NO. 45198-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANDRE JONES TAYLOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 12-1-00700-6

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On February 28, 2012, the Pierce County Prosecuting Attorney (State) filed an Information charging Andre Taylor, the defendant, with one count of assault in the first degree, committed by alternative means, and one count of attempted kidnapping in the second degree. CP 1-2. The State also alleged that the defendant acted with sexual motivation. *Id.*

The case was assigned to Hon. Linda Lee for trial. 1 RP 2[1]. Before testimony began, the court conducted a hearing, pursuant to CrR 3.5, regarding the defendant's statements. *See*, CP 239-243. After hearing all the evidence, the jury found the defendant guilty of the lesser degree of

[1] The VRP are numbered by volume, each of which begins with page 1. The State will refer to the VRP by volume and page; e.g. 1 RP 2. Some volumes refer to the date of the proceeding. Where the VRP is labeled by date the State will refer to the date; e.g. 6/12/2013 RP 2.

assault in the second degree in Count I, and attempted kidnapping in the second degree as charged in Count II. CP 473, 478. The jury found that both crimes were sexually motivated. CP 480, 482.

The court sentenced the defendant to 84 months to life in prison on Count I, and 72 months in prison on Count II. CP 583. The defendant filed a timely notice of appeal. CP 594.

2. Facts

On February 16, 2012, HH was working the graveyard shift as a floor manager at a McDonald's restaurant at South 72nd and Pacific Ave. in Tacoma, Washington. 4 RP 5, 8. HH's ride home was unavailable, so when her shift ended in the early morning hours of February 17, she decided to walk to her manager's nearby home. 4 RP 9. She was still wearing her McDonald's uniform. 4 RP 11.

As she walked, HH noticed a pick-up truck following her. 4 RP 12. The truck pulled into a nearby parking lot and stopped, facing the sidewalk. 4 RP 13. As HH passed in front of the truck, the driver (the defendant) made a gesture, as if trying to get her attention. 4 RP 15. She ignored him and crossed the street to get away from him. 4 RP 15. HH walked through a Pierce Transit center and a parking lot where several businesses were located. All were closed. 4 RP 18, 19-20.

When HH walked past another closed business, the truck came around the corner and struck her without warning. 4 RP 21, 29. The defendant driving the truck did not honk, brake, or swerve. 4 RP 31. The

truck knocked her down and under the truck. 4 RP 30. The defendant then stopped the truck and backed up. 4 RP 31.

The defendant got out and tried to lift HH from the pavement. 4 RP 32. HH struggled with the defendant and cried out for help. 4 RP 3, 33. Her phone had been knocked from her hand and was out of reach. 4 RP 34. A passing pedestrian stopped to see what was going on. 4 RP 38. HH was able to get her phone back and call 911. 4 RP 41. The defendant fled the scene. 4 RP 47.

Medical aid arrived. 4 RP 50. HH was transported to St. Joseph's Hospital for treatment. *Id.* Because her injuries were so severe, HH was stabilized and transported to Tacoma General Hospital. *Id.*

HH suffered multiple injuries from the defendant running her down. The ball joint in her right hip was shattered. 4 RP 54, 7 RP 10. She had a broken collarbone, three broken ribs, and 5 broken vertebrae. 4 RP 54, 7 RP 12. Her treatment required separate surgeries on her shoulder and her hip. 4 RP 54. HH was hospitalized for 3 weeks and spent an additional 2 weeks at a rehabilitation facility. 4 RP 54.

Police investigation identified the defendant and his truck. 5 RP 181-183, 190, 6 RP 17. Police arrested the defendant and interviewed him. 6 RP 27. The defendant admitted that he had followed the victim and struck her with his truck. 6 RP 29, 33. He admitted that, if he had been in the victim's place, he would have been afraid that the defendant's intent was to abduct, rape, and kill the victim. 6 RP 44.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE ELEMENTS OF ASSAULT.

a. The defendant failed to preserve this issue for appeal.

