68467-1

NO. 68467-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LARRY MULANAX,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2. The court entered convictions for both assault and unlawful imprisonment even though they were based on the same evidence, in violation of the double jeopardy clauses of the state and federal constitutions.

3. The prosecution presented insufficient evidence to prove the offense of intimidating a witness.

4. The court's instructions erroneously omitted the essential element of the "true threat" from the to-convict instruction for intimidating a witness.

5. The prosecution misrepresented the law of accomplice liability in its closing argument.

6. The court improperly admitted a prejudicial allegation of an unrelated and uncharged offense based on its incorrect ruling that it constituted a modus operandi under ER 404(b).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The court lacks authority to impose a firearm enhancement when the jury has found only that the accused person possessed a deadly weapon. The jury's special verdict form stated that Mulanax possessed "a deadly weapon" based on the definition of a deadly weapon given in the jury instructions. Did the court violate Mulanax's right to a fair trial by jury when it imposed a punishment that the jury's verdict did not authorize?

2. The double jeopardy clauses of the state and federal constitution protect against multiple convictions for the same conduct. Mulanax was convicted of both unlawful imprisonment and assault with the intent to commit unlawful imprisonment for his encouragement of another person who cut Kaylee Swanson's hair and detained her long enough to cut her hair. Did the multiple convictions based on the same evidence violate double jeopardy prohibitions? Alternatively, was the unlawful imprisonment incidental to the assault so that it must merge under double jeopardy principles?

3. The offense of intimidating a witness requires that a person issue a "true threat" for the purpose of keeping another person from reporting a crime. Mulanax was not accused of threating Swanson with

future harm if she reported the crime to the authorities. Did the State fail to prove the elements of intimidating a witness where Mulanax did not threaten future harm to Swanson?

4. The to-convict instruction must include all essential elements of the charged crime. The to-convict instruction for intimidating a witness did not include the necessary element of a true threat even though it purported to include all elements of the offense. Did the court fail to accurately explain the essential elements of the crime to the jury and dilute the State's burden of proof?

5. Accomplice liability requires knowledge of "the crime" and not the nebulous intent of "in for a penny, in for a pound." The prosecution told the jury that the "easiest" way to think about accomplice liability was that Mulanax was responsible for actions of any other person if he was "in for a penny, in for a pound." Did the prosecution's flagrant misrepresentation of the law of accomplice liability impact the jury when the crux of the case against him was whether Mulanax knew about and aided offenses that other people committed?

6. ER 404(b) constitutes a categorical bar against admitting evidence for the purpose of showing the accused has a dangerous

character or the propensity for committing similar acts. Modus operandi evidence is probative only when the identity of the perpetrator is otherwise hard to prove and it requires the highly unique, signature-like similarity of offenses. When the incident occurred at Mulanax's home and presence was not disputed, was the evidence of an unrelated wrongful act necessary to show the perpetrator's identity?

7. Modus operandi requires incidents that are so alike as to be the accused's signature. The State introduced an uncharged incident against Mulanax, but he did not carry out or orchestrate the shared, similar aspect of the incidents. Does the accused's lack of involvement in arranging the similarities show that the incident does not constitute a modus operandi?

C. STATEMENT OF THE CASE.

1. Charged incident

On July 30, 2011, Kayleen Swanson borrowed Mary Schuman's car. 1RP 251.[1] She gave different reasons for needing the car -- telling

[1] The verbatim report of proceedings from the trial and sentencing consists of three volumes of transcript, referred to as follows:
1RP refers to January 30-31, 2012, and February 22, 2012;
2RP refers to February 1, 2012;
3RP refers to February 2, 2012.

one person she needed to go to a CPR class, another that her mother had died, and another that she had a doctor's appointment, but none of these reasons were true.1RP 101, 150, 216, 251; 3RP 100. Instead she met her friend Dana, a heroin dealer. 1RP 101-02.

Swanson had promised to return the car in two hours. 1RP 151. By the time Swanson returned about 12 hours later, Schuman was frantic with worry and said she was going to "kick [Swanson's] ass." 1RP 102, 152, 215. Schuman was living at Larry Mulanax's house, along with Richard Brown, known as Ace, who rented a trailer on the property and Jennifer Bertalan. 1RP 206, 210-11.

Brown, Bertalan, Schuman, and Mulanax discussed how to punish Swanson, who they knew to be untrustworthy, when she returned. 1RP 152-53, 216-17. Brown thought they should cut her hair, Schuman thought they should beat her up, Bertalan favored the hair cut, and Mulanax may have favored the hair cut, if he had weighed in. Id.[2]

Swanson returned and went to Schuman's bedroom. 1RP 253. Brown and Bertalan followed her there. 1RP 157, 218. They may have smoked crack together. 1RP 157. Brown took out his pocket knife and

cut Swanson's hair. 1RP 218. He also told her to take her clothes off and checked them for drugs, stolen property, or a police wire. 1RP 157, 218. Brown said that Swanson was given the "choice" to "[g]et her ass kicked or get her hair cut." 1RP 222. Swanson chose her hair. 1RP 85.

