Supreme Court No. 90053-1
(COA No. 68467-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LARRY MULANAX,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Larry Mulanax, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Mulanax seeks review of the Court of Appeals opinion dated February 18, 2014, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. It is well-established that the State may not use evidence that the accused person committed a similar offense for which he was never prosecuted as a reason to convict him of the charged offenses. The prosecution argued that Mr. Mulanax should be convicted and punished because he had ruined the "lives" of the complainant as well as another person in an unrelated incident for which he had never been prosecuted. The Court of Appeals found that there was nothing improper about arguing that the defendant should be found guilty because had ruined lives of people in uncharged incidents. Does the Court of Appeals opinion conflict with established ER 404(b) case law and encourage

prosecutors to seek convictions based on misconduct that has not been prosecuted?

2. The categorical bar on evidence of uncharged misconduct applies permits evidence that establishes a modus operandi only when the perpetrator's identity is subject to significant dispute and the prior incident is so unique as to be a signature. Here, the court admitted a prior incident that was not highly similar and even though there was no dispute about Mr. Mulanax's presence at the scene during the incident. On the other hand, he was not present at the scene of the prior incident and his involvement in that prior incident was the subject of significant dispute. Did the Court of Appeals misconstrue the essential requirements of modus operandi evidence and create a broad rule that would make such evidence admissible any time an accused person does not concede his involvement in the offense?

3. Intimidating a witness must be based on a true threat of future harm to prevent reporting a crime to the authorities. Mr. Mulanax told the complainant he might have taken different action in past if the complainant had acted differently during the incident. Did the State fail to prove and did the Court of Appeals misapprehend the essential elements of intimidating a witness.

D. 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, all untrue, for needing the car: she needed to go to a CPR class, her mother had died, and she had a doctor's appointment.1RP 101, 150, 216, 251; 3RP 100. In fact, she met her friend Dana, a heroin dealer. 1RP 101-02.

Ms. Swanson had promised to return the car in two hours but returned 12 hours later. 1RP 151. Ms. Schuman was frantic with worry and said she was going to "kick [Ms. Swanson's] ass." 1RP 102, 152, 215. Ms. 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.

The four others discussed how to punish Ms. Swanson, who they knew to be untrustworthy, when she returned. 1RP 152-53, 216-17. Mr. Brown thought they should cut her hair, Ms. Schuman thought they

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[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.

should beat her up, Ms. Bertalan favored the hair cut, and Mr. Mulanax may have favored the hair cut, if he had weighed in. Id.[2]

When Ms. Swanson returned, she went to Ms. Schuman's bedroom. 1RP 253. Mr. Brown and Ms. Bertalan followed her there. 1RP 157, 218. They may have smoked crack together. 1RP 157. Mr. Mr. Brown said that Ms. Swanson was given the "choice" to "[g]et her ass kicked or get her hair cut." 1RP 222. Ms. Swanson chose her hair. 1RP 85.

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

After, Mr. Mulanax and Mr. Brown drove her to a friend's house, as Ms. Swanson requested. 1RP 87, 90. One or two days later, Ms. Swanson reported the incident to the police. 1RP 92. In response,

[2] Mr. Mulanax denied involvement or knowledge. 3RP 103, 134. Although people present during the incident gave somewhat different accounts of who did or knew what, no one testified Mr. Mulanax hit Ms. Swanson or cut her hair.

officers searched Mr. Mulanax's home and found 21 small baggies of cocaine along with two firearms. 2RP 20-22.

Mr. 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 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, but this was corrected by the Court of Appeals. Slip op. at 22.

2. Incident admitted under ER 404.

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

Ms. Bertalan arranged for Mr. Mulanax to buy drugs. 1RP 118, 119. She admitted she stole "a lot" from Mr. Mulanax, including drugs, money, and jewelry. 1RP 124-25, 185. He helped her break her heroin addiction, but she continued to use cocaine. 1RP 122-23, 185. Mr.

Mulanax did not use drugs and had never been in any trouble before meeting Ms. Bertalan. 1RP 177, 210.

In May 2011, two people Ms. Bertalan knew as drug dealers came to her motel room. 1RP 128-29. Immediately upon entering, one grabbed her, said she needed a haircut, and shaved the top of her head. 1RP 129. They left and Ms. Bertalan went to the hospital. 1RP 131.

About one week later, Ms. Bertalan went to Mr. Mulanax's house and saw one of the people who assaulted her. 1RP 132. She said Mr. Mulanax admitted his involvement, although she did not remember what he said. 1RP 133. Testimony about this incident was admitted at Mr. 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 prosecution argued to the jury that it should convict Mulanax because he committed multiple assaults against women. 3RP 23.

