

No. 45764-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOB M. EDWARDS

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Job Edwards was prosecuted for several offenses stemming from his and his brother's efforts to defend themselves in their home against two armed robbers. In self-defense, Job shot and killed one of these robbers. Job was not charged with homicide. Rather, he was convicted of drug crimes, unlawful imprisonment, and felony harassment. Though he had no prior convictions and the substantive crimes carried a sentence of only 18 months, Job was sentenced to nearly twenty years of confinement due to nine firearm enhancements. Most of these were for guns possessed by his brother, which included the gun seized from the robbers. The convictions should be reversed for insufficient evidence or, alternatively, for errors that deprived Job of his right to a fair trial. If not, most of the firearm enhancements should be vacated.

B. ASSIGNMENTS OF ERROR

1. In violation of the due process clause of the Fourteenth Amendment, the evidence was insufficient to support all four convictions.
2. The court erred in failing to give a requested self-defense instruction, relieving the State of its burden of proof in violation of due process under the Fourteenth Amendment. CP 750.
3. The court erred in admitting prior acts evidence in violation of ER 404(b).

4. The court erred in admitting irrelevant evidence.

5. In violation of the due process clause of the Fourteenth Amendment, prosecutorial misconduct deprived the defendant of his right to a fair trial.

6. In violation of the due process clause of the Fourteenth Amendment, most of the firearm enhancements are not supported by sufficient evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Unlawful threats to kill constitute felony harassment. To be an accomplice, a person must have knowledge of the crime. Actual participation is required. Immediately following the failed robbery in their house, Job's brother, Michael, threatened to kill one of robbers. Job was not in the room when this threat was made. Based on his brother's lawful threat, the prosecutor argued that Job was guilty of felony harassment as an accomplice. Was the evidence insufficient to prove that Job was guilty of felony harassment as an accomplice or principal?

2. To be guilty of unlawful imprisonment, the restraint must be without legal authority. Under the law of self-defense in Washington, a person in lawful possession of his home may use force to detain a person who unlawfully enters or remains in the building. Job and his brother momentarily detained the surviving robber, by brandishing or pointing

guns. The man wanted to take his dead companion with him. The Edwards accommodated this request, but the man changed his mind and ran away. No one tried to stop him. Was the evidence insufficient to prove that any restraint was unlawful?

3. Job lived downstairs while his two roommates, his brother and his brother's girlfriend, lived upstairs. All three had prescriptions for oxycodone. On October 25, 2012, Michael's girlfriend agreed to sell oxycodone to two men. Shortly thereafter, the two men arrived at the house and were invited upstairs by Job's roommates. There was no evidence that Job had spoken with his roommates that day. When one of the men pulled out a gun and tried to rob his roommates of the pills, Job was downstairs in his room. Was the evidence insufficient to prove that, on October 25, 2012, Job possessed oxycodone with intent to deliver?

4. To be guilty of unlawful use of a building for drug purposes, a person must have allowed others to deal drugs from a space over which the person maintained control. Job did not allow others to deal drugs from downstairs, the space over which he maintained controlled. Did the State fail to meet its burden to prove this crime?

5. Unlawful imprisonment requires proof of knowledge and that the restraint was unlawful. Self-defense is lawful and negates these elements, requiring the State to prove the absence of self-defense. To

protect themselves and their home. Job and Michael threatened to use force against the remaining robber. The court refused to give the self-defense instruction on defense of persons or property through use of necessary force. Necessary force may include putting a trespasser in fear of physical harm. Did the court relieve the State of its burden of proof?

6. Propensity evidence is inadmissible under ER 404(b). Job objected to other acts evidence under ER 404(b), but the court admitted the evidence as relevant to accomplice liability. Did the court err in admitting propensity evidence that Job had sold drugs in the past?

7. Irrelevant evidence is not admissible. Job had a gas-mask and knife in his room. His brother had a bullet-resistant vest in his room. Overruling Job's relevance objections, the court accepted the State's theory that this evidence tended to prove Job's knowledge or intent on the drug charges. Did the court err in admitting this irrelevant evidence?

8. During closing argument, the prosecutor compared the case to the movie "Pulp Fiction." Based on the Edwards brothers' lawfully possessed firearms and other items, the State further argued that Job had been living in an "armed camp" and had been prepared to combat police. Finally, though Job was not charged with homicide, the prosecutor argued that the jury had not heard evidence that the Job was justified in the killing. Is there a substantial chance that this flagrant and ill-intentioned

misconduct affected the verdicts?