Brown and Bertalan together cut or shaved Swanson's hair. 1RP 242. Bertalan claimed she did so only because she did not want Mulanax to be mad at her, but Brown said Bertalan was a willing participant and Swanson described Bertalan's involvement similarly to Brown. 1RP 85, 244

After, Mulanax and Brown drove her to a friend's house, as Swanson requested. 1RP 87, 90. One or two days later, Swanson reported the incident to the police. 1RP 92. In response, officers searched Mulanax's home and found 21 small baggies of cocaine along with two firearms. 2RP 20-22.

Mulanax was charged with possession of cocaine with intent to deliver while armed with a deadly weapon; assault in the second degree; unlawful imprisonment; and intimidating a witness. He was convicted of each offense, although the court treated the assault and

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[2] Mulanax denied involvement or knowledge. 3RP 103, 134. Although people present during the incident gave somewhat different accounts of who did

unlawful imprisonment as same criminal conduct. The court also imposed a firearm sentence enhancement even though the jury's verdict found Mulanax possessed a deadly weapon.

2. Incident admitted under ER 404(b) as modus operandi.

Mulanax met Bertalan when he was approximately 68 years old and married. 3RP 88. He separated from his wife and Bertalan moved into his home. 3RP 90. Bertalan was a 24-year-old prostitute and heroin addict. 1RP 148; 3RP 88.

Bertalan arranged for Mulanax to use his money to buy drugs that he would give to Bertalan or sell to others. 1RP 118, 119. Bertalan stole "a lot" from Mulanax, including drugs, money, and jewelry. 1RP 124-25, 185. Mulanax helped Bertalan break her heroin addiction, but she continued to use cocaine. 1RP 122-23, 185. Mulanax did not use drugs and had never been in any trouble before meeting Bertalan. 1RP 177, 210.

In May 2011, two people Bertalan knew as drug dealers came to the motel room where she was temporarily living. 1RP 128-29. Immediately upon entry, one person grabbed her, said she needed a

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or knew what, no one testified Mulanax hit Swanson or cut her hair.

haircut, and shaved the top of her head. 1RP 129. They left and Bertalan went to the hospital. 1RP 131.

About one week later, Bertalan went to Mulanax's house and saw one of the people who assaulted her. 1RP 132. She said Mulanax admitted his involvement, although she did not remember what he said. 1RP 133. Testimony about this incident was admitted at Mulanax's trial, over his objection, based on the prosecution's claim that is constituted a modus operandi and was therefore admissible under ER 404(b). 1RP 10-12. The court admitted the evidence for the single purpose of showing a modus operandi.1RP 38. The prosecution argued to the jury that it should convict Mulanax because he committed multiple assaults against women. 3RP 23.

Pertinent facts are addressed in further detail in the relevant argument sections below.

D. ARGUMENT.

1. **The court impermissibly imposed a firearm enhancement when the jury's special verdict found only that Mulanax possessed a "deadly weapon"**

"[S]entences entered in excess of lawful authority are fundamental miscarriages of justice." In re Pers. Restraint of Adolph,

170 Wn.2d 556, 563, 243 P.3d 540 (2010). "When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

The court exceeds its authority by imposing the punishment allotted to a firearm enhancement when the jury's verdict merely found the defendant possessed a "deadly weapon." State v. Williams-Walker, 167 Wn.2d 889, 898-99, 225 P.3d 913 (2010); U.S. Const. amend. 6; Wash. Const. art. I, §§ 21, 22.

In the three consolidated cases in Williams-Walker, each defendant was charged with a firearm sentencing enhancement, but the court instructed the jury on the definition of a deadly weapon, and by special verdict, the jury was asked to find whether the defendant possessed a deadly weapon. Id. at 893-94. Each defendant was also convicted of a predicate crime that involved using a firearm. However, the Supreme Court held that guilty verdicts alone are not "sufficient to authorize sentencing enhancements." Id. at 899. Instead, the governing statute and the constitutional right to a jury trial require that the jury authorize the additional punishment by a special verdict. Id.

Just as in Williams-Walker, the court instructed Mulanax's jury that, for purposes of the special verdict, it must decide whether Mulanax was "armed with a deadly weapon." CP 75. It provided the definition of deadly weapon to the jury. CP 75. The special verdict form asked the jury: "Was the defendant Larry Mulanax armed with a deadly weapon at the time of the commission of the crime in Count One?" CP 42.