Generally, a party who fails to object to jury instructions below waives any claim of instructional error on appeal. ***State v. Knight***, 176 Wn. App. 936, 309 P.3d 776 (2013); *see*, RAP 2.5(a). If the defendant is claiming the exception under RAP 2.5(a)(3), the defendant has the burden to demonstrate that the error is both manifest and is of constitutional magnitude. ***Knight*** at 951, citing ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Whether an error is "manifest" requires the defendant to show "actual prejudice". ***Knight***, 176 Wn. App. at 951. The appellate court determines "actual prejudice" by looking at the asserted error to see if it had "practical and identifiable consequences" at trial. *Id.*

Instructions that omit an element can be a constitutional violation. *See*, ***State v. Aumick***, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); ***State v. Rivas***, 168 Wn. App. 882, 278 P.3d 686 (2012). However, as long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of

constitutional magnitude. ***State v. Stearns***, 119 Wn.2d 247, 830 P.2d 355 (1992).

Here, the defendant had several opportunities to propose what he now says would be a "correct" elements instruction of assault in the second degree, or to object to Instruction 16. He did not propose one. *See*, CP 407-425. In fact, he agreed to the language of Instruction 16. 11(afternoon) RP 23. For the first time, on appeal, the defendant asserts that the instruction is defective.

It is likely that trial counsel failed to object for the reasons outlined below: that Instruction 16 is from RCW 9A.36.021 and WPIC 35.12; that Instruction 9 told them that all assaults require intent; and Instruction 1 told them "you must consider the instructions as a whole" (CP 435).

b. <u>The instructions included all elements of assault</u>.

Alleged errors in jury instructions are reviewed *de novo*. *See*, ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *see also,* ***State v. Pirtle***, 127 Wn.2d 628, 656–57, 904 P.2d 245 (1995). A jury instruction that relieves the State of its burden of proof is reversible error. ***Pirtle***, 127 Wn.2d at 656.

In this case, the language of Instruction 16 was verbatim from WPIC 35.12, which, in turn, uses the exact language of RCW 9A.36.021(1)(a)and (c):

> To convict the defendant of the crime of assault in the second degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 17th day of February, 2012, the defendant:
> (a) intentionally assaulted H.H. and thereby recklessly inflicted substantial bodily harm; or
> (b) assaulted H.H. with a deadly weapon; and
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

CP 450. The Legislature has the power to define the elements of a crime when it enacts a criminal statute. *See*, ***State v. Williams***, 162 Wn.2d 177, 183, 170 P.3d 30 (2007). The Legislature did not include a mental state for assault in the second degree with a deadly weapon, under RCW 9A.36.021(c). However, in an assault case, case law requires the State to prove the common law element of intent. ***State v. Allen***, 116 Wn. App. 454, 463–464, 66 P.3d 653 (2003).

The court instructed the jury:

> An assault is an *intentional* touching or striking of another person, that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

Instruction 9 (emphasis added). CP 443. Instruction 16, combined with Instruction 9, provided all elements of the charged crime. The jury is presumed to read the court's instructions as a whole, in light of all other instructions. ***State v. Hutchinson***, 135 Wn.2d 863, 959 P.2d 1061 (1998).

Here, the defendant did not and does not challenge the language of the assault with a deadly weapon alternative of assault in the second degree, as determined by the Legislature in RCW 9A.36.021(c). The defendant did not and does not challenge the instruction that an assault is an intentional act. The jury was correctly instructed according to statute and case law.

c. The trial court's answer to the jury's question was not erroneous.

A trial court has discretion whether to give further instructions to a jury after it has begun deliberations. ***State v. Sublett***, 156 Wn. App. 160, 231 P.3d 231 (2010), *aff'd* 176 Wn. 2d 58 (2012); *see, also*, CrR 6.15(f)(1). If the court decides to answer the jury question, the response is

reviewed *de novo* as any other jury instruction. *See, e.g.*, ***State v. Levy***, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Here, the court had properly instructed the jury, including the elements in Instruction 16 and a general definition of assault, which included intent, in Instruction 9. Because both of these instructions correctly state the law, the court committed no legal error. Having properly instructed the jury, including that they must consider the instructions as a whole (CP 435), the trial court decided to avoid placing undue emphasis on one instruction. 14 RP 4. This was not an abuse of discretion.

2. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

To establish prosecutorial misconduct, a defendant must show both improper conduct and resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). If a defendant objects to improper conduct at trial, he must show that the State's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. ***State v. Embry***, 171 Wn. App. 714, 749, 287 P.3d 648 (2012).

a. Cross-examination of the defendant.

The defendant asserts that the prosecuting attorney engaged in misconduct during cross-examination of the defendant. App. Br. At 16.

During cross-examination of the defendant, the prosecuting attorney pointed out that the defendant had changed his account of the incident from his statement to police and his cellmates to trial. 11 (morning) RP 19. The prosecutor asked the defendant about defense counsel's opening statement. *Id.*, at 22. Defense counsel objected. *Id.*, at 22, 23. The court sustained the objection . *Id.*, at 24. Soon thereafter, the prosecutor asked the defendant if the defendant had discussed a subject with his attorney. *Id.* The court again sustained the defense objection. *Id.*

On appeal, the defendant fails to demonstrate how this exchange is improper, let alone misconduct. He cites no authority for how a sustained objection to a question where there was no answer was improper and prejudicial. When the objections were sustained, that was the end of the matter, unless counsel moved to strike and have the jury admonished.

b. Rebuttal argument.

Where a defendant fails to object at trial to alleged improper argument, the defendant waives a prosecutorial misconduct claim for appeal, unless the misconduct is so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. ***Emery***, 174 Wn.2d at 760–761; ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. ***State v. Monday***, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

A defendant establishes sufficient prejudice to require reversal only by showing a substantial likelihood the misconduct affected the verdict. ***Monday***, at 675 (citing ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). Even otherwise improper remarks do not require reversal, "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Most instances of improper argument can be cured by an instruction or admonishment to the jury. ***State v. Warren***, 165 Wn.2d 17, 195 P.3d 940 (2008) is an excellent example. There, the prosecutor argued that the defendant was not entitled to the benefit of the doubt. *Id.*, at 25. Defense counsel objected and the trial court correctly re-instructed and admonished the jury. 165 Wn. 2d at 25. The Supreme Court held that the instruction cured this fundamental misrepresentation. *Id.*, at 28.

Here, the defendant did not object at any time during the State's closing argument. For the first time, on appeal, the defendant contends that the prosecutor misstated the law in rebuttal. App. Br, at 17. The prosecutor argued:

> [Defense counsel]suggested that I said Assault in the Second Degree did not require intent. That was her argument, that I, for some reason, said it didn't require intent. Well, I said in my opening statement and I said in my closing statement that that's the sole issue in this case. It applies to every assault. She said that her client clearly

> committed Assault 3. That's what she said because he negligently caused injury. Well, if he committed Assault 3, then he certainly committed Assault2, because in order to commit Assault 2, the only difference is that he has to act recklessly instead of negligently and reckless simply requires, it's Instruction No. 18, that the Defendant knows of and disregards a substantial risk that a wrongful act may occur and that this disregards a gross deviation from the conduct that a reasonable person would exercise. So, at a minimum, she is acknowledging that he is guilty of Assault 2, right? It doesn't change the fact. If he intended to strike her with a vehicle, he is still guilty of Assault in the First Degree, and you don't reach the lesser included offenses.

6/12/2013 RP 93-94.

If the argument was improper, defense counsel could object to it and request that the jury be instructed or admonished. If argument regarding the law or instructions is improper, the logical cure is to ask the court to re-instruct or remind the jury what the correct law of the case is. *See*, ***Warren***, *supra*. Here, defense counsel could have requested that the court correct any misstatement of the law and refer to the instructions. The defendant does not demonstrate that this was misconduct and, even if so, could not have been cured by instruction. He has waived the issue of prosecutorial misconduct in closing.