9. To impose a firearm enhancement, the State must prove that there was a connection between the firearm and the crime, and that the firearm was readily available. At the time of the purported crime of possession with intent to deliver, Job had a handgun and rifle in his room while his brother Michael had a shotgun in his room. Job was not involved in the attempted drug sale and Michael was in the living room away from his gun when the drug sale failed. Did the State fail to meet its burden to prove that Job or an accomplice were armed with these three firearms during the attempted delivery by Job's roommates?

10. As to the unlawful imprisonment charge, the jury found that Job or an accomplice were armed with three guns. One was Job's handgun, another was Michael's shotgun, and the third was the robber's gun, which Michael had secured by picking up. The evidence did not prove that Job was aware that Michael had the robber's gun. Did the State fail to prove a connection between this gun and the unlawful imprisonment count?

11. As to the felony harassment charge, the jury found that Job or an accomplice were armed with the same three guns as on the unlawful imprisonment count. Michael did not have the robber's gun at the time of the threat. Job was unaware that Michael was going to threaten the other

robber. Excluding the shotgun, did the State fail to prove that there was a connection between the guns and the purported crime of harassment?

D. STATEMENT OF THE CASE

In October 25, 2012, Job Edwards lived downstairs in a split level home in Bonney Lake. RP 144. Job's brother, Michael Edwards, and Michael's girlfriend, Krystal Freitas, lived upstairs.¹ RP 144. Other than a shared kitchen upstairs, both had complete living areas. RP 144.

Job has Charcot Marie Tooth (CMT) disorder and Factor V Leiden. Ex. 43 at 12.² CMT disorder causes nerve degeneration. Ex. 43 at 13. A person may experience sensations of burning, stabbing, numbness, and tingling. Ex. 43 at 13. The condition is progressive and becomes worse over time. Ex 43 at 17. Factor V Leiden is an inherited disorder that causes blood clotting. Ex. 43 at 15. Due to this latter condition, Job has problems with his left leg. Ex. 43 at 15. To manage these conditions, Job has been taking prescription pain medications since being diagnosed in his teens. Ex. 43 at 12, 19.

Krystal was addicted to oxycodone. RP 149, 153, 169. She began taking pain medication after a back surgery in 2006 due to an injury. RP

¹ For clarity, Job and Michael are referred to by their first names. Krystal is also referred to by her first name for consistency.

² This exhibit is a transcript of deposition testimony presented at trial. RP 426-28, 501-02.

152-53. She had prescriptions for oxycodone. RP 154; Ex. 21. She sold pills and had around 10 to 15 customers around October 2012. RP 159. Michael also had prescriptions for Oxycodone. Ex. 20. Through Krystal, he sold pills and had about five customers of his own. RP 158-59. According to Krystal, in 2012 Job would occasionally sell some of his pills to Michael, but no one else. RP 156, 158. Krystal estimated that 98 percent of sales she conducted were outside of the home. RP 167. She often sold without Michael's knowledge. RP 128, 159.

One of Krystal's regular customers was a woman named Stevie Geeson. RP 119, 438-40. Stevie³ was addicted to oxycodone. RP 83, 118. Stevie testified that she bought Percocet, which have 30 milligrams of oxycodone per pill, from Krystal. RP 438, 452-53. While some transactions occurred in Krystal's home, most usually happened outside the home at gas stations, parking lots, or down the road. RP 99, 439. Michael was sometimes with Krystal. RP 439. Job was never present. RP 439, 447. In at least one purchase that was immediately outside of the home, Krystal told Stevie to be quiet and pointed at Job's bedroom window. RP 440. While Stevie knew of Job, she first saw him in court in this case. RP 439-40.

³ For clarity, Stevie is referred to by her first name to avoid confusion.

Stevie's younger brother, Colton, testified that he sometimes accompanied Stevie when she went to buy pills from Krystal and Michael. RP 117, 128. Colton also abused oxycodone. RP 452. He bought Percocet from Krystal and got pills through Stevie. RP 117, 121-22. Until October 25, 2012, he had never seen Job and had never been inside the home. RP 124.

Stevie had a friend named Donald Thomas, who used the alias DJ. RP 87, 323. Stevie introduced DJ to Colton in 2012. RP 87, 125. DJ was a drug dealer. RP 87. DJ had robbed people before and asked Stevie if she knew of any drug dealers he could rob. RP 442. DJ told her that he made his money by robbing drug dealers. RP 445. Stevie and Colton were aware that DJ had a gun. RP 94. DJ sometimes spent the night at Colton's place. RP 90. Colton's fiancée thought DJ was dangerous and did not want him in their home. RP 126, 129.