Unlike the cases consolidated in Williams-Walker, Mulanax was not accused of firing a gun at anyone. The deadly weapon allegation was based on a gun that was in Mulanax's house, without any accusation that he used it. 2RP 10, 12-13. The jury's verdicts in the other charges do not even implicitly suggest that Mulanax used a firearm, making it factually as well as legally impossible for the court to infer that the jury made the determinations required for a firearm enhancement.

The jury's special verdict did not find the prosecution proved Mulanax was armed with a firearm as required for the court to impose the firearm enhancement. CP 42. The court imposed an enhanced penalty for a firearm without a jury's verdict finding he possessed a firearm and consequently, the firearm enhancement must be stricken.

2. **Mulanax's convictions for assault with the intent to commit unlawful imprisonment and unlawful imprisonment violate double jeopardy and may not be separately punished.**

a. Double jeopardy bars multiple punishment for the same legal and factual offense, as charged in an individual case.

The double jeopardy clauses of the state and federal constitutions protect against multiple convictions and punishments for the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); In re Pers. Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9. "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Orange, 152 Wn.2d at 817 (quoting Blockburger, 284 U.S. at 304) (emphasis in Orange).

In Orange, the Court criticized a "misconception" in double jeopardy analysis: that courts need only to compare a generic statutory

language to determine whether two crimes are the same under Blockburger. Orange, 152 Wn.2d at 818-19. Instead, the governing "same evidence" test requires the court to determine whether "the evidence required to support a conviction upon one of [the offenses] would have been sufficient to warrant a conviction upon the other." Orange, 152 Wn.2d at 816; see State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). Such crimes are "identical both in fact and in law," and therefore count as the same offense for double jeopardy purposes. Id.

Because this determination necessarily depends on the nature of the charges and the evidence in each particular case, the analysis cannot be completed merely by comparing statutory elements. Id. at 818-19; see also State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005) ("We consider the elements of the crime as charged and proved, not merely a[t] the level of an abstract articulation of the elements.").

In Orange, the court concluded that double jeopardy principles barred convictions for both first degree attempted murder and first degree assault. Even though the "substantial step" establishing attempted murder could, in some cases, be something other than an assault, the act offered as proof of the substantial step in Mr. Orange's

case was the same act used to prove first-degree assault. Where "the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault," the offenses are the same in law and fact, thereby satisfying the same-evidence test. 152 Wn.2d at 820.

Similarly, in Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), the Supreme Court held that convictions for both robbery and for felony murder arising from the same robbery violated the Double Jeopardy Clause, even though the felony murder statute did not require on its face proof of robbery. In United States v. Dixon, 509 U.S. 688, 698-700, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), the Court ruled that the defendant, who had been caught with drugs while subject to a court order prohibiting him from committing any crimes, could not be convicted both of drug possession and of contempt for violating the court order based on the same act, even though hypothetically he could have violated the order by committing a crime other than drug possession. These cases show that the abstract possibility of committing one crime without committing the other is not dispositive under Blockburger. The question instead is whether, in the

context of a specific case, the proof required to convict for one crime is also sufficient to convict for the other. Orange, 152 Wn.2d at 820.

b. Convictions for assault and unlawful imprisonment, based on the same act, violate double jeopardy.

Based upon a single incident, Mulanax was convicted of assault and unlawful imprisonment. The assault charge was elevated from simple fourth degree assault to second degree assault based on the allegation that Mulanax committed assault "with the intent to commit Unlawful Imprisonment." CP 60 (Instruction 14).

According to RCW 9A.40.040, "A person is guilty of unlawful imprisonment if he knowingly restrains another person." RCW 9A.40.040(1). "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. RCW 9A.40.010(1). Restraint is "without consent" if it is accomplished by "physical force, intimidation, or deception." RCW 9A.40.010(1)(a); CP 65 (Instruction 19).

Assault is defined by common law, rather than by statute, as: (1) an attempt, with unlawful force, to inflict bodily injury upon another, (2) an unlawful touching with criminal intent, and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict

or is incapable of inflicting that harm. State v. Abuan, 161 Wn.App. 135, 154, 257 P.3d 1 (2011). The jury was instructed only on the second and third definitions of assault, not the definition involving the attempt to inflict bodily injury. CP 62 (Instruction 16).

