68467-1

68467-1

NO. 68467-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY E. MULANAX,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

U.S CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

COURT RULES

OTHER AUTHORITIES

I. ISSUES

1. Kaylynn Swanson was present both when defendant sent two people to beat up Jennifer Bertalan and shave her head for stealing from him, and when defendant paid them for doing it. Swanson was shown a photograph of Bertalan with black eyes and her head shaved. A few months later Swanson offended defendant and was given the choice between getting beat up or having her head shaved. Defendant denied any involvement in cutting Swanson's hair. After having her head shaved and being photographed nude defendant told Swanson that she was lucky because they beat the living hell out of the last two girls. Was it an abuse of discretion for the trial court to admit modus operandi evidence relevant to prove the identity and involvement of defendant in the charged crimes?

2. Defendant participated in planning and directing the cutting of Swanson's pony tail and shaving her head. After her head was shaved defendant restrained Swanson by requiring her to remain in the bedroom while he took nude photographs of her for his personal use and benefit. Did defendant's conviction for second degree assault with intent to commit unlawful imprisonment and his

conviction for unlawful imprisonment violate the prohibition against double jeopardy?

3. After Swanson was forced to strip naked, given the choice between having her hair cut off or getting beat up, having her head shaved, photographed nude, and told that she was lucky because they beat the living hell out of the last two girls, defendant and an accomplice told Swanson that they would not let her leave if they thought she was going to call the police or tell anyone. Was the evidence sufficient to show that defendant attempted to induce Swanson to not report information relevant to the crimes?

4. The jury was correctly instructed on accomplice liability. The Prosecutor addressed accomplice liability in closing argument. Has defendant met his burden to establish that the Prosecutor's conduct was improper and prejudicial; that any prejudicial effect had a substantial likelihood of affecting the verdict; and that any prejudice was not cured by the court's instructions?

5. The State concedes that the trial court erroneously imposed a firearm enhancement when the jury's finding was that defendant was armed with a deadly weapon at the time of the crime. Is the proper remedy to remand for resentencing consistent with the jury's finding for a deadly weapon enhancement?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

At the end of July 2011, Kaylynn Swanson, Jennifer Bertalan, Richard Ace Brown and Mary Schuman were staying with Larry Eugene Mulanax, defendant, at his two bedroom house in Stanwood, WA. Swanson, Bertalan, Brown and Schuman all used illegal drugs. Swanson, Bertalan, and Schuman were drug addicts. Defendant provided and allowed them to use cocaine in his house. Defendant did not like heroin and did not want it in his house. 1RP 55-57, 60-68, 96, 115, 122, 144-145, 147-149, 185, 187, 203-204, 207-208, 210-213, 220, 233-235, 247, 249-250, 257-258; 2RP 90, 112-115, 117-118.

On July 29, 2011, Swanson borrowed Schuman's car and agreed to return it by 5:00 p.m. Swanson met up with "Dana," a heroin dealer, and did not return until after midnight. Prior to Swanson's return, defendant, Bertalan, Brown and Schuman discussed what should been done to Swanson: Defendant, Brown and Bertalan wanted to cut off her hair; Schuman wanted to kick her ass. Defendant denied participating in the conversation. Defendant asked Brown if he would cut Swanson's hair. Defendant, Bertalan, Brown and Schuman were all waiting when

Swanson returned. Defendant told everyone to act cool. 1RP 69-72, 108, 150-155, 170, 188, 212-217, 242, 244-245, 250-251, 253-255; 2RP 99-103, 131-132.

When Swanson arrived back at defendant's house she went straight to the bedroom to return the car keys to Schuman and explained about the Dana situation. Brown came into the bedroom and confronted Swanson. Brown searched Swanson's purse and had her remove her clothes so they could be searched and to make sure Swanson was not wearing a wire. A syringe was found in Swanson's underpants. Brown then grabbed Swanson's hair and cut off her pony tail with a knife. After cutting off her pony tail Brown told Swanson to not move or she would be hurt. 1RP 73-78, 83, 157-159, 217-220, 255.

