No. 71967-0-I

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JENNIFER MARKWITH, APPELLANT

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Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-1-00174-0

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# SUPPLEMENTAL BRIEF OF RESPONDENT

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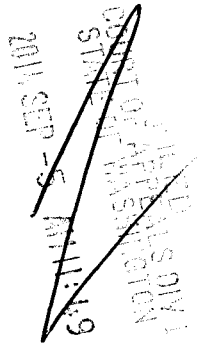

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A. INTRODUCTION

This Court ordered the parties to submit supplemental briefing that discusses the cases of State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2001), *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013), and *State v. Middleworth*, 179 Wn. App. 1025, 2014 WL 470734 (2014), and these cases' application to the double jeopardy issue in the instant case.

B. ARGUMENT

a) ***State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2001).**

The defendant in *State v. Mutch* was convicted of five counts of second degree rape and one count of second degree kidnapping. *Id.* at 652. The defendant contended that his convictions for five counts of rape violated double jeopardy because the jury instructions were vague and allowed for the possibility that the jury had convicted him of all five counts based on a single act. *Id.* at 662. The jury instructions were flawed because "they failed to include sufficiently distinctive 'to convict'



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instructions or an instruction that each count must be based on a separate and distinct criminal act." *Id.* at 662.

The jury instructions in the instant case did not contain *separate and distinct criminal act* language to distinguish between the charge of assault in the second degree and the charge of reckless endangerment. CP 41, 46. But this circumstance is unlike the circumstance in *Mutch*, where the defendant was charged with five identical counts and the corresponding five *to-convict* instructions were also nearly identical. *Id.* at 662. In the instant case, Markwith was charged with two very distinct crimes, and the *to-convict* jury instructions corresponding to each offense were distinct, and each instruction contained an element not contained in the other. CP 41, 46.

The Court in *Mutch* wrote that:

> [F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant potentially received multiple punishments for the same offense. "In order to violate federal and state double jeopardy standards, there must be multiple punishments for the 'same offense.'"

*Mutch* at 663, quoting *State v. Noltie*, 116 Wn. 2d 831, 848, 809 P.2d 190 (1991).



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The *Mutch* Court reaffirmed that when "'reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court.'" *Mutch* at 664, quoting *Noltie* at 848-49. The *Mutch* court explained that the reviewing court should consider the instructions, arguments and evidence and determine whether it was manifestly apparent to the jury that each count was based on a separate act and that the State was not seeking to impose multiple punishments for the same offense. *Mutch* at 664.

But, in the instant case, the State contends that this language from *Mutch* should be viewed in the context to which it applied. In the instant case, the defendant was charged with two distinct crimes, reckless endangerment and assault in the second degree, whereas in *Mutch*, the defendant was charged with five identical counts of a single crime, second degree rape. Thus, the need to have jury instructions that clearly distinguished the separate counts in *Mutch* provided the context of the *Mutch* Court's analysis and discussion, but this context is distinct from the context of the instant case. The State contends that, which the legal principles are consistent between the two cases, the factual context of



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*State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013), is more appropriately applied to instant case.

**b) *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013).**

The defendant in *Land* alleged a double jeopardy violation after he was convicted of one count of child molestation and one count of child rape, where each offense was committed against the same victim in the same charging period. *Land* at 597-98. As in *Mutch*, the jury instructions did not include *separate and distinct act* language to distinguish the two offenses. *Id.* Land contended that the duel convictions violated double jeopardy because it was possible that they were based upon the same act. *Id.* at 598.

The *Land* court noted that:

> *Mutch* and its antecedents [footnote omitted] that address the potential problem of double jeopardy arising out of jury instructions are all cases where the State has charged more than one identically worded count of the same offense in the same charging period. Here, the two convictions are for different offenses that do not have identical elements.



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*Land* at 599. Thus, the context of *Land* is similar to the context of the instant case, where Markwith was convicted of two offenses do not have identical elements.

The *Land* court first analyzed and discussed the possibility that a single act could constitute both the offense of child molestation and the offense of child rape, but the court ultimately found that examination of the information, instructions, arguments and evidence in the case made it manifestly apparent to the jury that the State did not intend to impose separate punishments for the same offense. *Id.* at 600-03. When discussing the potential for double jeopardy, however, the *Land* court noted as follows:

> Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation. And this is so even if the penetration and molestation allegedly occur during a single incident of sexual contact between the child and the older person. The touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point, the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape.