The charges stem from an incident where Ace Brown and Jennifer Bertalan cut Swanson's pony tail and shaved hair from her head in retaliation for her having taken Mary Schuman's car without bringing it back as promised. 1RP 217-18, 242. The prosecution alleged that Swanson was forced to submit to the hair cut under threat of being beaten if she did not submit to it. 3RP 7-8 (prosecutor's closing argument explaining factual basis for unlawful imprisonment). While Brown was cutting her hair, Swanson claimed he said he would break her pinky finger if she moved. 1RP 83. Mulanax did not cut Swanson's hair but was alleged to have encouraged the incident as an accomplice. 1RP 242.

The prosecution alleged that Swanson was assaulted when her hair was cut and shaved, when she was threatened that she would be hit unless she submitted to having her hair cut, as well as when Brown had her take off her clothes to check her for recording devices. 3RP 6-7. All of these acts were "offensive" and could be construed as an assault, the

prosecution told the jury. 3RP 6. The unlawful restraint occurred by these same acts; there was "intimidation" the prosecution claimed, because she was told if she tried to leave, rather than submit to the haircut, she would be beaten. 3RP 7-8. The purpose of the restraint was to force Swanson to submit to the assault – once the "hair cut" ended, Swanson left.

Swanson also testified that at some point during the incident, Brown took a string from her tank top and tied her hands together, but none of the other four people present corroborated that claim. 1RP 83, 242. The prosecution expressly disavowed this as the basis of any charged crimes in its closing argument, telling the jury that "who knows" whether she was tied up or lying about that, "we don't have to prove any of that beyond a reasonable doubt" and it is not an element that it must prove. 3RP 38-39.

Mulanax was not accused of assault by virtue of causing bodily injury. CP 62. He was accused of committing an assault by virtue of an unwanted touching or threat of harm, elevated to a second degree assault because at the same time, he intended to commit unlawful imprisonment. CP 60. Swanson left the house once the haircut was over and was not further "restrained."1RP 90. The unwanted touching

necessary to prove the assault charge was the same evidence used to prove the restraint element of the unlawful imprisonment allegation. The two convictions violated double jeopardy.

This Court addressed a similar compounding of punishments in State v. Leming, 133 Wn.App. 875, 888, 138 P.3d 1095 (2006). The defendant in Leming was charged with second degree assault under the prong that elevated a simple assault to a felony because it occurred with the intent to commit felony harassment and he was also charged with felony harassment. Applying the same-evidence test, the Leming Court concluded that as charged, the State had to prove the same threatening conduct for both offenses. Id. at 888-89. Because the two charges were predicated on the same act of felony harassment, and both involved the threat of harm as a legal matter, the two convictions violated double jeopardy. Id.

Again in State v. Martin, 149 Wn.App. 689, 701, 205 P.3d 931 (2009), the Court applied the same-evidence test to the case of a defendant charged with both second degree assault based on the intent to commit rape and attempted rape in the third degree. Looking at the facts "as alleged" at trial, the Court found there was no purpose for the

assault that was independent of the acts constituting the attempted rape and found the two convictions violated double jeopardy. Id.

Although the Court reached a different result in State v. Frohs, 83 Wn.App. 803, 924 P.2d 384 (1996), that decision's application of the same-evidence test has been abrogated. In Frohs, the Court viewed the elements of the two crimes as hypothetical abstractions, not how they were charged and proved at trial. Id. This type of analysis was expressly repudiated in Orange. 152 Wn.2d at 817-18 ("Purporting to apply the [Blockburger] test, the Court of Appeals did nothing more than compare the statutory elements at their most abstract level"). Second, the Court concluded that because the crimes appeared in different chapters of the criminal code, this was indicative of an intent for multiple punishments. Frohs, 83 Wn.App. at 814. Again, this analysis has been disapproved by the Supreme Court. Freeman, 153 Wn.2d at 773-74. In short, Frohs does not control the outcome here, and a comparison of the two crimes as charged and proved shows that they rest on the same law and facts.

c. The prosecution agreed the convictions merge.

In its sentencing memorandum, the prosecution informed the court, "the State believes the second degree assault and unlawful imprisonment convictions merge." CP 28. However, without further discussion of the matter, the court treated these two convictions as "same criminal conduct," rather than as merged for double jeopardy purposes. CP 16.

Under the merger doctrine, when a particular degree of crime requires proof of another crime, the court presumes the legislature intended to punish both offenses singly. Freeman, 153 Wn.2d at 772-73; State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). A separate conviction for the included crime will not stand unless it involved an injury to the victim that is separate and distinct from the greater crime. Johnson, 92 Wn.2d at 680.