Stevie asked Colton if he would arrange for DJ to buy Percocet from Krystal. RP 90. Colton agreed. RP 90. The plan was that DJ would buy fifty Percocet from Krystal for \$1500. RP 94. For setting up the deal, Colton would receive \$100 from DJ. RP 91.

On October 25, 2012, Colton text messaged Krystal asking about buying 50 Percocet. RP 90-91, 164. Krystal agreed to the sale. RP 91. Colton and DJ went to Krystal's house. RP 96. Colton assumed that DJ

was carrying his gun. RP 94. Colton at first led Krystal to believe that he was coming by himself. RP 165. About 30 minutes before they met, Colton told Krystal that another person was coming with him and that he would not let him come alone. RP 165, 172-73.

They pulled up to the house in DJ's car shortly before about 4:00 p.m. See RP 92-93, 96, 326-27. As the car arrived, Job, who had been outside smoking a cigarette, went inside and downstairs to his room. RP 323-24. Krystal intended the deal to take place in the driveway next door, but Michael, who was with her, was uncomfortable and told Krystal to complete the deal inside. RP 173-74. Krystal had not spoken to Job that day. RP 215.

Krystal introduced Colton to Michael. RP 97. Michael, Krystal, Colton, and DJ entered the house and went upstairs to the living room area. RP 174-75. Krystal showed Colton and DJ the pills. RP 97, 175. As Michael started to walk toward his bedroom down the hall, DJ pulled out his gun, put it to Michael's head, and demanded, "Give me the fucking pills." RP 97, 177. Michael and DJ began to fight in the area in front of the staircase. RP 98, 177-78. Krystal tried to run away, but DJ grabbed her, hit her with his gun, and commanded her "to stay the fuck down." RP 177. Michael yelled for Job to help. RP 98, 177.

Job, downstairs in his room, heard the cry. RP 175, 324. Job

grabbed his gun and began making his way upstairs. RP 324. He encountered DJ as he was coming upstairs near the landing by the front door. RP 99, 324. DJ may have been making his way down the stairs from the living room. RP 99. Job saw DJ raise his right arm. RP 324. While unsure whether DJ was armed, Job was afraid he was going to be shot. RP 324. Job fired multiple shots and DJ went down. RP 324.

After Colton heard gunshots, Michael appeared next to him with a shotgun. RP 99. Colton testified that Michael pointed the shotgun at him and told Colton that he had to kill him. RP 99. Job was not present. RP 133. Colton showed Michael he was unarmed. RP 99. Colton testified that he backed up to a sliding door near the kitchen and went outside. RP 100. He saw a little girl next door and asked her to call the police as someone had been shot. RP 100. Michael walked up to him with the shotgun and told him to get back inside. RP 100. Colton followed Michael to the platform by the front door where DJ was laying. RP 100.

Colton claimed he did not know that DJ was going to try to rob Krystal. RP 102. Colton said he would leave, that he would take DJ with him, that they would not see them again, and that he would not talk to the police. RP 102-03. He did not recall Job saying anything to him. RP 102. Michael and Krystal led Colton outside. RP 101, 104. By this point, Michael had secured DJ's gun on his person. RP 104-105.

Using a button in the back of the garage, Job opened the garage door and Colton slowly drove in. RP 104. Colton perceived that Job had his gun on him as he got out of the car. RP 104, 106. Michael had dragged DJ down the stairs to the entrance to the garage inside the house. RP 106-07. Michael told Job to close the garage door, but the door would not close. RP 107. At this point, Colton ducked under the garage door and ran across the street. RP 107-08. He eventually found a neighbor who let him use a phone. RP 108. After calling his sister and his father, Colton called 911. RP 108-09. Colton left Stevie a message admitting that he and DJ tried to “jack” Krystal, and that DJ had been shot. RP 446-47. About two minutes after the 911 call, the police arrived. RP 109. Around the same time, Michael called 911. RP 232.

Colton testified that while Job had pointed his gun at him, Job had not threatened to kill him, had not been present when Michael threatened to kill him, had not ordered him to move DJ’s body, had not touched DJ’s body, and never demanded that he do anything. RP 131-33. Krystal did not recall Job threatening to kill Colton or commanding Colton to do anything. RP 216.