Substantively, while the above argument may not be the model of clarity, the prosecutor accurately conveyed that all assaults require intent; correctly referred to and quoted the jury instructions regarding recklessness; and correctly distinguished the difference in mental states between second and third degree assaults. The prosecutor's argument "if

[the defendant] committed Assault 3, then he certainly committed Assault2" may be confusing, but it is not misconduct.

3. THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT'S STATEMENT.

a. Relevance generally.

Evidence is relevant if it tends to make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Minimal logical relevancy is all that is required. ***State v. Bebb***, 44 Wn. App. 803, 814, 723 P.2d 512 (1986). An appellate court grants the trial court the widest discretion and reviews the trial court's relevancy determinations only for manifest abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). In reviewing for manifest abuse of discretion, the appellate court will affirm the trial court's decision unless no reasonable judge would have reached the same conclusion. *See*, ***State v. Embry,*** 171 Wn. App. 714, 287 P.3d 648 (2012); ***Tatham v. Rogers***, 170 Wn. App. 76, 106, 283 P.3d 583 (2012).This is because a trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and, therefore, the prejudicial effect and relevancy of evidence. ***State v. Posey***, 161 Wn.2d 638, 648, 167 P. 3d 560 (2007).

b. The defendant's statement was relevant to issues before the jury.

Here, the charges of assault and attempted kidnapping included the element of intent. The State had also alleged sexual motivation. Intent and motivation can be proven through a defendant's admission, or through circumstantial evidence. *Mens rea* in the present case, as in many cases, was likely to be proven through circumstantial evidence, especially where the defendant was asserting that the collision was an accident. Any statement indicating his intent, or even agreeing that the circumstances were inculpatory, were probative of his *mens rea* and, therefore, relevant.

During an interview with Detectives Larsen and Bair, the following exchange occurred between Det. Larsen and the defendant:

> I then asked Taylor "What do you think she would have said, if asked, about what you were going to do to her. Taylor looked up at me and stated "Stalk. She said stalk to me." I then asked what she thought he was going to do to her. Taylor then stated "Kill, rape." I then asked "Do you think she was scared?" Taylor stated "Yes. If I was in her shoes alone I'd be scared."

CP 50.

The defendant's statement is somewhat similar to the statement made in ***State v. Grimes***, 92 Wn. App. 973, 966 P.2d 394 (1998). Grimes was charged with burglary for his role in taking property from a house. The homeowner arrived and confronted Grimes and another man. They

told her that they were moving furniture out. Grimes provided his identification and explained the other three people approached him at a grocery store parking lot and offered him $20 for the use of his truck to move their furniture.

During the trial, Grimes saw the investigating detective in the hall. Grimes asked the detective if he believed Grimes was guilty. When the detective answered yes, Grimes responded "I can believe that" or "I can live with that." *Id.*, at 977. The Court of Appeals agreed that statement was relevant because, as the trial court explained, it lent itself to two interpretations: as a confession or as an acknowledgement that the detective was entitled to his own opinion. If a confession, it contradicted Mr. Grimes's protestations of innocence. *Id.*, at 981.

Here, as in ***Grimes***, the defendant's statement could be seen more than one way. It could be seen 1) as an admission regarding his intent, by agreement; 2) as acknowledging that the victim's conclusion (or that of any other observer), from the circumstances, regarding the defendant's intent, was reasonable; or 3) that he understood the victim's reaction.

The trial court understood that the statement was the defendant's own words, regarding his own behavior. 9/24/2012 RP 6. It was not the defendant's opinion or speculation regarding another witness' testimony. *Cf.* ***State v. Montgomery***, 163 Wn. 2d 577, 591, 183 P.3d 267 (2008). It was the defendant commenting upon his own intent, guilt, or innocence. 9/24/2012 RP 8. It was relevant, admissible evidence.

c. Unfair prejudice.