Merger applies when one crime was used to effectuate the other, without a separate purpose or effect. For example, in State v. Williams, 156 Wn.App. 482, 494, 123 P.3d 1174 (2010), the defendant was charged with second degree assault with sexual motivation and rape in the first degree. Mr. Williams strangled his victim and the resulting substantial bodily harm provided the bodily injury necessary for the

rape conviction. Id. The Court reasoned, "The only assault here was the attack and strangulation of KW before and during the act of rape. The assault was used to effectuate the rape. The assault had no purpose or effect independent of the rape." Id. at 495. Likewise, the assault in Mulanax's case involved cutting Swanson's hair and threatening that she would be hurt if she did not submit to the haircut. This was not separate from the threat used to restrain her, but the same act at the same time and place, done for the same purpose.

In In re Francis, 170 Wn.2d 517, 521, 242 P.3d 866 (2010), the defendant pleaded guilty to felony murder, first degree attempted robbery, and second degree assault all arising from the same conduct. After first holding that Francis' double jeopardy argument was not waived by his guilty plea, the court reiterated, "[w]e view the offenses as they were charged." Id. at 523 (emphasis in original). As charged, Francis' second degree assault conviction merged into his conviction for attempted first degree robbery. Id. at 525. The Court also concluded there was no "injury to the person or property of the victim or others, which [was] separate and distinct from and not merely incidental to the crime of which it forms an element." Id. (citation and internal quotation omitted).

Here, the prosecution told the jury that the several aspects of the incident were offensive and threatening, but it was those same offensive threats that constituted the physical force and intimidation that caused Swanson to believe her liberty was restrained that underlie the unlawful imprisonment. 3RP 7-9. The purpose of the assault was not to effectuate Swanson's restraint, but rather Swanson was held for the purpose of threatening her and cutting her hair. During the hair cut, Swanson claimed Mulanax told Brown "that's good enough, you can stop." 1RP 87. Mulanax took pictures of Swanson and then "we left." 1RP 87, 89. Mulanax drove Swanson to the home of one of Swanson's friends at Swanson's request. 1RP 90. There was no purpose and injury caused by the restraint that was separate from the assault. Accordingly, the convictions merge.

d. The remedy is reversal and remand for vacation of the lesser conviction.

If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. Freeman, 153 Wn.2d at 777. In Womac, the Supreme Court held that a trial court that has an affirmative obligation to vacate from the judgment convictions which have been found to

violate double jeopardy prohibitions. 160 Wn.2d at 659-61. "[C]onvictions may not stand for all offenses where double jeopardy protections are violated." Id. at 658 (emphasis in original, citation omitted); see also State v. Trujillo, 112 Wn.App. 390, 411, 49 P.3d 935 (2002) ("where the jury returns a verdict of guilty on each alternative charge, the court should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense"). Mulanax is entitled to vacation of the lesser conviction.

3. **Mulanax's conviction for intimidating a witness is not proven by sufficient evidence, was premised on the State's improper statement of the law, and rests on an incomplete jury instruction that diluted the State's burden of proof.**

    a. To prove the crime of intimidating a witness, the prosecution must establish a true threat to cause physical injury in the future.

When a crime rests on pure speech, a conviction must be predicated on proof of a "true" threat or the conviction will violate the First Amendment. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); see State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2005). ("An appellate court must be exceedingly cautious when assessing

whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right to free speech.").

The offense of intimidating a witness requires the perpetrator issue a threat to a current or prospective witness. RCW 9A.72.110(1)(d); CP 115. The accused's conduct may not be criminalized unless the prosecution proves the threat was a true threat. Schaler, 169 Wn.2d at 283; State v. Brown, 137 Wn.App. 587, 154 P.3d 302 (2007).

"A 'true threat' is a statement made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life of [another individual].'" State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (quoting State v. Knowles, 91 Wn.App. 367, 373, 957 P.2d 797 (1998) (alteration in original) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir.1990)).

Because the threat necessary to commit the offense of intimidating a witness must be a true threat, the prosecution bears the burden of proving this essential element. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14;

Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. Winship, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010).

b. There was no reasonable evidence that the statement to Swanson constituted a true threat.

An expression of past thoughts about harming another person does not constitute a true threat, which requires a threat to cause bodily injury in the future. Brown, 137 Wn.App. at 592. In Brown, the defendant said to a clerk that he was upset about having been convicted of DUI and he had thought about shooting the judge and his family when he saw them outside their home. Id. at 589-90. The clerk told the judge and Mr. Brown was convicted of intimidating a judge, defined as

threatening a judge based on a ruling in an official proceeding. Id. The Court of Appeals held Mr. Brown's statement of past thoughts of violence could not constitute a true threat, and ruled that "an opposite finding would wrongly criminalize past thoughts." Id. at 592.

Swanson said Mulanax told her he would not have let her leave unless he thought she would not tell anyone. 1RP 89. She claimed Brown made a similar comment. 1RP 89.