Krystal testified that in the immediate aftermath of the incident, Michael told her to get the pills out of the house. RP 181. She gathered many of the pill bottles that were upstairs and went to Michael’s car. RP

182-83. The bottle with pills had been in Michael's control. RP 184. Krystal consumed a large amount of the pills and left the rest in the car. RP 183. She drove the car down the street, left it, and returned to the house. 183, 185. She took some of the pills with her. RP 185. She ingested more pills later that day, including while in custody. RP 185-88.

Police later found many prescription bottles in the car. RP 285-86. Four bottles were in a camera bag. RP 287-90. One of these bottles had a label for Oxycodone in Job's name and had been fulfilled on October 22, 2012. RP 295-96; Ex. 18L, 22. It had 30 pills inside. RP 296.

The State filed charges against Job, Michael,⁴ Krystal, and Colton. RP 29, 114, 217. Job was ultimately charged with possession of a controlled substance with intent to deliver (Count I), unlawful use of a building for drug purposes (Count III), kidnapping in the first degree (Count IV), and felony harassment (Count V).⁵ CP 11-14. The State alleged three firearm enhancements each on counts I, IV, and V. CP 11-14. The State's theory of the case was that Job was guilty as an accomplice to the crimes of harassment, kidnapping, and possession with

⁴ With the State's agreement, Michael's case was continued, severing the cases. RP 19-23. 29.

⁵ Job was also charged with conspiracy to possess a controlled substance with intent to deliver. CP 11. On Job's motion, the court severed this charge. CP 54. The court granted the State's motion to dismiss the charge without prejudice. CP 780-82.

intent to deliver. RP 510-14 (prosecutor's closing argument); CP 11, 13-14 (charging accomplice liability).

The jury convicted Job as charged except as to kidnapping. CP 714-19. Job was found guilty of the lesser included offense of unlawful imprisonment. CP 718. The jury found all nine firearm enhancements. CP 720-28. The court sentenced Job to 234 months, nearly 20 years, in confinement. CP 790. Due to the firearm enhancements, 216 of these months were "flat time" that ran consecutively. CP 790.

E. ARGUMENT

1. The evidence was insufficient to find Job guilty of felony harassment.

A person is guilty of felony harassment if, without lawful authority, the person knowingly threatens to kill a person and the threat places the person in reasonable fear that it would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b)(ii). Michael threatened to kill Colton immediately following the botched robbery. The State's theory was that Job was guilty as an accomplice. RP 513-14 ("based on the evidence that we have in this case with Michael telling Colton, 'I am gonna kill you,' clearly Felony Harassment. The question is whether or not Job, as an accomplice of Michael, is also guilty of that, as well."). This Court should reverse for insufficient evidence because (1) the evidence did not prove

Job was complicit in the threat, (2) the evidence did not prove the threat was unlawful, and (3) the evidence did not prove Job himself placed Colton in reasonable fear that the threat would be carried out.

a. The State bears the burden of proving all the elements of an offense beyond a reasonable doubt.

Due Process requires the State prove every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art 1, § 3. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). Reversal for insufficient evidence requires dismissal of the charge with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

b. Because Job was merely present, the evidence was insufficient to prove he was an accomplice to harassment.

A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, the person solicits, commands, encourages, or requests another person to commit the crime. RCW 9A.08.020(3)(a)(i). Additionally, a person is an accomplice if, with

knowledge that it will promote or facilitate the commission of the crime, the person aides or agrees to another person in planning or committing the crime. RCW 9A.08.020(3)(a)(ii). The person must have knowledge of the crime for which the person was eventually charged, not merely a crime. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Further, mere knowledge or physical presence at the scene of a crime is insufficient. In re Welfare of Wilson, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). The State must prove that the defendant actually participated in the crime. State v. Everybodytalksabout, 145 Wn.2d 456, 471, 39 P.3d 294 (2002).

To find Job guilty of felony harassment, the jury was required to find that “the defendant or his accomplice knowingly threatened to kill Colton Geeson immediately or in the future.” CP 708. The evidence was insufficient to prove this.

There was no evidence that Job threatened to kill Colton. RP 133, 216. The evidence was that Michael threatened to kill Colton. Colton testified that immediately after hearing gunshots, Michael appeared with a shotgun and threatened to kill him. RP 99.

As Colton and Krystal testified, Job was not present during the attempted robbery. RP 130-31, 216. He was not upstairs in the room when he heard his brother make the threat. RP 133, 175, 324, 327-28.

Colton himself testified that when Michael threatened to kill him, Job was not present. RP 133. Additionally, there was no evidence that Job knew Michael was going to threaten to kill Colton or assisted him in the threat.

