163 Wn.2d 1053 (2008), cert. denied, 555 U.S. 1055 (2008). Because the Legislative intent is clear the court was authorized to impose one sentence enhancement for each of the four jury verdicts finding the defendant was armed with a firearm at the time he committed each offense.

Even if the Legislative intent were not clear as to the specific question raised by the defendant here the tests for statutory construction do not lead to the conclusion that the defendant's double jeopardy rights were violated. The defendant's argument that multiple enhancements are precluded here is tied to the claim that multiple punishments for the assault and kidnapping charge merged. The merger doctrine does not lead to this result because in order to prove second degree kidnapping the State was not required to also prove second degree assault. Likewise, in order to prove second degree assault, the state was not required to prove second degree kidnapping. State v. Taylor, 90 Wn. App. 312, 320, 950 P.2d 526 (1998). Nor is double jeopardy violated under the same evidence test. "Assault with a deadly weapon does not contain the same legal elements as kidnapping by the use or threatened use of deadly force." Id. at 318.

2. Multiple Sentences For Multiple Firearms Enhancements Does Not Constitute Cruel Punishment.

The Eighth Amendment proscribes infliction of cruel and unusual punishments." In contrast the Washington Constitution proscribes infliction of "cruel punishments". Art. 1, §14 Washington

Constitution. The defendant argues that the sentence enhancements imposed violates each of these provisions.

The Court has held that in most circumstances the state constitutional provision provides broader protection than its federal counterpart. State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980), State v. Thorne, 129 Wn.2d 736, 732-33, n. 10, 921 P.2d 514 (1996), abrogation recognized on other grounds, In re Eastmond, 173 Wn.2d 632, 636, 272 P.3d 188 (2012). Thus if the sentence does not violate the State provision it does not violate the federal provision.

Punishment may be harsh, but that does not mean that it is cruel in the constitutional sense. State v. Rose, 7 Wn App. 176, 183, 498 P.2d 897 review denied, 81 Wn.2d 1008 (1972), cert. denied, 414 U.S. 835 (1973). When determining whether a sentence constitutes cruel punishment the court considers four factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 397, State v. Korum, 157 Wn.2d 614, 640, 141 P.3d 13 (2006). The inquiry relates to the sentence imposed for

each individual count. Wahleithner v. Thompson, 134 Wn App. 931, 938, 143 P.3d 321 (2006).

Under the first factor the court considers whether the offense caused or threatened injury to persons or property. Id. at 938-39. Here the jury found the defendant was armed with a firearm at the time he committed each of the charged offenses. 1 CP 49, 51, 54, 57. Arming oneself with a firearm during the commission of an assault or kidnapping of another would constitute a threat of injury to the victim of those offenses. The legislative intent is to provide for longer sentences when a firearm is used to commit crimes. Nguyen, 134 Wn. App. at 868. Other states do impose enhanced sentences for crimes committed with a firearm. See M.C.L.A. §750.227(b)(Michigan), M.S.A. §609.11 (Minnesota), F.S.A. §775.087 (Florida), California Penal Code §12022.53. The punishment for committing any class B felony in Washington while armed with a firearm is the same. An offender will be sentenced to serve an additional three years unless an exception applies. RCW 9.94A.533(3)(b).

The defendant does not address any of these factors in support of his claim that the consecutive firearm enhancements violated either the state or federal constitutional provision. Instead

he makes two arguments to support his claim that the sentence imposed was disproportionate to the character of the offense.

He first argues that the sentence imposed exceeded the statutory maximum for each offense. The addition of a firearm enhancement cannot result in a sentence beyond the statutory maximum for the underlying offense associated with that enhancement. RCW 9.94A.533(3)(g), Those limits are specific to the sentence imposed for that particular offense. Where the defendant has been found guilty of two or more offenses, with enhancements as to each offense, the total sentence may exceed the statutory maximum for the most serious offense. State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003).

Here the statutory maximum for each offense was 10 years. RCW 9A.20.020(b), RCW 9A.36.21(2)(a), RCW 9A.40.020(3)(a). The court imposed 36 months for each offense, far less than the statutory maximum for each offense. Under Thomas's reasoning the aggregate sentence in excess of the statutory maximum for each offense was permissible.

The defendant's second argument assumes that the offenses merged. He states that permitting sentences for each of the four enhancements will promote charging decisions regardless

of whether the underlying counts merge. BOA at 30. The defendant cites no authority for the proposition that either the state or federal constitutional provision is designed to control a prosecutor's charging decision. The merger doctrine arises only when the defendant has been convicted of multiple offenses. It does not prevent the State from charging a defendant with multiple crimes, even when those crimes may merge. State v. Michielli, 132 Wn.2d 229, 238, 937 P.2d 587 (1997). If it does not curb prosecutorial discretion to charge the underlying offenses, surely it does not curb prosecutorial discretion to charge any associated enhancements that are supported by probable cause.