E. ARGUMENT

1. **The State's reliance on an inadmissible uncharged offense, which it used in closing argument to urge conviction based on the uncharged assault, denied Mr. Mulanax a fair trial and raises an issue meriting review.**

a. *This Court should accept review because the prosecutor misused ER 404(b) to seek a conviction based on harm caused in an uncharged assault.*

Courts uniformly recognize the brutal prejudice resulting from presenting the jury with evidence permitting 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). 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). 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); 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");U.S. Const. amend. 14; Const. art. I, §§ 3, 22. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial.

The danger of the jury drawing the improper inference that its job includes punishing a person for uncharged acts is palpable when the State tells the jury to do just that. Here, the prosecution convinced the

State to admit extensive evidence of an uncharged and unprosecuted allegation that Mr. Mulanax ordered cohorts to assault another woman. Then, in its closing argument, the prosecution told the jury that it should convict Mr. 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.

The Court of Appeals concluded that because the prosecutor ended these remarks by telling the jury to convict him of the "four crimes" charged, the prosecutor was not seeking a verdict based on uncharged acts. Slip op. at 11. This reasoning is illogical. The only crimes the jury *could* convict Mr. Mulanax of were those that were charged, but the State encouraged the jury to convict him of these charged offenses because of what the State claimed he did in an uncharged crime.

The State made the forbidden propensity argument when it argued about the "lives" Mr. Mulanax had "ruined" with "his assault*s*" and "his threat*s*." 3RP 23. Because Mr. Mulanax was only *charged* with assaulting or threatening *one person*, Ms. Swanson, the only available inference is the Mr. Mulanax should be punished for what happened

during the uncharged crime. Moreover, the jury knew that Mr. Mulanax had never been charged with any crime for the injuries Ms. Bertalan suffered and therefore would have the desire to see him punished for her suffering.

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. The prosecution's explicit use of ER 404(b) for an illegitimate reason should be reviewed and the Court of Appeals opinion reversed.

b. *The Court of Appeals opinion conflicts with and misapplies the modus operandi case law from this Court and the Court of Appeals.*

The court admitted testimony about a forceful assault and head-shaving suffered by Ms. Bertalan solely because this incident constituted a modus operandi. 1RP 13, 38; CP 116-18. The Court of Appeals misunderstood the law governing modus operandi and crafted a broad rule that would make allegations of another similar offense admissible in almost all cases.

First, the Court of Appeals correctly recognized that the admissibility of modus operandi evidence hinges on whether the

identity of the perpetrator is at issue in the charged crime. Slip op. at 6. For example, when the accused presents an alibi defense – and thus claims he was not present during the offense -- 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 where he admitted that he, personally, committed a highly similar ritualistic assault because he claimed he had an alibi that negated the possibility of his involvement. Id .at 357.

Likewise, when the accused person denies involvement and there are no eyewitnesses, the identity of the perpetrator is at issue. 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.

But for Mr. Mulanax, his presence at the scene of the charged crime was undisputed. 1RP 10. It happened at his house. 1RP 64, 217. Four eyewitnesses testified at trial, and each talked about the extent of his involvement in the charged offenses.

The Court of Appeals concluded that any time a person contests his involvement in the charged offense, his identity is at issue and thus modus operandi evidence may be presented. Slip op. at 9. By issuing this broad ruling, the Court of Appeals extends the modus operandi rule beyond existing precedent. This rule would make modus operandi evidence admissible any time a person does not concede his involvement. And if a person concedes his involvement, there would be few reasons to have a trial.

But as this Court explained in Gresham, ER 404(b) is intended to exclude evidence of uncharged misconduct absent a few, narrow circumstances. The modus operandi exception is intended to be construed narrowly, to apply only when the various incidents are so similar and unique as to be a signature. Gresham, 173 Wn.2d at 420-21; Foxhoven, 161 Wn.2d at 178. If modus operandi evidence was admissible anytime a person did not concede his actual involvement, even though he agreed he was present at the scene, then it would be admissible whenever a prior incident was similar enough. No case law supports such a broad interpretation of the rule.

c. *The two incidents did not contain enough similarities to be admissible as 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 Court of Appeals misunderstood the evidence showing whether Mr. Mulanax was connected to the uncharged incident involving Ms. Bertalan. It claimed that Ms. Swanson said she had heard Mr. Mulanax order "others to shave Bertalan's head and beat her up after she stole from him." Slip op. at 3. But there was no evidence that Mr. Mulanax ordered this head-shaving incident. Ms. Swanson only claimed that she knew Mr. Mulanax sent two others to the room where Ms. Bertalan was staying. 1RP 20. She never claimed there was a plan to conduct a specific type of assault against Ms. Bertalan. Mr. Mulanax's involvement in this prior incident was most certainly contested, unlike the charged incident where his presence was clear and

the only question was how much he encouraged the specific acts that occurred.