In Wilson, our Supreme Court reversed a reckless endangerment conviction that was based on the defendant's mere presence at the scene of the crime. Wilson, 91 Wn.2d at 492. There, a group of youths pulled a rope taut across a road as the defendant stood by. Id. at 489-90. Found guilty as an accomplice, our Supreme Court reversed, holding that "something more than presence alone plus knowledge of ongoing activity must be shown" to find a person guilty. Id. at 490, 492.

For similar reasons, this Court reversed a robbery disposition based on accomplice liability in State v. Robinson, 73 Wn. App. 851, 872 P.2d 43 (1994). There, without any warning, a passenger in the defendant's car got out at an intersection, robbed a girl of her purse, and got back into the car. Id. at 852. Because the robbery was completed by the time the robber re-entered the car and the defendant was merely present at the scene, the evidence was insufficient. Id. at 46-47.

Here, Job was merely present elsewhere in the home when Michael threatened Colton. As in Wilson, Job's mere presence was not criminal. Similar to Robinson, the purported criminal act was completed before Job could have assisted in any manner. Further, there is no evidence that Job

had any knowledge that Michael was going to threaten Colton. The State failed to prove Job was an accomplice to felony harassment.

c. The evidence did not prove that the threat to kill was unlawful.

When circumstances justify action in self-defense, threats of bodily injury may lawfully be made. State v. Smith, 111 Wn.2d 1, 9, 759 P.2d 372 (1988). “The use of force against another, including causing injury, is privileged when necessary to protect persons or property.” Id. “An individual who is privileged to cause injury undeniably is privileged to threaten to do so.” Id. Moreover, “under certain circumstances necessary force may include putting a trespasser in fear of physical harm.” State v. Bland, 128 Wn. App. 511, 517, 116 P.3d 428 (2005).

To find Job guilty of felony harassment, the jury was required to find that the act was “without lawful authority.” CP 708. Colton was an accomplice to an armed home robbery. The State agreed that Job and Michael had lawful authority to use force against DJ as they did not charge homicide. But the lawful use of force did not end there.

The evidence did not prove that Michael’s threat to Colton was unlawful. Michael had been held at gunpoint by DJ. Michael did not know Colton and Colton appeared complicit. Moreover, he threatened Colton before he learned Colton was unarmed. RP 99. There was no

evidence that he repeated this threat upon learning that Colton was unarmed. Under these circumstances, the threat was justified to neutralize the potential danger Colton posed. Because the evidence was insufficient to establish that the threat was unlawful, the evidence was insufficient to prove Job guilty.

d. The evidence did not prove that Job himself created reasonable fear that his brother's threat would be carried out.

The State also failed to prove the second element in the to-convict instruction. Per that instruction, the jury was required to find “[t]hat the words or conduct of the defendant placed Colton Geeson in reasonable fear that the threat would be carried out.” CP 708 (emphasis added). Under the law of the case doctrine, jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State assumes the burden of proving any unnecessary elements of the offense when these elements are included without objection in a jury instruction. Id. Here, by failing to include the phrase “or an accomplice” in the second element of the instruction, the State assumed the burden of proving that Job’s words or conduct placed Colton in reasonable fear that Michael’s threat to kill would be carried out. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (failure to include the phrase “or an accomplice” in instruction on firearm

enhancement required the State to prove that defendant himself was armed).⁶

There was no evidence that Job said anything to Colton. As for Job's conduct, Colton testified that Job later held a gun on him in the garage. But the evidence did not connect this conduct to Michael's threat. Colton did not testify that he feared Job would carry out Michael's threat. Thus, there was inadequate evidence that Job's words or conduct placed Colton in reasonable fear that Michael's threat would be carried out.

The State failed to prove that Job was an accomplice, that either brother acted unlawfully, or that Job himself placed Colton in fear that Michael's threat would be carried out. For these three reasons, the conviction should be reversed.

2. The evidence was insufficient to find Job guilty of unlawful imprisonment.

Based on the brief detention of Colton in their home, the State charged Job with kidnapping in the first degree. The jury convicted Job of the lesser included offense of unlawful imprisonment. "A person is guilty of unlawful imprisonment if he or she knowingly restrains another

⁶ State v. Teal is not to the contrary. 152 Wn.2d 333, 96 P.3d 974 (2004). There, though instructed on accomplice liability, the to-convict instruction did not refer to "defendant or an accomplice" on any of the elements of the crime. Id. at 335-36. In contrast, here, the term "defendant or his accomplice" was used for the first element, but not the others. CP 708. Under Willis, the law of case doctrine applies.

person.” RCW 9A.40.040. This required proof that the restraint was “without legal authority.” RCW 9A.40.010 (“‘Restrain’ means to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his or her liberty.”); CP 702. The State was also required to prove that the restraint was not a lawful act of self-defense. RCW 9A.16.020(4); CP 703. Because the State failed to meet its burden, this Court should reverse.

a. A person may use force to detain a trespasser.