Swanson said that she knew what was going to happen next because defendant had Bertalan's hair shaved off. Swanson had been present at defendant's house when he sent Charlie and Sean Black to Bertalan's motel room to beat her up because she stole money from him. Swanson was also present when Sean and Charlie returned with photos showing Bertalan with a shaved head and black eyes and when defendant paid them with crack cocaine.

Defendant showed Swanson a photograph of Bertalan with her head shaved. 1RP 78-82, 175-176.

Swanson thought Brown would break her finger and told him to ask defendant first. Defendant came into the bedroom and gave Swanson a choice; have her head shaved or get her ass beat. Swanson chose having her hair cut. Defendant told Bertalan to get clippers. Brown used his knife and scissors while Bertalan used an electric razor to shave Swanson's head. During the hair cutting Bertalan told Swanson, "don't worry honey, this happened to me too." Defendant watched and told Brown when to stop cutting Swanson's hair. Defendant denied participating in cutting Swanson's hair. 1RP 83-87, 104, 108-109, 161-163, 188, 220-222.

After Swanson's head was shaved defendant told Swanson, "God, don't be so distressed. You are lucky ... the last two girls I seen this happened to, they beat the living hell out of too, and you ain't got a mark on you." Defendant explained that he was referring to Bertalan and "Roxanne." Defendant had Swanson pose and took nude photographs of Swanson after her head was shaved. Defendant told Swanson that no one else would see the photographs; they were for his benefit and his own use. Defendant claimed that Swanson asked him to take the photographs and that

he gave them to her. However, defendant showed the nude photographs of Swanson to Bertalan and others. Swanson's pony tail was put in a plastic bag and given to defendant. The nude photographs of Swanson and her pony tail were located in defendant's safe; the keys to the safe were in his pocket. 1RP 87-88, 92-94, 164-165, 221-222; 2RP 16-17, 42-43, 66, 96-97, 104-106, 127, 135-136.

Prior to driving Swanson to Everett and dropping her off defendant and Brown told Swanson that they would not let her leave if they thought she was going to call the police. Brown told Swanson that if she had declined the hair cutting they would have tied her up and left her outside naked. Two days later Swanson reported the incident to the police. 1RP 89-92, 223.

B. EVIDENCE ADMITTED UNDER ER 404(b).

During the time Bertalan associated with defendant she frequently stole from him. On May 1, 2011, defendant sent Charlie and Sean Black to her motel room. Charlie and Sean shaved the top of Bertalan's head, kicked her several times, gave her black eyes and cut her hand. They told her that this was what she got for ripping defendant off and that if she called the cops she would get hurt. About a week later Bertalan went to defendant's house and

saw one of the persons who shaved her head. Defendant admitted to Bertalan that he sent Charlie and Sean to her motel room. To get drugs from defendant Bertalan had to let him take a photograph of her shaved head in the bedroom. Defendant claimed that Bertalan asked him to take the photograph and that he gave the photograph to her. The photograph of Bertalan's shaved head was recovered from defendant's computer drive. 1RP 124-125, 128-130,132-134, 185, 192-195, 199; 2RP 65, 96-97, 127.

C. PROCEDURAL HISTORY.

On September 2, 2011, defendant was charged with: Count 1, Possession of a Controlled Substance with Intent to Manufacture or Deliver—cocaine; Count 2, Second Degree Assault with Deadly Weapon Allegation; Count 3, Intimidating a Witness. On December 22, 2011, defendant was charged by amended information with: Count 1, Possession of a Controlled Substance with Intent to Manufacture or Deliver—cocaine with Firearm Allegation; Count 2, Second Degree Assault with Intent to Commit a Felony—Unlawful Imprisonment; Count 3, Unlawful Imprisonment; Count 4, Intimidating a Witness. CP 155-156, 160-161; RP (12/22/11) 5-6.

Prior to trial defendant moved to sever count 1 from counts 2-4. The court denied the motion finding that the evidence

supporting each count was cross-admissible as res gestae. CP 134-149; RP (01/06/12) 2-8.