The details were different too. Two drug dealers went to Ms. Bertalan's motel room purportedly in retaliation some thefts but not due to any specific item stolen. 1RP 128-29. They grabbed Ms. 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. 1RP 128-29. Mr. Mulanax was not present for any part of the incident.

On the other hand, Ms. Swanson unexpectedly disappeared with Mary Schuman's car one day, which upset Ms. Schuman, Mr. Brown, and Mr. Mulanax. 1RP 152-53, 213. Ms. Bertalan was at Mr. Mulanax's house when this occurred. She said Mr. Mulanax favored beating up Ms. Swanson but Mr. Brown cut Ms. Swanson's ponytail with a knife and Ms. Swanson chose to have the rest of her hair cut rather than being beaten. 1RP 152, 162. Mr. Brown and Ms. Bertalan said the hair cut was Mr. 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 Mr. Mulanax was the source of the purportedly unique demand to cut hair. He was not present for the Bertalan incident. Mr. Brown was not involved in the Bertalan incident.

In the absence of evidence that Mr. 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.

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 Mr. 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.

This Court should grant review to address whether modus operandi evidence is necessarily admissible unless the accused person concedes his involvement in the charged incident, which is the rule the Court of Appeals crafted in the case at bar.

2. **Intimidating a witness requires evidence of a future threat, not a remark about a completed incident, contrary to the Court of Appeals opinion.**

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 Ms. 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.

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

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 Mr. Mulanax described his prior thoughts. 1RP 89. He did not threaten harm to Ms. Swanson in the future if she told anyone, instead said that he would not have acted as he did if he thought she would tell anyone.

The Court of Appeals viewed the statement as if it had occurred during the incident, in the course of the assault, not afterward. Slip op. at 14. But because this mistakes the context of the statement, it does not reasonably construe it.

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"). The vague remarks 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. Mr. 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. This Court should accept review

because the Court of Appeals opinion conflicts with case law describing future threats and substantial public interest favors clarifying this nebulous area of the law.

F. CONCLUSION

Based on the foregoing, Petitioner Larry Mulanax respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 19th day of March 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LARRY EUGENE MULANAX, Appellant.	)	NO. 68467-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 18, 2014

LEACH, C.J. — Larry Mulanax appeals his convictions for possession of cocaine with intent to manufacture or deliver, with a firearm allegation; assault in the second degree with intent to commit unlawful imprisonment; unlawful imprisonment; and intimidating a witness. He claims that the trial court erred by imposing a firearm enhancement when the jury found only that he possessed a deadly weapon. He also contends that his convictions for both unlawful imprisonment and second degree assault with intent to commit unlawful imprisonment violated the prohibition against double jeopardy. He challenges the admission of evidence of his prior misconduct to show modus operandi under ER 404(b) and the sufficiency of the evidence supporting his conviction for intimidating a witness. Finally, he alleges prosecutorial misconduct. We find no

merit in Mulanax's arguments about ER 404(b), sufficiency, and prosecutorial misconduct. However, the State concedes error in the firearm enhancement, and Mulanax's convictions for both unlawful imprisonment and assault with intent to commit unlawful imprisonment put him in double jeopardy. We affirm Mulanax's convictions for possession, assault with intent to commit unlawful imprisonment, and intimidating a witness. But we vacate the firearm enhancement and the conviction for unlawful imprisonment and remand for resentencing.

FACTS

In July 2011, Kaylynn Swanson, Richard Ace Brown, Mary Schuman, and Jennifer Bertalan were staying with Larry Mulanax at his home. Swanson, Bertalan, Brown, and Schumann all used illegal drugs. Mulanax provided and allowed the use of cocaine in his house.

Around noon on July 30, 2011, Schumann gave Swanson permission to borrow her car. Swanson agreed to have it back by 5:00 p.m. but did not return until after midnight. Brown, Schuman, Bertalan, and Mulanax discussed "what kind of revenge should happen." Mulanax, Brown, and Bertalan wanted to cut her hair; Schuman wanted to beat her up.

When Swanson returned, she went back to Schuman's bedroom to return her keys and explain her absence. Brown came into the bedroom and

confronted Swanson. He ordered her to undress and used his pocketknife to cut off her ponytail. Mulanax entered the room and told Swanson that she "had a choice to either have the rest of her hair cut off or get beat up really bad." Brown and Bertalan cut and shaved the rest of Swanson's hair. Brown told Swanson not to move or he would hurt her. Bertalan told Swanson, "Don't worry honey, this happened to me too." Mulanax watched and told Brown and Bertalan when to stop cutting Swanson's hair. Mulanax said to Swanson, "God, don't be so distressed. You are lucky. . . . [T]he 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." Then Mulanax took pictures of Swanson naked with her head shaved and told Swanson that the pictures were for his own use and benefit.