A person who lawfully possesses a building may forcibly detain a person who is unlawfully in the building:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person’s presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public.

RCW 9A.16.020(4). The court gave an instruction based on this provision. WPIC 17.03. CP 703. There do not appear to be any cases interpreting this specialized defense.

b. Job used reasonable force to temporarily detain a robber.

Job and Michael reasonably used available force to restrain Colton. Neither of the brothers knew Colton. They did not know if he might try to attack them, as DJ had done. Because Colton appeared complicit in the home-invasion robbery and neither Job nor Michael had reason to believe Colton's claim of ignorance, this degree of force was reasonable and lawful. See Smith, 111 Wn.2d at 9 (threats of bodily injury may be lawfully made in self-defense or when apprehending a dangerous criminal); Bland, 128 Wn. App. at 516-17 (reasonable jury could conclude that homeowner, who was armed with a gun and had chased a woman he wanted to leave his home, acted lawfully).

Colton was not detained for long. See RP 103, 327. Colton, who testified he had not understood that DJ was dead, said he would take DJ with him. RP 102-03, 112-13. The Edwards acceded to Colton's request. Colton drove into the garage. RP 103-04. Michael moved DJ downstairs to the entrance to the garage. RP 106. After parking in the garage, Colton changed his mind and left. RP 107-08. While Job and Michael were armed, there was no evidence they pursued Colton or tried to stop him.

Because the State failed to prove the absence of self-defense beyond a reasonable doubt and the State did not prove that any restraint

was without legal authority, this Court should reverse the conviction for unlawful imprisonment.

3. The evidence was insufficient to find Job guilty of possession with intent to deliver a controlled substance because he was not complicit in the crime.

It is unlawful to possess with intent to deliver a controlled substance. RCW 69.50.401(1). To prove Job guilty of this crime, the State was required to prove that (1) “on or about the 25th day of October, 2012, the defendant or an accomplice possessed a controlled substance; oxycodone” and (2) “the defendant or his accomplice possessed the substance with the intent to deliver a controlled substance, oxycodone.” CP 691. The State argued that Job was an accomplice. The prosecutor said, “Well, you certainly clearly know by now somebody possessed oxycodone with intent to deliver it. Krystal, Michael, and [it] would appear from the evidence that the only thing Defense could contest on this one is whether or not Job was or wasn't an accomplice to that.” RP 510.

The evidence was sufficient to establish that Krystal and Michael possessed oxycodone and intended to deliver it on October 25, 2012. However, there is no evidence Job knew of, assisted in, or encouraged either that possession or intended delivery. The evidence was insufficient.

Physical presence is insufficient to establish accomplice liability for possession of a controlled substance with intent to deliver. State v.

Amezola, 49 Wn. App. 78, 89-90, 741 P.2d 1024 (1987). Merely providing information on where and from whom to purchase drugs is also insufficient to establish complicity. State v. Gladstone, 78 Wn.2d 306, 312, 474 P.2d 274 (1970).

Here, while Job was present in the house and was aware that Krystal sold prescription medication, the evidence did not prove or even support an inference that Job was involved in the failed transaction on October 25, 2012. On that date, Colton text messaged Krystal and asked about buying 50 Percocet pills. RP 90-91. Krystal said yes. RP 91. That day, Colton and DJ met Michael and Krystal at the house and went upstairs. RP 96-97, 174. Job was downstairs. Krystal had not even spoken with Job that day. RP 215. There was no evidence that Job spoke to Michael that day. Thus, there was no evidence that Job knew of the planned sale.

The State's theory was that Job was complicit because he supplied the pills. See RP 518 ("What does Job do during this delivery? Doesn't have to do a darned thing. He has already done his. He supplied the pills"). The evidence, however, did not prove that Job had provided the pills at issue or that he had provided them with the intent that they be delivered on October 25, 2012.