On the first day of trial defendant moved to exclude testimony or reference to other crimes, wrongs, or acts committed by defendant pursuant to Evidence Rule 404(b); the State responded with an offer of proof. In denying defendant's motion to exclude evidence of prior bad acts under ER 404(b) the trial court found by a preponderance of the evidence that the misconduct occurred; that the purpose the State sought to introduce the evidence is to establish modus operandi; that the evidence is obviously relevant to prove the identity and involvement of defendant in the crime; and with respect to weighing the probative value against the prejudicial effect, the misconduct is not more heinous than the charged crime and the extreme similarity between the two events is highly provitive, such that the prejudice is outweighed by the probative value. CP 104, 114-133; 1RP 7-15, 37-39.

Defendant was found guilty of the four crimes charged in the amended information. The jury also found that defendant was armed with a deadly weapon at the time of the commission of the crime in Count 1. CP 37, 38, 40, 42, 43; 3RP 44-46.

At sentencing the parties agreed and the court found that the second degree assault and unlawful imprisonment were the same criminal conduct, giving defendant an offender score of 2. Defendant was sentenced within the standard range for each count and given 36 months for a firearm enhancement, totaling 104 months. CP 15-18; 1RP (02/22/12) 3, 7-10.

III. ARGUMENT

A. THE EVIDENCE OF OTHER ACTS WAS PROPERLY ADMITTED UNDER ER 404(b).

While Evidence Rule 404(b)[1] prohibits the admission of evidence to show the character of a person to prove the person acted in conformity with it on a particular occasion, the rule does permit the admission of prior misconduct for other purposes. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002); State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). Before admitting ER 404(b) evidence, a trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2)

---

[1] ER 404(b) provides:

> 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.

identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Foxhoven, 161 Wn.2d at 175. This analysis must be conducted on the record. Id. The trial court is not required to conduct an evidentiary hearing and may assess admissibility on offer of proof to determine whether alleged uncharged acts probably occurred prior to admitting evidence of other crimes, wrongs, or acts. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 176; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. McCreven, 170 Wn. App. 444, 457, 284 P.3d 793 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Powell, 126 Wn.2d at 258. The reviewing court will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. McCreven, 170 Wn. App. at 457, citing State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988)).

1. Defendant's Motion To Exclude Prior Bad Acts.

In denying defendant's motion to exclude evidence of prior bad acts under ER 404(b) the trial court found: 1) by a preponderance of the evidence that the misconduct occurred; 2) the purpose the State sought to introduce the evidence is to establish modus operandi; 3) the evidence is obviously relevant to prove the identity and involvement of defendant in the crime; and 4) with respect to weighing the probative value against the prejudicial effect, the misconduct is not more heinous than the charged crime and the extreme similarity between the two events is highly provitive, such that the prejudice is outweighed by the probative value. 1RP 37-39. Defendant challenges the second and third requirements claiming that "modus operandi" was insufficiently proven and not probative of an element of the crime charged. Appellant's Brief 33-37. The trial court is generally the proper court to weigh the relevance of evidence. Foxhoven, 161 Wn.2d at 176. "Whether the prior offenses are similar enough to the charged crime to warrant admission is left to the discretion of the trial court." Foxhoven, 161 Wn.2d at 177, citing State v. Jenkins, 53 Wn. App. 228, 236, 766 P.2d 499 review denied, 112 Wn.2d 1016 (1989). It is not an abuse of discretion when the trial court correctly interprets

the rules of evidence. Gresham, 173 Wn.2d at 422; Foxhoven, 161 Wn.2d at 174.