The defendant also states that to impose a sentence for each enhancement where the associated counts have merged is disproportionate to others convicted of second degree kidnapping. He argues that if the assault count is incidental to the kidnapping then the assault would be vacated, and likewise the firearm enhancement should be vacated as well. BOA at 31.

When a court finds convictions for two offenses violate the double jeopardy proscription against multiple punishments it must vacate one of the convictions. State v. Turner, 169 Wn.2d 448, 468-69, 238 P. 3d 461 (2010). The State concedes that if one

offense has been vacated then the associated firearms enhancement must be vacated as well. However, as discussed above, the second degree assault and second degree kidnapping charges did not merge, and did not otherwise violate the double jeopardy proscription against multiple punishments. It was appropriate for the court to impose sentence for each of the enhancements found by the jury.

D. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE ELEMENTS OF SECOND DEGREE KIDNAPPING.

1. The To Convict Instruction Included All Of The Elements Of Kidnapping Second Degree.

The defendant joins in his co-defendant's argument that the "to convict" instruction relieved the State of its burden to prove the elements of kidnapping second degree. BOA at 1, n. 1[2]. The argument is based on recent amendments to the standard to-convict instruction for unlawful imprisonment. Because the amendments to that instruction only clarified that instruction, and because the to-convict instruction given in this case followed the language of the statute, the instructions did not relieve the State of its burden of proof.

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[2] The argument is set out in the appellant's brief in State v. Saunders, no. 68771-9-I

The "to convict" instruction must include all of the elements of the crime charged. Fisher, 165 Wn.2d at 753. An "element" is defined as "'the constituent parts of a crime—usu[ally] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction." Id. at 754 quoting Black's Law Dictionary 559 (8th ed. 2004). The statutory elements of a crime constitute the essential elements. Id. A constitutionally adequate "to convict" instruction need not contain all pertinent law such as the definition of terms. Id.

This Court rejected an argument similar to that advanced here in State v. Jain, 151 Wn. App. 117, 210 P.3d 1061 (2009). There the defendant was charged with money laundering. An element of that offense is that the defendant's conduct involves "specified unlawful activity." RCW 9A.83.020. "Specified unlawful activity" is defined by RCW 9A.83.010(7). This Court held a "to convict" instruction written in the language of the statute, accompanied by separate definitional instructions adequately set out the elements of the offense, and did not relieve the State of its burden of proof. Id. Like the instructions in Jain, the to-convict instructions given in this case for kidnapping second degree held the State to it burden to prove every element of the offense.

The court gave the following instruction setting out the elements of second degree kidnapping:

> To convict the defendant, Robin Davis, of the crime of kidnapping in the second degree as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or a about the 10th day of September, 2010, the defendant intentionally abducted Salvador Valdez; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

1 CP 60.

An identical instruction was given for count II charging second degree kidnapping of J. V. 1 CP 62. The jury was also instructed on the definition of intent, abduct, restrain, and knowledge. 1 CP 64, 65, 74. These instructions were written in the language of their respective statutes. RCW 9A.40.030(1), RCW 9A.40.010(1) and (6). The jury was adequately instructed regarding what the State was required to prove, even though the definition of "abduct" was not included in the "to convict" instruction.

The defendant argues the instruction was inadequate because it failed to set out as elements that the defendant (1) knowingly acted without consent, (2) knowingly acted without lawful authority, and (3) knowingly acted in a manner that substantially interfered with another's liberty. BOA at 18[3]. He supports his argument by reference to State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000).

Warfield considered the sufficiency of the evidence for unlawful imprisonment. To convict the defendant of unlawful imprisonment the State was required to prove that the defendant knowingly restrained another. RCW 9A.40.040. The statutory definition of restraint has four components: (1) restricting another's movements, (2) without the person's consent, (3) without legal authority, and (4) in a manner that substantially interferes with that person's liberty. Warfield, 103 Wn. App. at 157. The Court reasoned that under the plain language of the statute and legislative history, the mens rea of knowledge modified all four components of the actus reus of restraint. Id.

The defendant points to the pattern instruction for unlawful

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[3] This section of the State's response refers to defendant Saunders opening brief, no. 68771-9-I.

imprisonment, noting that it was modified to separately inform jurors that the knowledge requirement applied to each of the components set out in the statutory definition for "restrain." The former version of the pattern instruction for unlawful imprisonment only required the jury find the defendant knew that he was restraining another movements in a manner that substantially interfered with his or her liberty. It did not require that the jury find the defendant knew he was acting without the person's consent or without legal authority. See comments to WPIC 39.16. The modification to that pattern instruction incorporated the court's decision in Warfield, but it says nothing about the elements of kidnapping.