Krystal was unsure of where or from whom the Percocet that she

was trying to sell that day came from. RP 216. Krystal testified that pills were pooled together and placed in the “current bottle.” RP 157, 184. This bottle was controlled by Michael, not Job. RP 184. There was evidence that Job had sold medications to Michael in 2012. But there was no proof that he had done so with the 50 Percocet pills that Colton asked Krystal to sell. While there was evidence that Job had recently been prescribed oxycodone, and a corresponding pill bottle with 30 pills was found in the car Krystal had moved, the pills may have originated from Michael or Krystal. Both Michael and Krystal also had recently fulfilled prescriptions for oxycodone. Ex. 20, 21. Further, Krystal testified she got some pills on the black market. RP 160.

Even assuming the evidence was sufficient to prove Job supplied the pills, this would still be inadequate. Krystal testified that, in 2012, Job only sold his medicine to Michael. RP 156-57. Job was not prosecuted for delivering drugs to Michael, he was prosecuted for being complicit in the failed sale by Krystal and Michael on October 25, 2012. They are not equivalent. Proof that Job had sold drugs to his brother in the past did not prove that he was complicit in the charged crime.

The State failed to prove that Job supplied the drugs possessed by his roommates on October 25, 2012 or, assuming he had, that he did so with the purpose of furthering a sale by Krystal and Michael. The

conviction should be reversed for insufficient evidence.

4. The evidence was insufficient to prove Job guilty of unlawful use of a building for drug purposes because Job did not make an area under his control available to others for drug purposes.

Job was convicted of unlawful use of a building for drug purposes. Unlike the other allegations, the State did not charge or argue that Job was liable as an accomplice. CP 13; RP 510-11. It is crime for a person who controls a building to knowingly make it available for another person for the purpose of selling drugs. RCW 69.53.010(1).⁷ It requires the State to prove that a person “knowingly provided a space under [his or] her management or control as ‘an owner, lessee, agent, employee, or mortgagee,’ *to others* for storing, manufacturing, selling, or delivering drugs.” State v. Davis, 176 Wn. App. 385, 395, 308 P.3d 807 (2013).

The State failed prove that Job provided a space under his control to another person for the purpose of storing, manufacturing, selling, or delivering drugs. Job was in control of the downstairs area of the house.

⁷ The statute reads:

It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW, legend drug under chapter 69.41 RCW, or imitation controlled substance under chapter 69.52 RCW.

RP 145, 168. There was no evidence that Job allowed others to deal drugs from the downstairs area. While there was an attempted drug transaction by his roommates upstairs, Job was not in control of that area. His roommates were. RP 144. Even if he had been, there was no evidence that he purposefully made it available for that use.

This analysis is consistent with this Court's decision in Davis. There, a woman lived and worked at a hotel. Davis, 176 Wn. App. at 388. She was convicted of various drug crimes and unlawful use of a building for drug purposes. Id. at 392-93. The evidence established that she sold drugs from her living quarters. Id. at 395. Nevertheless, this Court reversed because the evidence did not prove that she "allowed others to deal drugs from a space of which she maintained control." Id. at 395-96.

As in Davis, the State failed to prove that Job knowingly allowed others to deal drugs from a space of which he maintained control. This Court should reverse the conviction. Id. at 396.

5. The court's failure to instruct the jury on self-defense of persons or property relieved the State of its burden of proof on the elements of unlawful imprisonment.

a. As there was adequate evidence to support self-defense of persons or property, Job was entitled to an instruction on self-defense of persons or property.

"The State bears the burden of proving beyond a reasonable doubt the absence of a defense if the absence of such defense is an ingredient of

the offense and there is some evidence of the defense.” State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). Force used in self-defense of persons or property is lawful.

[w]hen used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3). “The self-defense statute does not expressly limit its application to assault or homicide.” State v. Arth, 121 Wn. App. 205, 210, 87 P.3d 1206 (2004). Because self-defense is lawful, this negates the knowledge element in unlawful imprisonment. See State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984) (“the State bear the burden of disproving self-defense where the applicable mental state is knowledge.”). Further, the State was required to prove that restraint was “without legal authority.” State v. Warfield, 103 Wn. App. 152, 157, 5 P.3d 1280 (2000); CP 702.

When there is some evidence of self-defense, the defendant is entitled to the pertinent self-defense instruction. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Evidence of self-defense is viewed from the position of a reasonable person, knowing and seeing what the defendant knows and sees. Id. at 474. “[O]nce the defendant produces

some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.” Id. at 473.