Swanson said these statements occurred after the head-shaving incident was over, either in the car or in the house as they were leaving. 1RP 90. The words used were about past events, where Mulanax described his prior thoughts. 1RP 89. He did not threaten harm to Swanson later if she told anyone, but rather said that he would not have acted as he did if he thought she would tell anyone.

The remarks do not express the required intent to inflict harm in the future essential for a true threat. See Kilburn, 151 Wn.2d at 46 ("[t]he requirement is that the words express the intent to inflict harm"). They are also vague and do not reference the police or reporting a crime. Intimidating a witness requires that the threat must be directed at stopping the person from reporting a crime. RCW 9A.72.110.

A true threat must be not only a serious threat, rather than an idle comment, it must be expressed for the purpose of instilling fear of bodily injury in a future action. Schaler, 169 Wn.2d at 283. Mulanax's alleged statement describing his thought does not meet this threshold and thus, there was insufficient evidence to support the offense of intimidating a witness.

c. The failure to include the true threat in the to-convict instruction diluted the State's burden of proof.

The to-convict instruction must contain all elements essential to the conviction. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A reviewing court "may not rely on other instructions to supply the element missing from the 'to convict' instruction." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The to-convict instruction "carries with it a special weight" because it is the "yardstick" by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). For this reason, the omission of an essential element from the instruction is a manifest error affecting a constitutional right that may be reviewed for the first time on appeal. Id.

Because only "true threats" may be prosecuted, the "true threat" requirement is an essential element of intimidating a witness. Yet the to-convict instruction did not include this element. The omission of this element from the to-convict instruction, which otherwise set forth all essential elements of the offense, diluted the State's burden of proof and permitted the jury to convict even if it concluded that Mulanax was speaking idly, bragging, or talking about past events.

d. The prosecution's flagrant misrepresentation about the law of accomplice liability, combined with the insufficient evidence, requires reversal.

A person is liable for conduct of another person only if proved to be an accomplice to that crime. An accomplice's knowledge that "the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow. Such an interpretation is contrary to the statute's plain language, its legislative history, and supporting case law. State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); RCW 9A.08.020(3)(a).

Washington courts have discredited the notion that a person may be treated as an accomplice based on the maxim "in for a penny, in for a pound." In re Pers. Restraint of Wilson, 169 Wn.App. 379, 392, 279 P.3d 990 (2012) (reversing murder conviction where prosecutor argued

"in for a penny, in for a pound"). In Cronin, the prosecutor told the jury that the "policy" underlying accomplice liability is "in for a penny, in for a pound [and] in for a dime, in for a dollar." State v. Cronin, 142 Wn.2d 568, 577, 14 P.3d 752 (2000). The Supreme Court unmistakably disagreed with this characterization of accomplice liability, holding that a person may be liable as an accomplice only where the prosecution proved that the accused knowingly aided in the specific crime charged. Id. at 580.

Here, the prosecution explained the law of accomplice liability as "the easiest way to think about this is sort of in for a penny, in for a pound." 3RP 6. This was an incorrect and "discredited" statement of the law governing accomplice liability. Wilson, 169 Wn.App. at 392.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). It is misconduct for the prosecution to misrepresent the law. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996).

The prosecution misrepresented the law by telling the jury that accomplice liability can be "easily" thought of as "in for a penny, in for a pound." 3RP 6. Given the case law explaining the specific knowledge required for a person to be an accomplice, this misrepresentation of the law is flagrant and ill-intentioned and may be raised on appeal even without a contemporaneous objection by Mulanax. Fleming, 83 Wn.App. at 214.

Mulanax did not threaten Swanson himself and if the jury relied on words Brown used when Mulanax was not present, the jury would need to find Mulanax knew about Brown's threats. There is no evidence he knew what Brown was saying to Swanson when he was not there. The prosecution's argument of "in for a penny, in for a pound" absolved it of the responsibility of proving Mulanax knew and intended to aid Brown in threatening Swanson not to tell the police. The prosecution encouraged the jury to convict Mulanax as an accomplice based merely on his involvement in some aspect of the incident, "in for a penny," even if it did not find he knowingly aided in the charged offense. This impropriety, together with the weak and insufficient evidence to support the intimidating a witness conviction, as well as the omission of an element from the to-convict instruction, require reversal.

4. **The court impermissibly admitted highly prejudicial evidence of an uncharged wrongful act and the State used that evidence to ask the jury to punish Mulanax for that uncharged offense.**

   a. A person accused of a crime may not be convicted because he is dangerous or likely to commit similar acts if not convicted.

It can be brutally prejudicial to present the jury with evidence that permits them to infer the accused person is dangerous or violent based on uncharged acts. State v. Freeburg, 105 Wn.App. 492, 500, 20 P.3d 984 (2001). An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice").