The evidence of the incident with Bertalan was markedly similar to the charged crimes involving Swanson. Both Bertalan and Swanson were perceived to have offended defendant. Both had their heads shaved by others at the direction of defendant. Both were photographed by defendant after having their heads shaved. While there were some differences (e.g., Bertalan was not given a choice between having her hair cut or being beaten), these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as "individual manifestations" of the same plan. Gresham, 173 Wn.2d at 423; State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). The relevant commonality need not be "a unique method of committing the crime." Gresham, 173 Wn.2d at 423, citing State v. DeVincentis, 150 Wn.2d 11, 20–21, 74 P.3d 119 (2003). Further, defendant denied involvement in the crimes committed against Swanson. Identity is an issue when the accused denies any involvement in the charged crime. Foxhoven, 161 Wn.2d at 178. Evidence of other crimes is relevant for the purposes of establishing identity when the method employed to commit each

crime is so distinctive "that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged." State v. Fualaau, 155 Wn. App. 347, 357, 228 P.3d 771, review denied 169 Wn.2d 1023 (2010), citing State v. Russell, 125 Wn.2d 24, 66–67, 882 P.2d 747 (1994). The trial court did not abuse its discretion in admitting the challenged ER 404(b) evidence for the purpose of modus operandi and to prove the identity and involvement of defendant in the charged crime. The probative value of the evidence outweighed any prejudicial effect.

2. A Limiting Instruction Was Not Requested.

The trial court has a duty to correctly instruct the jury on the purpose and use of ER 404(b) evidence, if a criminal defendant requests a limiting instruction. State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012); State v. Asaeli, 150 Wn. App. 543, 577 n. 35, 208 P.3d 1136 (2009). In the present case, defendant did not request a limiting instruction, nor does he argue that the trial court erred by failing to give a limiting instruction. Failure to give an ER 404(b) limiting instruction is reviewed under harmless error. Gresham, 173 Wn.2d at 425. The error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of

the trial would have been materially affected." Gresham, 173 Wn.2d at 425, citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Errors on rulings concerning admission of evidence under ER 404(b) are not of constitutional magnitude and do not result in automatic reversal. State v. Mezquia, 129 Wn. App. 118, 131, 118 P.3d 378, review denied, 163 Wn.2d 1046, 187 P.3d 751 (2005). "Instead, if an error is found, the reviewing court must then determine, within reasonable probability, whether the outcome of the trial would have been different but for the error." Id., citing State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). A review of the entire record shows convincingly that the outcome of the trial would not have been affected had the challenged evidence been excluded or if a limiting instruction been given prohibiting the jury from considering the evidence of the prior offense for the purpose of showing defendant's character and action in conformity with that character.

Bertalan, Brown and Schuman all testified that defendant participated in planning what should be done to Swanson. 1RP 152-155, 216-217, 242, 244-245, 253-255. Bertalan, Brown and Swanson testified that defendant gave Swanson the choice of

having her hair cut or getting beat up, 1RP 84-85, 161-162, 222, and that defendant was present to observe Swanson's head being shaved. 1RP 87, 163, 220. Bertalan and Swanson testified that defendant told Bertalan to use a razor to shave Swanson's head, 1RP 85, 162, and that defendant took nude photographs of Swanson after her head was shaved. 1RP 87-89 164-165. Brown testified that defendant told him to cut Swanson's hair. 1RP 244-245. Bertalan and Brown testified that defendant was given Swanson's severed pony tail. 1RP 164, 221-222. Defendant admitted telling Swanson, "God, don't be so distressed. You are lucky ... the last two girls I seen this happened to, they beat the living hell out of too, and you ain't got a mark on you." 2RP 104. Taken together, this evidence establishes that there is no reasonable probability that the outcome would have been materially affected by the elimination of any impermissible inference.

B. DEFENDANT'S CONVICTIONS FOR SECOND DEGREE ASSAULT AND UNLAWFUL IMPRISONMENT DID NOT VIOLATE HIS PROTECTION FROM DOUBLE JEOPARDY.

The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The Washington Constitution provides the same protection. State

v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005); Adel, 136 Wn.2d at 632. A double jeopardy challenge may be raised for the first time on appeal. Adel, 136 Wn.2d at 632. The question of whether a defendant's double jeopardy protection has been violated is a question of law reviewed de novo. State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996). Even when sentences for multiple offenses are served concurrently, double jeopardy protection remains applicable because of the other adverse consequences of multiple convictions. State v. Calle, 125 Wn.2d 769, 773, 888 P.2d 155 (1995).