*Land* at 600. Thus, the Land court recognized that a single episode of criminal conduct can give rise to a "separately punishable conviction" for two crimes, even when the two crimes share elements. *Id.* Prior to



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making this point, the *Land* court acknowledged that "[t]wo offenses are not the same when 'there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.'" *Id.* at 599, quoting *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

In the instant case, the crime of assault in the second degree and the crime of reckless endangerment each contain an element not contained in the other. RCW 9A.36.021(1)(c); RCW 9A.36.050(1). The jury was instructed that the crime of assault in the second degree required the State to prove that the defendant used a deadly weapon to complete the crime. CP 41. The crime of harassment did not require the use of a deadly weapon. CP 46. The assault charge required the State to prove that the defendant intended "to create... apprehension and fear of bodily injury," but the harassment charge did not contain this element. CP 40, 41, 46. The assault charge required proof that the defendant's assaultive act "in fact" created "reasonable apprehension and imminent fear of bodily injury[,]" but the harassment charge did not contain this element. CP 40, 41, 46. Likewise, the charge of harassment requires proof that the defendant's "reckless conduct created a substantial risk of death or serious



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physical injury[,]" but the offense of assault does not require any risk of actual injury – instead, to prove assault the victim need only fear injury, even if such injury were in fact impossible. CP 40, 41, 46.

Thus, is does not follow that proof of reckless endangerment would "*necessarily* [emphasis added] prove" the offense of assault or that proof of the offense of assault would "*necessarily* [emphasis added] prove" the offense of reckless endangerment. *Land* at 599, quoting *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

The *Land* court considered the possibility that potentially facts might exist wherein duel convictions for child molestation and child rape could violate double jeopardy, as follows:

> But where the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person's sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape. In such a case, the two offenses are not separately punishable. They are the same *in fact and in law* because all the elements of the rape *as proved* [emphasis addes] are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape. [Citations omitted].

*Land* at 600. But it does not necessarily follow from this reasoning that a crime of assault, *as proved*, will also *necessarily* prove the crime of



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reckless endangerment. If a person intentionally inflicts severe bodily injury upon another, then the crime of reckless endangerment would *necessarily* be consumed by the assault, because to intentionally inflict severe bodily injury would *necessarily* create a substantial risk of severe bodily injury.

But *as proved* in the instant case, the crime of reckless endangerment was not consumed by the crime of assault in the second degree. Proof that Markwith used a deadly weapon, a car, to create an apprehension and fear of bodily injury does not necessarily prove that the victim was in actual danger. Nor does proof that the victim (or another person) was in actual danger prove that the victim actually apprehended and feared bodily injury.

**c) *State v. Middleworth*, 179 Wn. App. 1025, 2014 WL 470734 (2014).**

In an unreported decision, the court in *State v. Middleworth*, 179 Wn. App. 1025, 2014 WL 470734 (2014), reasoned that "[a] 'defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law." *Id.* at 3, quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). The *Middleworth* court held

that "[c]hild molestation is not a lesser included offense of child rape." *Id.* at 3, citing *State v. French*, 157 Wn.2d 593, 610-11, 141 P.23d 54 (2006). Thus, by the *Middleworth* court's reasoning, "a conviction for both child molestation and child rape does not violate double jeopardy." *Middleworth* at 3, citing *French* at 611, n. 11.

The *Middleworth* court criticized the Land decision and noted that the Land decision is the only case that had applied the separate and distinct acts jury instruction requirement to different offense rather than to duplicate counts of the same offense. *Middleworth* at 4, n. 5. The *Middleworth* court reasoned that Land had "conflated the identical 'in fact and in law' test and is in conflict with French." *Id.* at 4.

But the *Middleworth* decision was specific to the charges of molestation and rape, rather than reckless endangerment and assault as in the instant case, and the holding in *Middleworth* was specific to its facts, where there was no allegation of oral-genital contact that would give rise to the analysis undertaken by the Land court. *Id.* at 4.

For this reason, the State respectfully refers the Court to the State's discussion of State v. Land, above, for analysis and reasoning applicable to the facts of the instant case.



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C. CONCLUSION

Because proof of either the offense of reckless endangerment or assault as determined from the instructions, evidence, and arguments in the instant case did not necessarily require proof of the other offense, double jeopardy was not violated by duel convictions for both offenses in this case.

DATED: September 4, 2014.

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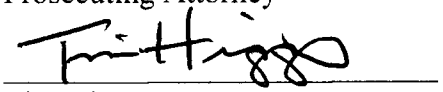

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