While the evidence and the defendant's statement was prejudicial in the sense that it was offered to persuade the jury to arrive at one conclusion and not another, it was not unfairly prejudicial within the meaning of ER 403. The nature of the evidence was neither unduly inflammatory nor likely to prevent the jury from making a rational decision. Evidence is unfairly prejudicial when it tends to encourage a decision on an improper basis, such as an emotional one. ***State v. Stackhouse***, 90 Wn. App. 344, 356, 957 P .2d 218, *review denied*, 136 Wn.2d 1002 (1998).

Two cases further illustrate how a defendant's words may be prejudicial, but not unfairly so. In ***State v. Finch***, 137 Wn.2d 792, 975 P.2d 967 (1999), a letter written by the defendant was admitted in evidence. The letter included unkind remarks about the victims of this capital murder, including a police officer. *Id.*, at 821. Although prejudicial, it was not unfairly so. *Id.*, at 823. The letter was admissible.

In ***State v. Castellanos***, 132 Wn.2d 94, 935 P.2d 1353 (1997), the defendant was recorded selling drugs to a person wearing a "body wire". Although this was powerful evidence and the defendant's own words, it was not unfairly prejudicial in the sense of ER 403. ***Castellanos***, 132 Wn. 2d at 100.

Here, the statement and the words used were the defendant's. The characterization and words chosen were not an interjection, observation,

or opinion of a witness, but the party-opponent. His words were probative and admissible.

d. If error, it was harmless.

Where error is from violation of an evidentiary rule rather than a constitutional mandate, the defendant must show prejudice. ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. ***State v. Thomas***, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

The defendant cannot show that, absent this statement, the result of the trial would have been different; i.e., the jury would not find that he acted intentionally, or he would have been acquitted. Circumstantial evidence of his intent included that he followed HH at 4:00 a.m.. 6 RP 30, 32, 42, 10 RP 41, 44. Despite HH ignoring him, he tried to get her attention. 6 RP 29-30. He wanted "companionship" or sex with a woman. 6 RP 43, 10 RP 41, 47. He was frustrated because his girlfriend was withholding sex and he "needed to find a woman". 6 RP 159. He wanted sex that day. 7 RP 39.

He thought that HH was a prostitute. 11 RP 19. He wanted to have sex with HH. 11 RP 21. He told his cellmates that he thought HH was a prostitute and intended to rape her. 7 RP 109, 8 RP 62, 65.

He struck HH without braking, honking, or other warning. He failed to summon medical aid and fled the scene. *See*, ***State v. McDaniel***,

155 Wn. App. 829, 854, 230 P.3d 245 (2010) (flight is circumstantial evidence of consciousness of guilt.)

The defendant himself testified that he thought HH was a prostitute and that he had picked up prostitutes in that area before. 10 RP 41, 11 RP 19. He admitted that his intent was to offer her a ride home and have sex with her. 10 RP 47, 11 RP 21. He testified that, from HH's perspective, he was stalking her. He, himself, testified that he had told police that, had he been in HH's shoes, he would think that the intent would be to rape and kill her. 10 RP 64.

Even without the "rape and kill" statement, the jury had plenty of evidence to find *mens rea*. The alleged error admitting the one statement is harmless.

4. THERE WAS NO CUMULATIVE ERROR DENYING THE DEFENDANT A FAIR TRIAL.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court's weighing those errors. ***State v. Russell***,

125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

The record of this case, as a whole, shows that the defendant received a fair trial. As argued above, the court correctly admitted evidence and instructed the jury. There was no such accumulation of error to deprive the petitioner of a fair trial.

D. CONCLUSION.

The defendant received a fair trial where evidence of his own statements were properly admitted against him. The jury was properly instructed. For these, and the other reasons argued above, the State respectfully requests that the conviction be affirmed.

DATED: May 28, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-28-14
Date Signature

PIERCE COUNTY PROSECUTOR

May 28, 2014 - 1:21 PM

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