Allegations that an accused person committed an uncharged crime are presumed inadmissible under ER 404(b). Uncharged criminal conduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused's propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); ER 404(b).[3] Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776.

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The DeVincentis Court warned that the State's burden of proving the admissibility of the uncharged conduct is "substantial." Id. at 17-18.

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[3] Under ER 404(b):
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

b. The purported "modus operandi" was insufficiently proven and not probative where identity was not an issue.

The prosecution insisted that a prior incident in which the top of Bertalan's head was shaved was relevant as a modus operandi. 1RP 13. It did not claim this head shaving incident was relevant, material, or necessary for any purpose other than modus operandi. 1RP 13, 38; CP 116-18.

When a perpetrator's identity is at issue, the signature-like commission of other offenses may be probative even though such uncharged acts would be otherwise inadmissible under ER 404(b). For example, when the accused presents an alibi defense, his identity as the perpetrator is "squarely" at issue. State v. Fualaau, 155 Wn.App. 347, 354, 228 P.3d 771, rev. denied, 169 Wn.2d 1023 (2010), cert. denied, 131 S. Ct. 1786 (2011). In Fualaau, the court admitted the defendant's own testimony from a prior case admitting to committing a highly similar ritualistic assault. His description of his own unique and distinctive criminal conduct was admissible under ER 404(b) due to the degree to which the perpetrator's identity was at issue. Id .at 357.

Identity may be at issue when the accused person denies any involvement in the charged crime and there are no eyewitnesses. State

v. Foxhoven, 161 Wn.2d 168, 178, 163 P.3d 786 (2007). In Foxhoven, the defendants were accused of writing graffiti and the court permitted evidence of the "tags" used on other graffiti to show that the defendants distinctively signed their own graffiti. Id. "When the focus of the inquiry is the identity of the perpetrator, not whether the crime occurred," modus operandi evidence may be relevant. DeVincentis, 150 Wn.2d at 21.

Mulanax's identity was not at issue in the case. 1RP 10. Four eyewitnesses to the assault testified at trial; each person knew Mulanax and testified about the extent of his involvement in the charged offenses. The incident occurred at Mulanax's home. 1RP 64, 217. His presence at the time of the incident was not disputed.

Because Mulanax's identity was not at issue, the prior incident had little probative value as identity evidence even assuming the two incidents met the strict requirements of modus operandi. Uncharged acts are inadmissible under ER 404(b) if the purpose for which they are offered is not relevant to prove the charged crime or if the prejudicial effect outweighs the probative value. Foxhoven, 161 Wn.2d at 175. The probative value of modus operandi rests on whether identity is at issue. There was no question that Mulanax was present during the incident,

which occurred at his home, and he was identified by everyone present. In Foxhoven, no one saw the graffiti being drawn on the property at issue, and thus the "signature" affixed on other graffiti was probative of who left the graffiti. 161 Wn.2d at 172, 178. In Fualaau, the "proffered alibi defense placed the question of identity squarely at issue" and made the defendant's admission of other uniquely similar acts probative. 155 Wn.App. at 354. But Mulanax did not deny he was present, offer an alibi, or commit the current act in the absence of available witnesses. His potential involvement in other similar incidents was not probative of identity under ER 404(b), and even if minimally probative, that minor relevance could not outweigh the strong prejudicial effect.

Furthermore, the two incidents contain more differences than similarities and do not establish a modus operandi. A prior act does not constitute a modus operandi "because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused." Foxhoven, 161 Wn.2d at 176 (quoting inter alia United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir.1974)). "The more distinctive the defendant's prior acts, 'the higher the probability that the defendant committed the crime, and thus the greater the relevance.'" Id. (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1145 (2002)).

The prior incident involved Bertalan, who admitted she stole a great deal of money, drugs, and property from Mulanax. 1RP 124-25. Purportedly as revenge, but not in retaliation for any recent theft, two drug dealers went to Bertalan's motel room. 1RP 128-29. They entered the room, grabbed Bertalan, and shaved the top of her head. 1RP 129. She was not given a choice between having her hair cut and having something else happen to her; rather, she was grabbed and her hair was cut against her will. 1RP 128-29. Mulanax was not present for any part of the incident.

On the other hand, Swanson unexpectedly disappeared with Mary Schuman's car one day, which upset Schuman, Brown, and Mulanax. 1RP 152-53, 213. Bertalan was at Mulanax's house when this occurred. She said Mulanax and Brown wanted to beat up Swanson, then Brown cut Swanson's ponytail with a knife and Swanson chose to have the rest of her hair cut rather than being beaten. 1RP 152, 162. Brown and Bertalan said the hair cut was Brown's idea. 1RP 153, 159, 216, 242, 255.