To successfully prevail on his double jeopardy challenge, defendant must affirmatively establish that he has been twice punished for the same offense. Although the protection against multiple punishments is constitutional, the Legislature has the power to determine what type of conduct is prohibited under the law and to determine the appropriate punishment. Calle, 125 Wn.2d at 776. The inquiry thus becomes whether the Legislature intended to authorize multiple punishments for the actions which led to defendant's convictions. State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003); State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006).

> 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 an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger test is similar to Washington's 'same evidence' test. Calle, 125 Wn.2d at 777. In order to be the same offense for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense that is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. Calle, 125 Wn.2d at 777.

1. Different In Law.

Here, the crimes of unlawful imprisonment and assault in the second degree are found in different sections of the criminal code. "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). On the other hand: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... With intent to commit a felony, assaults another...." RCW 9A.36.021(1)(e). The fact that the two statutes are directed at

different evils indicates the legislative intent to punish these crimes separately. Cf. Calle, 125 Wn.2d 780-781 (finding the rape and incest statutes directed to separate evils, double jeopardy did not prevent convictions for both offenses arising out of a single act of intercourse).

2. Different In Fact.

The court next looks to see whether each crime requires proof of an element the other does not. Jury instruction 14 states in pertinent part:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 30th day of July, 2011, the defendant or an accomplice assaulted Kaylynn Swanson;
>
> (2) That the assault was committed with intent to commit unlawful imprisonment; and
>
> (3) That the acts occurred in the State of Washington.

CP 60. Jury instruction 19 states in pertinent part:

> To convict the defendant of the crime of unlawful imprisonment, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 30th day of July, 2011, the defendant or an accomplice restrained the movements of Kaylynn Swanson in a manner that substantially interfered with her liberty;
>
> (2) That such restraint was
>
> (a) without Kaylynn Swanson's consent or

(b) accomplished by physical force, intimidation, or deception; and

(3) That such restraint was without legal authority;

(4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and

(5) That the acts occurred in the State of Washington.

CP 65.

Assault in the second degree requires proof of an assault. Swanson was assaulted when her pony tail was cut and her head shaved. The fact that Swanson was assaulted was irrelevant to the crime of unlawful imprisonment. Proof of an assault is not necessary to prove unlawful imprisonment. State v. Frohs, 83 Wn. App. 803, 814, 924 P.2d 384 (1996). Likewise, the actual restraint of Swanson required for unlawful imprisonment was irrelevant to the crime of assault *with intent to commit* the felony of unlawful imprisonment. The difference is that the crime of second degree assault *with the intent to commit unlawful imprisonment* was committed the moment defendant formed the requisite intent to knowingly restrain Swanson and used force or intimidation to do so. Cf. In re Fletcher, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989) (kidnapping statute only requires proof of intent to commit various criminal acts, not that the perpetrator actually bring about or complete one of those qualifying acts).

Because the elements of the two crimes are different, defendant has failed to meet his burden under the Blockburger and same evidence tests to show how proof of the assault necessarily proves the unlawful imprisonment and how proof of the unlawful imprisonment necessarily proves the assault. Frohs, 83 Wn. App. at 814.

3. Same Criminal Conduct.

At sentencing the parties agreed and the court found that the second degree assault and unlawful imprisonment were the same criminal conduct. CP 16; 1RP (2/22/12) 3. The Legislature has validated the concept of multiple convictions arising out of the same criminal act. RCW 9.94A.589(1)(a), requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score: "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Sentences imposed under this subsection are to be served concurrently. Id. Thus, it is clear that the legislative intent includes the possibility that a single act may result in multiple convictions, and simply limits the consequences of such

convictions. State v. Calle, 125 Wn.2d 769, 781-782, 888 P.2d 155 (1995).