Swanson testified that she knew what was going to happen because she was present some time earlier when Mulanax ordered others to shave Bertalan's head and beat her up after she stole from him.[1] Swanson was present when the two individuals returned and when Mulanax paid them with crack cocaine. She later saw a photo of Bertalan with a shaved head and black eyes.

After Mulanax took photos, Brown and Mulanax drove Swanson to a friend's house at her request. Swanson said, "Ace first threatened me that if they were to think for any reason I was going to call anyone or call the police, that

[1] Bertalan testified at trial that this occurred while she was staying at a motel in Everett in May 2011.

they wouldn't let me go" and that Mulanax said, "[I]f he thought for any reason I was going to be telling anyone, that he wouldn't let me go." Two days later, Swanson reported the incident to police. In a subsequent search of Mulanax's home, police found 22 small "baggies" of cocaine, digital scales, drug paraphernalia, and two firearms. They also found the photographs of Swanson and Swanson's ponytail in Mulanax's safe. Mulanax had the keys to the safe in his pocket. Police recovered a photograph of Bertalan's shaved head on Mulanax's computer hard drive.

The State charged Mulanax with possession of a controlled substance with intent to manufacture or deliver, with a firearm allegation; second degree assault with intent to commit unlawful imprisonment; unlawful imprisonment; and intimidating a witness. Mulanax moved to exclude the evidence associated with the attack on Bertalan, but the trial court admitted the evidence under ER 404(b) for the purpose of showing a modus operandi.

The jury found Mulanax guilty as charged and also found in a special verdict that Mulanax was armed with a deadly weapon when he committed the crime of possession with intent to deliver. Mulanax appeals.

ANALYSIS

ER 404(b)

Mulanax argues that the trial court improperly admitted under ER 404(b) the "brutally prejudicial" evidence associated with the uncharged assault against Bertalan. He contends that "[t]he purported 'modus operandi' was insufficiently proven and not probative where identity was not an issue." He argues further that the prosecutor misused the evidence by urging the jury to convict Mulanax for both incidents, though one was uncharged.

Interpretation of a rule of evidence presents a question of law that we review de novo.[2] If the trial court correctly interpreted the rule, this court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion.[3] A trial court abuses its discretion if it bases its decision on untenable grounds or reasons.[4]

"ER 404(b)[5] is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity

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[2] State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

[3] Foxhoven, 161 Wn.2d at 174; State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

[4] State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

[5] ER 404(b) provides, in full:
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.

with that character."[6] Though "there are no 'exceptions' to this rule,"[7] the rule permits a court to admit prior misconduct for certain other purposes, such as proof of motive, plan, or identity.[8] To admit such evidence, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine if the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.[9] The court must conduct its analysis on the record.[10]

Evidence of prior bad acts introduced to establish a modus operandi is relevant to the charged crime "only if the method employed in the commission of both crimes is 'so unique' 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"[11] and "when the focus of the inquiry is the identity of the perpetrator, not whether the charged crime occurred."[12] The modus operandi alleged "'must

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[6] Gresham, 173 Wn.2d at 420.
[7] Gresham, 173 Wn.2d at 421.
[8] Foxhoven, 161 Wn.2d at 175; State v. Everybodytalksabout, 145 Wn.2d 456, 465-66, 39 P.3d 294 (2002).
[9] In re Det. of Coe, 175 Wn.2d 482, 493, 286 P.3d 29 (2012) (quoting Foxhoven, 161 Wn.2d at 175).
[10] Foxhoven, 161 Wn.2d at 175.
[11] Thang, 145 Wn.2d at 643 (quoting State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994)).
[12] State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003).

be so unusual and distinctive as to be like a signature.'"[13] A sufficiently unique method does not require each feature of the crime to be unique; seemingly common features, especially when combined with a lack of dissimilarities, can combine to create a unique signature.[14] But when too many dissimilarities exist, the evidence should be excluded.[15] "'Whether the prior offenses are similar enough to the charged crime to warrant admission is left to the discretion of the trial court.'"[16]

Following the State's offer of proof, the trial court (1) found by a preponderance of the evidence that the prior misconduct involving Bertalan occurred; (2) identified the purpose for the evidence as modus operandi; (3) determined that the evidence was relevant to prove Mulanax's identity and involvement in the charged crime; and (4) found that the evidence of the prior act, though undoubtedly prejudicial, was not more heinous than the charged crime, and consequently that its probative value outweighed its prejudicial effect.

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[13] Foxhoven, 161 Wn.2d at 176 (internal quotation marks omitted) (quoting State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984)).