The two incidents arose in different manners, and in both instances, there is no evidence that the idea to engage in the purportedly unusual aspect of the incidents, the hair cut, originated with Mulanax.

He was not present for the Bertalan incident. Brown was not involved in the Bertalan incident. In the absence of evidence that Mulanax was involved in the decision to commit the distinctive part of the incident, in addition to the different reasons for the acts and the way they were carried out, the two events cannot satisfy the requirements for a modus operandi.

c. The State urged the jury to convict Mulanax for both charged and uncharged crimes.

After convincing the court to admit these two hair cut incidents for the sole purpose of showing a modus operandi, the prosecution used this evidence to urge the jury to convict Mulanax for both incidents, even though one was uncharged. 1RP 38; 3RP 22-23. These arguments show that the real reason and the clear effect of admitting both incidents was to urge a conviction based on Mulanax's propensity or potential for dangerous behavior.

Not only was there little or no probative value of the prior incident as modus operandi evidence when identity of the perpetrator was not at issue, evidence of Bertalan's assault was highly prejudicial. It implied Mulanax as a violent person, who exacted revenge in mean-spirited and demeaning ways. While complainant Swanson suffered

from distinct credibility problems, having been caught in many lies and exaggerations so that even Bertalan thought of her as untrustworthy, the prosecution used Bertalan to bolster Swanson's credibility. 1RP 97-98, 102, 105-06, 150-51.

The prosecutor told the jury that it should convict Mulanax because "he ruined lives with his assaults. He ruined lives with his threats." 3RP 23. He controlled "these women through drugs, threats, assaults, but it's time to take control away from him" and "find him guilty of all four crimes." Id.

This argument was a direct plea to convict Mulanax based on uncharged offenses against a different victim. Mulanax was charged with offenses against one woman, Swanson. He was not charged with assaulting "women" or threatening anyone else. The prosecution used the evidence admitted under ER 404(b) to argue that Mulanax should be punished for uncharged crimes and because he was a dangerous repeat offender.

ER 404(b) is "a categorical bar" to evidence introduced to show the defendant acted in conformity with his character traits. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). "There are no exceptions to this rule." Id.

When admitting evidence under ER 404(b), it is "the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes." Gresham, 173 Wn.2d at 423-24 (citing State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). Although the court is not mandated to give a limiting instruction when not requested, improperly admitted evidence requires reversal where it may have impacted the jury's deliberations. Gresham, 173 Wn.2d at 433.

This harmless error test does not view the evidence in the light most favorable to the prosecution akin to a sufficiency of the evidence review. Id. Evidentiary errors require reversal when it is reasonably likely that "had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Furthermore, the impact of improperly admitted evidence is assessed based on inferences the prosecution asked the jury to make. State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (reversing due to evidentiary error where State asked jury to make inferences affected by improperly admitted evidence).

The testimony about the unrelated incident in which Bertalan suffered physical injury when her hair was forcibly cut from her head

was undoubtedly prejudicial and it was not probative as modus operandi evidence. The prosecution told the jury to convict Mulanax because of the multiple women he had assaulted and threatened, using Bertalan's story as if she were a victim of a charged crime and implying there were other uncharged incidents as well. 1RP 22-23. Because it impacted the jury's deliberations, this improper admitted evidence tainted the trial and requires a new trial to be ordered. Gresham, 173 Wn.2d at 433.

d. The State's claim that accomplice liability rests on "in for a penny" together with the propensity evidence requires a new trial.

As discussed above, the prosecution told that jury that the "easiest way" to determine whether Mulanax was an accomplice to the acts that others took was "in for a penny, in for a pound." 3RP 6. This argument based on a discredited statement of the law affected each offense involving Swanson. See Wilson, 169 Wn.App. at 676. Accomplice liability was the central focus of the case, becuase the State relied on acts that others did, outside Mulanax's presence, as the basis to convict him. The "in for a penny" argument let the jury infer that if Mulanax knew about some part of the incident, such as the assault of Swanson, he was also culpable for threats Brown made that Mulanax

did not know about. This argument, viewed together or separately with the claim that he should be convicted for assaulting other women, dilted the State's burden of proof and undermines the fairness of the trial.

E. CONCLUSION.

Larry Mulanax respectfully asks this Court to reverse his firearm enhancement, vacate his conviction for unlawful imprisonment based on double jeopardy, reverse his conviction for intimidating a witness due to insufficient evidence, and remand any remaining charges for retrial due to the overwhelmingly prejudicial effect of improperly admitted evidence of uncharged wrongful conduct.

DATED this 31st day of October 2012.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, LARRY MULANAX, Appellant.	)))))))))	NO. 68467-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF OCTOBER, 2012.

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