The statutory elements of unlawful imprisonment are (1) knowingly (2) restraining another person. RCW 9A.40.040. Knowledge and restraint are defined by other statutes. RCW 9A.08.010(1)(b), RCW 9A.40.010(6). The modification to the to-convict instruction for unlawful imprisonment incorporated the definition of restrain previously set out in WPIC 39.31. Once the modification to the to-convict instruction had been adopted the definition in WPIC 39.31 was superfluous and was therefore withdrawn. See comments to WPIC 39.16 and WPIC 39.31.

The pattern instruction committee's decision to modify the unlawful imprisonment to-convict instruction did no more than clarify the instructions. "Clarification of the standard instruction does not amount to an indictment of earlier versions." State v. Holzknecht, 157 Wn. App. 754, 765, 238 P.3 1233 (2010) review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011). Nor does it create additional elements to the crime where those elements did not previously exist. The to-convict instruction for kidnapping second degree, written in the language of the statute, adequately set out the elements of that crime.

2. If The To Convict Instruction Was Deficient, The Error Was Harmless.

A jury instruction that omits or misstates an element of the crime may be harmless error. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002), Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The error is harmless if the court is convinced beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 704 (1967). That standard is met when the element at issue is supported by uncontroverted evidence. Brown, 142 Wn.2d at 341, Neder, 152 U.S. at 18.

In Brown, an erroneous accomplice liability instruction was harmless as to certain crimes charged where the evidence established the defendant acted as a principal, but not harmless where the evidence showed the defendant acted as an accomplice. Brown, 142 Wn.2d 342-43. In Neder failure to instruct the jury that a taxpayer's misstatement was material was harmless where the evidence showed the defendant failed to report over $5 million in income. The Court said "no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not 'a material matter.'" Neder, 527 U.S. at 16.

The defendant argues omission of an element of a crime in the "to convict" instruction entitles him to automatic reversal, citing State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995), State v. Seek, 109 Wn. App. 876, 37 P.3d 339 (2002), and State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). Byrd and Seek pre-dated Brown. Neither case addressed the question whether an error in the to-convict instruction could be harmless. The Court in DeRyke employed the harmless error analysis it articulated one year earlier in Brown. DeRyke, 149 Wn.2d at 912. Under the current state of the law, if this Court finds error in the to-convict instruction, it should address whether that error was harmless.

The defendant argues error in the jury instruction was not harmless because the evidence showed that he was acting as a repossession agent and was unaware of any law governing that field. This relates to the "knowingly acted without legal authority" portion of the legal definition of restraint. While the evidence showed that at the time Saunders and the Davis' first approached Mr. Valdez at Kentucky Fried Chicken they intended to repossess the car, it did not show that they intended to forcefully take the Valdez's anywhere. Only later when the kidnapping occurred did the defendant's intent change from repossessing the car to making an arrest. Saunders testified that at the point that he pulled Mr. Valdez and J.V. from the car, searched Mr. Valdez and took his wallet, and then ordered each person into the vehicles his intent was to affect an arrest. Saunders testified that he took Mr. Valdez's wallet in case Mr. Valdez attempted to escape. He checked Mr. Valdez's wallet for identification "so if he runs, I know who he was," even though his identity was immaterial to the vehicle repossession. 2 RP 416-17. There is no evidence either the defendant or Saunders believed he had any lawful authority to effect an arrest in the manner that he did.

The defendant also argues evidence regarding use of a firearm was conflicting; the defendant and Saunders testified the gun was pointed at the grill of the Explorer. BOA at 26. Regardless of where the gun had been pointed, it had been used to get Mr. Valdez and J.V. out of their car. All of the evidence, including each defendants' testimony, established the victims were intimidated by the defendants. They only accompanied Saunders and the defendant because they were forced to do so. The uncontroverted evidence showed the defendant and Saunders did not give Mr. Valdez or J.V. a choice as to where they were going at the moment they were ordered into the vehicles. Saunders admitted that he would not let Mr. Valdez and J.V. ride in the same vehicle for his own reasons. 2 RP 417-18. It is highly unlikely that if the jury would not have found that the defendants knowingly restricted another's movements, knowing it was without their consent, and knowingly acted in a manner that substantially interfered with another's personal liberty under the evidence presented in this case.

Given the uncontroverted evidence, should this Court find the to-convict instruction should have included the elements the

defendant claims were necessary, any error was harmless beyond a reasonable doubt

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction and sentence.

Respectfully submitted on January 30, 2013.

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