[14] Coe, 175 Wn.2d at 494 (citing Thang, 145 Wn.2d at 644); see also State v. Bradford, 56 Wn. App. 464, 468-69, 783 P.2d 1133 (1989) (finding sufficient similarities where burglaries committed by two black males driving small blue pickup truck, one or both wearing baseball caps, at night in mobile home display lots, using channel lock pliers to twist off doorknobs); State v. Jenkins, 53 Wn. App. 228, 237, 766 P.2d 499 (1989) (finding sufficient similarities where burglaries committed by offender driving brown Camaro, at only ground floor units, with partner, using pipe wrench to open door).

[15] Coe, 175 Wn.2d at 494 (citing Thang, 145 Wn.2d at 645).

[16] Foxhoven, 161 Wn.2d at 177 (quoting Jenkins, 53 Wn. App. at 236).

The court found "strong" similarities between the prior act and the charged crime and that they supported the ruling.

Mulanax first contends that because he does not dispute his presence at the assault on Swanson, evidence of a prior act has little or no probative value to prove identity. The defendant in State v. Fualaau[17] argued that because the State had two live witnesses who would testify that he committed the current offenses, the evidence of prior crimes was not necessary to prove identity and should be excluded. Because Fualaau's alibi defense "placed the question of identity squarely at issue," however, the trial court admitted the evidence, and we affirmed the trial court's ruling.[18]

In State v. Vy Thang,[19] the trial court admitted evidence of the defendant's prior assault conviction for the purpose of proving identity at his murder trial. Like Mulanax, Thang denied committing the crime but admitted he was present at the scene.[20] The Washington Supreme Court held that the trial court erred in admitting evidence of the prior crime, but not because Thang's undisputed presence destroyed the evidence's relevance to show identity. Rather, the admission was erroneous because the merely general similarities between the

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[17] 155 Wn. App. 347, 353-54, 228 P.3d 771 (2010).
[18] Fualaau, 155 Wn. App. at 354, 356.
[19] 145 Wn.2d 630, 640-41, 41 P.3d 1159 (2002).
[20] Thang, 145 Wn.2d at 640-41.

two crimes were not sufficiently signature-like to constitute modus operandi.[21] Whether the defendant presents an alibi defense or concedes he was present, denial of all involvement in a crime admittedly committed puts the identity of the perpetrator at issue. In each instance, the defendant necessarily asserts that someone else committed the crime. Thus, evidence of a prior bad signature-like act by the defendant becomes relevant. The trial court properly interpreted ER 404(b) to conclude that Mulanax's undisputed presence did not destroy the relevance of evidence of his prior act offered to show modus operandi.

Our inquiry does not end with relevance, however. As we noted in Fualaau, "The critical determination for the trial court to make is whether there are sufficient similarities between the crimes to make evidence of the prior crime probative of the defendant's identity as the perpetrator of the crime charged."[22] In Fualaau, both the currently charged and prior assaults shared a number of similar features consistent with a ritual punishment. We concluded that the distinctive ritualistic qualities shared by the two crimes made evidence that the

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[21] Thang, 145 Wn.2d at 643-45 (concluding that theft of a purse and jewelry, elderly victims who were kicked, perpetrator's allegedly similar remarks were not probative of modus operandi, especially where there was no geographic or temporal proximity, and collecting cases showing absence or presence of modus operandi).

[22] Fualaau, 155 Wn. App. at 357.

defendant committed the first "strongly probative of his identity as the perpetrator of the second, notwithstanding any dissimilarities between the two events."[23]

Though it does not demonstrate a particular tradition or ritual as in Fualaau, the record here reveals distinctive and unusual similarities between the earlier uncharged assault against Bertalan and the charged assault against Swanson. Both involved young women with drug addictions who appeared to be under Mulanax's patronage and/or control. Others carried out both assaults, allegedly at Mulanax's direction, to punish the unauthorized taking or holding of property. Both involved the cutting and shaving of the victim's hair, accompanied by a beating or the threat of a beating. Both women said they were warned not to go to the police. Mulanax admitted photographing both women sometime after their heads were shaved, and police seized evidence of both incidents from Mulanax's safe and computer hard drive. Moreover, there was temporal and geographic proximity between the incidents: Bertalan's took place in Everett, sometime around May 2011; Swanson's occurred in Stanwood, a city in the same county, at the end of July 2011.[24] Having found by a preponderance of the evidence that the assault on Bertalan occurred, the trial court did not abuse its

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[23] Fualaau, 155 Wn. App. at 358.

[24] See also Russell, 125 Wn.2d at 68 (allowing joinder of two signature-like murders occurring a few weeks apart in Bellevue-Kirkland area). Contra Thang, 145 Wn.2d at 644 (finding proximity factor not satisfied when crimes committed 18 months apart, on opposite sides of state).

discretion in concluding that the peculiar similarities between the two incidents warranted admission of the prior act under ER 404(b).