4. Merger Only Applies Where The Legislature Intended The Offenses To Merge.

The merger doctrine is another aid in determining legislative intent. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); State v. Sweet, 138 Wn.2d 466, 477, 980 P.2d 1223 (1999). Merger only applies where the Legislature has clearly indicated it intended the offenses to merge. Sweet, 138 Wn.2d at 478; State v. Vladovic, 99 Wn.2d 413, 420-421, 662 P.2d 853 (1983). Under the merger doctrine, when separately criminalized conduct raises another offense to a higher degree, the court presumes that the Legislature intended to punish both offenses only once, namely for the more serious crime with the greater sentence. Freeman, 153 Wn.2d at 772–773; State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006). "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." Frohs, 83 Wn. App. at 810, citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980). Defendant's

high end standard range sentence for second degree assault was 14 months; defendant's high end standard range sentence for unlawful imprisonment was 12 months. The minor difference in defendant's sentence is not persuasive evidence for the application of the merger doctrine to defendant's convictions. Freeman, 153 Wn.2d at 778.

5. Merger Does Not Apply To Separate Injuries.

The well established "separate and distinct injury" exception operates to allow two convictions even when they formally appear to be the same crime under other tests. Freeman, 153 Wn.2d at 778; State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983). The offenses may in fact be separate when there is a separate injury to the "the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." Frohs, 83 Wn. App. at 807, citing State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. Freeman, 153 Wn.2d at 778-779.

Defendant and his accomplices assaulted Swanson when they cut her hair to punish her for the perceived wrong to

defendant. Swanson was required to remain in the bedroom after her head was shaved and pose naked so defendant could photograph her for his prurient interest. 1RP 88. Clearly, Swanson suffered a separate injury from the unlawful restraint that was distinct from the injury of the assault. The defendant's double jeopardy claim fails. His convictions for both second degree assault and unlawful imprisonment should be affirmed.

C. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT DEFENDANT ATTEMPTED TO INDUCE SWANSON TO NOT REPORT INFORMATION RELEVANT TO THE CRIMES.

Defendant argues that insufficient evidence was presented to show that a "true threat" was made to induce Swanson to not report the crimes. Appellant's Brief 23-28.

1. Sufficiency Of The Evidence.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) citing State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). The court reviews the trial court's findings of fact for substantial evidence and its conclusions of law de novo. State v. Santacruz, 132 Wn. App. 615, 618, 133 P.3d 484 (2006); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of

witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

2. True Threat.

Washington courts have defined the term "threat" when used in statutes that prohibit threats as prohibiting only "true threats." State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006) (holding that the bomb threat statute application is limited to true threats); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001) (noting that the harassment statute is defined as prohibiting only true threats). "True threats" are statements made in a context or under such circumstances that a reasonable person would interpret the statement as a serious expression of intention to inflict bodily harm. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. Smith, 93 Wn. App. 45, 48-49, 966 P.2d 411 (1998); State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998); see Webster's Third New International Dictionary, defining "threat" as "an expression of an intention to inflict evil, injury, or damage on another." Our supreme court has defined "true threat" as follows:

> "[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 person."

State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010), quoting State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43. The defendant need not actually intend to carry out the threat. "It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, 151 Wn.2d at 44. The fact that a threat is subtle does not make it less of a threat. United States v. Gilbert, 884 F.2d 454, 457 (9th Cir.1989), cert. denied, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). However, as explained in Kilburn, an appellate court must make an independent examination of the whole record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. Kilburn, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts—those so intermingled with the legal question as to make it necessary, in order to pass on the

constitutional question, to analyze the facts. Kilburn, 151 Wn.2d at 50–51. Thus, whether a statement constitutes a true threat is a matter subject to independent review. Johnston, 156 Wn.2d at 365. But the rule of independent appellate review does not extend to factual determinations such as findings on credibility. Johnston, 156 Wn.2d at 365–366.

As charged defendant is guilty of intimidating a witness, by use of a threat against a current or prospective witness, he attempted to induce that person not to report the information relevant to a criminal investigation, or attempted to induce that person not to have the crime prosecuted. RCW 9A.72.110(1)(d). The definition of true threat includes stated intent to harm another person; to subject another person to physical confinement or restraint; or expose or publicize an asserted fact tending to subject a person to contempt, or ridicule. As the trial court instructed the jury:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person; or to subject the person threatened or any other person to physical confinement or restraint; to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule.