We reject Mulanax's assertion that the prosecutor's references to this evidence in closing argument were improper and "tainted the trial." The prosecutor argued in closing that Mulanax "ruined lives with his assaults. He ruined lives with his threats." The prosecutor then urged the jury to "take control away from him" and "find him guilty of all four crimes." Mulanax argues that this was reversible error because the prosecutor "urge[d] a conviction based on Mulanax's propensity or potential for dangerous behavior," violating ER 404(b)'s "categorical bar" against propensity evidence.

During closing argument, the prosecutor has "wide latitude in drawing and expressing reasonable inferences from the evidence."[25] The prosecutor's comments here were tied to the properly admitted evidence at trial. "[A]ll four crimes" referred to the four charged crimes. Mulanax fails to demonstrate prosecutorial misconduct.

Sufficiency: Intimidating a Witness

Mulanax also challenges the sufficiency of the evidence supporting his conviction for intimidating a witness. He contends that his remarks to Swanson after the incident were "about past events, where [he] described his prior

[25] State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

thoughts" and do not show an intent to prevent Swanson from reporting the crimes. He also argues that the remarks are vague and "do not express the required intent to inflict harm in the future essential for a true threat."

Courts review constitutional questions de novo, and in a case involving pure speech engage in an independent review of the record to ensure a conviction is not a "'forbidden intrusion on the field of free expression.'"[26] RCW 9A.72.110(1) defines the offense of intimidating a witness as the use of a threat against a current or prospective witness to influence testimony, induce the witness to elude legal process or absent herself, or not report the offense. "Importantly, only threats that are 'true' may be proscribed."[27] Our Supreme Court has adopted an objective test of what constitutes a "true threat": "'[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."[28] This objective standard focuses on the speaker, who need not

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[26] State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010) (internal quotation marks omitted) (quoting State v. Kilburn, 151 Wn.2d 36, 49-50, 84 P.3d 1215 (2004)).

[27] Schaler, 169 Wn.2d at 283.

[28] Kilburn, 151 Wn.2d at 43 (alteration in original) (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)).

actually intend to carry out the threat: "It is enough that a reasonable speaker would foresee that the threat would be considered serious."[29]

Sufficiency of the evidence also presents a question of constitutional magnitude that a defendant may raise for the first time on appeal.[30] Sufficient evidence supports a conviction if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.[31] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence.[32] A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.[33] We do not review issues of credibility or persuasiveness of the evidence.[34]

To define the element of threat in the offense of intimidating a witness, the trial court instructed the jury as follows:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury to the person threatened or to any other person . . . .

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[29] Schaler, 169 Wn.2d at 283.
[30] State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995).
[31] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).
[32] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[33] State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).
[34] Fiser, 99 Wn. App. at 719.

> 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.

Mulanax relies on State v. Brown,[35] where the defendant said in a phone conversation that he "had thought about shooting" the judge who sentenced him for driving under the influence of an intoxicant. Mulanax argues that, like Brown's remarks, his words were not true threats but only past thoughts, which the State may not criminalize.[36]

Brown is inapposite. Mulanax was not describing his past thoughts about an earlier event to an uninvolved third party. While Brown forced Swanson to submit to head-shaving and nude photographs, Mulanax told her that "the last two girls" he'd seen this happen to, "they beat the living hell out of too." Swanson had seen a photograph of Bertalan with a shaved head and black eyes. Mulanax also said that "if he thought for any reason [she] was going to be telling anyone, that he wouldn't let [her] go." Given the context of the statements, a reasonable person in the speaker's position would foresee that Mulanax's statements would be interpreted not as past thoughts but as a serious expression of intention to

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[35] 137 Wn. App. 587, 589-90, 154 P.3d 302 (2007).
[36] See Brown, 137 Wn. App. at 591-92.

carry out a threat of bodily harm. A reasonable juror could have found that Mulanax made the statements to influence Swanson against reporting the crime. Sufficient evidence supports Mulanax's conviction.

Finally, Mulanax argues that by not including the words "true threat" in the "to-convict" instructions, the trial court omitted an "essential element" of the offense, thereby diluting the State's burden of proof. But the definition of an element is not the element itself. "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."[37] In its jury instructions, the trial court correctly stated the requirement of a serious expression of intention to inflict bodily harm. We affirm Mulanax's conviction for intimidating a witness.

Prosecutorial Misconduct

In her closing argument, the prosecutor characterized the law of accomplice liability as "the easiest way to think of this is sort of in for a penny, in for a pound." Mulanax contends that this statement misrepresents the law and constitutes prosecutorial misconduct.[38] Because Mulanax did not object to the

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[37] State v. Tellez, 141 Wn. App. 479, 483, 170 P.3d 75 (2007); see also State v. Allen, 176 Wn.2d 611, 628, 294 P.3d 679 (2013).