> Threat also means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 68 (Jury Instruction 22, WPIC 2.24 & 115.52); see also RCW 9A.04.110(28)(a), (c), (e) and Schaler, 169 Wn.2d at 283.

In the present case, defendant and his accomplice told Swanson that they would not let her leave if they thought she was going to call the police. 1RP 89-90. In light of the facts that Swanson had just been assaulted, unlawfully restrained to have degrading photographs taken of her, and previously had been shown a photograph of another women who had her head shaved and was beaten, a reasonable person would foresee that the statements made by defendant and his accomplice would be interpreted as serious expressions of an intent to induce Swanson to not report the information and to not have the crime prosecuted. A reasonable juror could infer that the statements were made to influence Swanson and not as idle talk nor in jest. The statements clearly constituted true threats.

Defendant erroneously relies on State v. Brown, 137 Wn. App. 587, 591-592, 154 P.3d 302 (2007) (holding that a statement of past intent to harm a judge was not a true threat and that an opposite finding would wrongly criminalize past thoughts). Swanson was referring to a past event when she testified that defendant said "if he thought for any reason I was going to be telling anyone, that he wouldn't let me go." She was not stating that defendant was expressing his thoughts about past events. The statements that defendant would not let Swanson leave if he thought she was going to call the police indicated a future intent to influence Swanson.

3. Definition Of True Threat Is Not An Element.

"No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document or 'to convict' instruction." State v. Tellez, 141 Wn. App. 479, 483, 170 P.3d 75 (2007). Washington courts have repeatedly held that the definitions of elements are not elements themselves. State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements); State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638

(1999) (definition of "great bodily harm" does not add element to assault statute); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional terms do not add elements to statute). In State v. Lorenz, 152 Wn.2d 22, 34-36, 93 P.3d 133 (2004), the Court held that "sexual gratification" is not an element of the crime of first degree child molestation, but a term that defines the element of "sexual contact." The court reasoned that: "Had the legislature intended a term to serve as an element of the crime, it would have placed 'for the purposes of sexual gratification' in RCW 9A.44.083." Id. at 34. Courts have applied the definition of "true threat" to the element of threat in order to ensure statutes do not run afoul of the First Amendment. The legislature has not included "true threat" in the intimidating a witness statute, therefore, there is no basis to conclude that the legislature intended that term to be an element of that crime. Like other definitions, it does not add an element to the statute.

D. DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT THE PROSECUTOR'S CONDUCT WAS IMPROPER OR PREJUDICIAL AND THAT ANY PREJUDICIAL EFFECT HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE VERDICT AND WAS NOT CURED BY THE COURT'S INSTRUCTIONS.

Defendant alleges that the prosecutor committed misconduct by misstating the law during closing argument. Appellant's Brief

28-30, 40-41. In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (reversal is not required if the error could have been obviated by a curative instruction which the defense did not request).

1. Accomplice Liability.

The prosecutor did not misstate the law regarding accomplice liability. Rather, after telling the jury that instruction 15 defined what an accomplice is, the prosecutor said, "and the easiest way to think of this is sort of in for a penny, in for a pound." 3RP 6. Jury Instruction 15 reads:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or

> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 61 (WPIC 10.51). The prosecutor continued by stating:

> The defendant is legally accountable for the actions of Ace and for the actions of Jennifer because he helped plan this. He directed their actions. He supervised it. He stood by ready to lend them aid. And he finished it up by taking pictures and telling Kaylynn that if she told anyone what happened there, they weren't going to let her go. That makes the defendant an accomplice to what happened in that room, despite the fact that maybe he never touched Kaylynn, because it all happened under his supervision. That makes the defendant legally responsible for her assault.

3RP 6. The prosecutor's argument was a correct statement of the law regarding accomplice liability. Additionally, the prosecutor's argument was also supported the facts. See 1RP 152-165, 216-217, 220-222, 244, 254-256. The Supreme Court has observed that the pertinent case law from this court supports imposing criminal liability on an alleged accomplice so long as that individual

has general knowledge of "the crime" for which he or she was eventually charged. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (citing State v. Roberts, 142 Wn.2d 471, 513, 14 P.3d 713 (2000); State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984); and State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984)).

2. Defendant Did Not Object To The Prosecutor's Argument.

Defendant did not object to the prosecutor's argument. The absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Where there is no objection to alleged misconduct during trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-761, citing Stenson, 132 Wn.2d at 727; State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The prosecutor's statements in the present case are not the type of comments which courts have held to be inflammatory. Emery, 174 Wn.2d at 763; but see State v. Monschke, 133 Wn. App. 313, 338, n.16, 135 P.3d 966 (2006)

("Although the prosecutor did not improperly use the phrase, 'in for a penny, in for a pound,' here, we encourage the State to refrain from using this expression for concern that it might be confused with the usage disavowed in Roberts [142 Wn.2d 471].")

The standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument. Emery, 174 Wn.2d at 760-761. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether any resulting prejudice could have been cured. Emery, 174 Wn.2d at 762. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762, citing State v. Weber, 159 Wn.2d 252, 271–272, 149 P.3d 646 (2006) (were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal); Swan, 114 Wn.2d at 661 (counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal). "An objection is unnecessary in cases of incurable prejudice only because 'there is, in effect, a mistrial and a

new trial is the only and the mandatory remedy.'" Emery, 174 Wn.2d at 762, quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

Under the heightened standard where there was no objection at trial, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 761, citing State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The reviewing court's focus is on whether any resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762, quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932). Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury.

In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d at 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168

P.3d 359 (2007); Brown, 132 Wn.2d at 561. The court must consider what would likely have happened if defendant had timely objected. Emery, 174 Wn.2d at 763. Moreover, closing argument is, after all, *argument*. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence). Stenson, 132 Wn.2d at 727; State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). As shown above, the prosecutor's statement was a correct statement of the law regarding accomplice liability and was supported the facts. See D, 1, above.

3. Any Prejudice Was Cured By The Court's Instructions.

Here, any potential prejudice from the prosecutor's statements was cured by the instructions given to the jury. The

statements and remarks by counsel are not evidence and should not be so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993); State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005). The court may mitigate potential prejudice by so instructing the jury. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). The trial court did instruct the jury that the prosecutor's statement was argument, not evidence, and that the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 46 (Jury Instruction 1, WPIC 1.02). Further the jury was instructed: "You must not let your emotions overcome you rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." CP 47 (Jury Instruction 1, WPIC 1.02). Additionally, the jury was properly instructed on accomplice liability. CP 61 (Jury Instruction 15, WPIC 10.51). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

In the present case the court's instructions eliminated any possible confusion and cured any potential prejudice stemming

from the prosecutor's remarks. Defendant has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice that affected the jury's verdict. Any potential prejudice from the prosecutor's statements was obviated by the court's instructions to the jury.

E. FIREARM ENHANCEMENT.

The State concedes that the trial court erroneously imposed a firearm enhancement of 36 months when the jury's finding was that defendant was armed with a deadly weapon at the time of the crime. CP 42; 3RP 45. The jury was given a special verdict form for a deadly weapon enhancement, and answered in the affirmative. The fact that the State provided notice in the information to defendant that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding. State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913, 918 (2010). The proper remedy is to remand the cases for resentencing consistent with the jury's finding for a deadly weapon enhancement. Williams-Walker, 167 Wn.2d at 902.

IV. CONCLUSION

For the reasons stated above, defendant's convictions should be affirmed. The case should be remanded for resentencing defendant under the deadly weapon enhancement as found by the jury.

Respectfully submitted on January 14, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
JOHN J. JUHL, WSBA #18951
Deputy Prosecuting Attorney
Attorney for Respondent