[38] See In re Pers. Restraint of Wilson, 169 Wn. App. 379, 392, 279 P.3d 990 (2012) (finding prejudicial cumulative error that included the prosecutor's use of the "now-discredited argument of 'in for a penny, in for a pound'"), review denied, No. 87901-0 (Wash. Mar. 1, 2013).

alleged misconduct at trial, he cannot raise this issue on appeal unless the misconduct was "so flagrant and ill intentioned" as to cause enduring prejudice that could not have been cured by instruction to the jury and had a substantial likelihood of affecting the verdict.[39]

Though we have characterized the "in for a penny" explanation as "discredited," these remarks are not the type of comments that the Washington Supreme Court has found to be inflammatory.[40] In the two cases Mulanax cites in support of his position, In re Personal Restraint of Wilson[41] and State v. Cronin,[42] the prejudicial error that this court and the Supreme Court found was not primarily the "in for a penny" remark, but rather the improper arguments, erroneous instructions,[43] and "meager evidence" supporting the accomplice convictions.

Here, the prosecutor followed the general "in for a penny" illustration with a specific application of the law:

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[39] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

[40] Emery, 174 Wn.2d at 763 (collecting cases where prosecutor's inflammatory comments prejudiced defendant); see also State v. Monday, 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011) (holding prosecutor's appeal to racial bias was improper and prejudicial).

[41] 169 Wn. App. 379, 392, 279 P.3d 990 (2012), review denied, No. 87901-0 (Wash. Mar. 1, 2013).

[42] 142 Wn.2d 568, 578-79, 14 P.3d 752 (2000).

[43] Prosecutors in both cases stated that accomplice liability attaches when the defendant knows that he or she is aiding in the commission of any crime, not "the" crime charged, as the statute requires. In Wilson, the obsolete jury instruction likewise said "a crime." 169 Wn. App. at 390.

> 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 [Swanson] 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 . . . because it all happened under his supervision.

This stated the law of accomplice liability correctly. The jury also received proper instruction from the trial court. We reject Mulanax's prosecutorial misconduct claim.

Double Jeopardy

Mulanax asserts that his convictions for both unlawful imprisonment and assault in the second degree with intent to commit unlawful imprisonment violate the prohibition against double jeopardy. According to Mulanax, "The unwanted touching necessary to prove the assault charge was the same evidence used to prove the restraint element of the unlawful imprisonment allegation."

A double jeopardy claim presents a question of law reviewed de novo.[44] The guaranty against double jeopardy in the United States and Washington State Constitutions protects against multiple punishments for the same offense.[45] A defendant may raise a double jeopardy challenge for the first time on appeal.[46] Multiple convictions may constitute a double jeopardy violation even when

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[44] State v. Frodert, 84 Wn. App. 20, 25, 924 P.2d 933 (1996).
[45] State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).
[46] State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

sentences run concurrently because separate convictions implicate other adverse collateral consequences.[47]

Within constitutional limits, a legislature has the power to define prohibited conduct and to assign punishment.[48] To analyze a double jeopardy claim, a court must determine what punishments the legislative branch has authorized and if it intended to impose separate punishments for the acts that led to the defendant's convictions.[49] This court applies a three-part test to determine if the legislature intended to impose multiple punishments for the same criminal conduct.[50] First, the court examines the statutory language to determine if it expressly authorizes multiple convictions for a single act.[51] Second, if the relevant statutes do not reveal an express intent to impose multiple punishments, Washington courts apply a "same evidence test" that is similar to the rule set forth in Blockburger v. United States:[52] offenses are the "same offense" for

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[47] Calle, 125 Wn.2d at 773-74.

[48] Calle, 125 Wn.2d at 776.

[49] Calle, 125 Wn.2d at 776 (citing Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)); State v. Baldwin, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003).

[50] State v. Martin, 149 Wn. App. 689, 698, 205 P.3d 931 (2009); see also Calle, 125 Wn.2d at 776-80.

[51] Calle, 125 Wn.2d at 776; Martin, 149 Wn. App. at 698. RCW 9A.52.050, where the legislature explicitly provided for cumulative punishments for crimes committed during a burglary, is an example of this express authorization.

[52] 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

purposes of double jeopardy when the crimes are the same in fact and in law.[53] "Offenses are the same in fact when they arise from the same act or transaction. They are the same in law when proof of one offense would also prove the other."[54] The Washington Supreme Court has emphasized that when courts apply the Blockburger-"same evidence" test, they must compare elements of the offenses not in the abstract, but as charged and proved at trial.[55]

Third, when two offenses satisfy the Blockburger-"same evidence" test, courts look for any evidence of contrary legislative intent that would rebut the presumption that multiple convictions are appropriate.[56] Where the degree of one offense depends on conduct constituting a separate offense, the merger doctrine may help determine legislative intent, and the court will examine if the commission of the "included" crime had an independent purpose or effect from the other crime.[57] "[W]hen separately criminalized conduct raises another offense to a higher degree, we presume that the legislature intended to punish

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[53] State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

[54] Martin, 149 Wn. App. at 699 (citing Calle, 125 Wn.2d at 777-78).

[55] In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 100 P.3d 291 (2004); see also Martin, 149 Wn. App. at 699-700.

[56] Calle, 125 Wn.2d at 780.

[57] State v. Freeman, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005); Martin, 149 Wn. App. at 699.

both offenses only once, namely, for the more serious crime with the greater sentence."[58]

The State relies heavily on State v. Frohs,[59] in which this court considered a challenge to separate convictions for assault in the fourth degree and unlawful imprisonment and affirmed both convictions. Important facts in Frohs distinguish it. The assault was in the fourth degree and was therefore the lesser offense. It was not predicated on the unlawful imprisonment; the court emphasized that the defendant had already assaulted and injured the victim before he told her she would be shot if she tried to leave.[60]

We consider State v. Leming[61] more analogous. There, the jury found defendant Leming guilty of multiple charges that included felony harassment and second degree assault "predicated on felony harassment."[62] The court noted that to prove the felony harassment charge, "the State had to prove that Leming (1) threatened to kill [the victim] and (2) that she feared he would carry out the threat."[63] To prove the assault in the second degree charge, the State had to

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[58] State v. Leming, 133 Wn. App. 875, 882, 138 P.3d 1095 (2006) (citing Freeman, 153 Wn.2d at 772-73).

[59] 83 Wn. App. 803, 804-05, 924 P.2d 384 (1996).

[60] Frohs, 83 Wn. App. at 815. The court continued, "We doubt that [the victim] would agree that she suffered no separate injury from the assault that was distinct from the injury of unlawful restraint." Frohs, 83 Wn. App. at 815.

[61] 133 Wn. App. 875, 138 P.3d 1095 (2006).

[62] Leming, 133 Wn. App. at 880.

[63] Leming, 133 Wn. App. at 889.

prove that Leming assaulted his victim "by intending to place her in fear that he would carry out his threat to kill her. In short, the State had to prove the same facts for both crimes, namely, that Leming committed felony harassment."[64] The court held that these two convictions "predicated on the same acts of felony harassment" resulted in multiple punishments for the same offense and thereby violated Leming's federal and state constitutional rights by putting him in double jeopardy.[65] The court reversed Leming's conviction for felony harassment, the lesser offense, because "the felony harassment conviction was incidental to the second degree assault conviction."[66]

The State charged Mulanax with an assault that was raised to the second degree by intent to commit unlawful imprisonment. The lesser offense is not the assault, as in Frohs, but the unlawful imprisonment.[67] An abstract examination of the elements of assault and of unlawful imprisonment does satisfy the "same evidence" test; proof of an assault is not necessary to prove unlawful imprisonment.[68] But as in Leming, where the two convictions were predicated on the same acts of felony harassment, here the two convictions are predicated on the same act of unlawful imprisonment. This violates the prohibition against

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[64] Leming, 133 Wn. App. at 889.
[65] Leming, 133 Wn. App. at 889.
[66] Leming, 133 Wn. App. at 887.
[67] Assault in the second degree is a class B felony. RCW 9A.36.021(2)(a). Unlawful imprisonment is a class C felony. RCW 9A.40.040(2).
[68] Frohs, 83 Wn. App. at 814.

double jeopardy. We affirm Mulanax's conviction for assault with intent to commit unlawful imprisonment but vacate his conviction for unlawful imprisonment as the lesser offense.[69]

Firearm Enhancement

The jury found that Mulanax was armed with a deadly weapon at the time of the commission of the crime of possession with intent to deliver a controlled substance. The trial court imposed a firearm enhancement of 36 months. The State concedes that this was erroneous. When the trial court instructs the jury on a specific enhancement, the court is bound by the jury's finding.[70] Here, the jury verdict authorized only a deadly weapon enhancement, not the more severe firearm enhancement. We remand for resentencing consistent with the jury's finding of a deadly weapon enhancement.[71]

CONCLUSION

Because the trial court properly admitted ER 404(b) evidence to show modus operandi, sufficient evidence supported Mulanax's conviction for intimidating a witness, and Mulanax fails to show any prejudicial error in the prosecutor's closing argument, we affirm his convictions for possession of cocaine with intent to deliver, assault in the second degree with intent to commit

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[69] See Martin, 149 Wn. App. at 701.
[70] State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913 (2010).
[71] Williams-Walker, 167 Wn.2d at 897.

unlawful imprisonment, and intimidating a witness. But we vacate Mulanax's conviction for unlawful imprisonment and the firearm enhancement and remand for resentencing.

Leach, C. J.

WE CONCUR:

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68467-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent John Juhl, DPA
Snohomish County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

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Date: March 19, 2014