In addition to the self-defense instruction on detaining a person in a building per WPIC 17.03, Job requested an instruction on self-defense of persons and property per WPIC 17.02. RP 479; CP 750. The State did not object. Still, the court refused to give WPIC 17.02, ruling that it was inapplicable and, for reasons that are not clear, would confuse the jury:

[COUNSEL]: Well, I think 17.02 can be applied within your -- 17.02 is applicable whether you're in a building you possess or not. 17.03 is more specific to -- it can be raised when you are in a building to possess, so I thought they both applied. If it's self-defense in a parking lot or something, 17.03 would not be applicable.

THE COURT: I tell you, I think it confuses things. 17.02 -
-

[COUNSEL]: 17.02 uses language about a malicious trespass and that type of language. I am proposing them because after reading them, it appeared applicable.

...

[PROSECUTOR]: All right. Then I am not going to object, Your Honor.

...

THE COURT: Well, I think I have got an obligation not to confuse them and to - -

...

THE COURT: Because if you look at just the heading of

17.02, it's a defense of self, others or property defense, as opposed to 17.03, it's lawful force, detention of a person. So 17.03 really applies to Colton because that's who alleged to be the victim of the kidnapping. And 17.02 is defending self, others or properties which applies to CJ (sic).

So I think that confuses the jury, to give 17.02 as well as 17.03, so that's my inclination, is to give that one.

RP 479-81. The court refused to give the instruction. RP 490, 500.

WPIC 17.02 (defense of self, others, property) and WPIC 17.03 (detention of person) serve different purposes and are not mutually exclusive. As outlined in WPIC 17.03, RCW 9A.16.020(4) allows a person in possession of a building to use force to detain a suspected trespasser so that the person can ascertain the person's purpose in being in the building. In contrast, RCW 9A.16.020(3), as outlined by WPIC 17.02, allows a person to use force to protect persons or property.

This Court's opinion in Bland indicates the court erred. There, after being awoken and harassed by a guest who staying the night, the defendant chased a guest around his house with a gun and back into his bedroom. Bland, 128 Wn. App. at 516. Charged with assault, the jury was instructed on self-defense under RCW 9A.16.020(3). Id. at 514. On appeal, the defendant argued the instruction was unclear because it allowed the jury to read in a requirement that the defendant must reasonably fear injury "before he could exert reasonable force to expel a

malicious trespasser.” Id. at 513. Applying the rule that in defense of property there is no requirement of fear of injury to oneself, the court agreed, ruling that “necessary force may include putting a trespasser in fear of physical harm.” Id. at 513, 516.

As in Bland, the evidence supported the use of force (brandishing or pointing a gun) to protect persons and property from a trespasser. The evidence showed this was justified to make sure that Colton did not attempt to use force as his companion, DJ, had done. Thus, an instruction based on WPIC 17.02 was applicable. The court erred.

b. The failure to instruct the jury was prejudicial.

“An error affecting a defendant's self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt.” Arth, 121 Wn. App. at 213. Here, the failure to give the instruction precluded Job from arguing to jury that the force used against Colton was to protect themselves and their property from him. Neither Job nor Michael knew what Colton might do if not restrained. His companion had just threatened them with a gun. Had the jury been so instructed, the jury could have acquitted Job of unlawful imprisonment based on reasonable fear of injury or protection of property. The instruction would have changed how the jury evaluated the evidence.

Because the State cannot meet its burden to prove the error harmless beyond a reasonable doubt, this Court should reverse the conviction.

6. In violation of ER 404(b), the court erred in admitting evidence that Job was complicit in previous drug transactions.

a. Job objected to propensity evidence.

Before trial, Job raised the issue of whether the prosecutor intended to present evidence that Job had been involved in previous drug activity prior to the charged date of October 25, 2012. RP 61-62. He contended that admission of such evidence was “just propensity” evidence in violation of ER 404(b). RP 73. The prosecutor contended it was not propensity evidence, rather it was “accomplice liability information.” RP 71. He explained that he expected Krystal to testify about how the “operation” worked. RP 71-72. He acknowledged that on “the day of the event, in terms of drug dealing, the defendant does nothing.” RP 72. Job countered that he was on trial for what he did or did not do on October 25, 2012, not what he may have done in the past. RP 73. The court agreed with the State:

In order to prove someone is an accomplice, I agree that the State can present evidence of what the conduct was that resulted in the allegations on this particular day in terms of establishing aiding or agreeing to aid, soliciting, commanding, encouraging and ready to assist. So that is all relevant. It has prejudicial value, obviously. Most criminal evidence does, but its probative value outweighs any

prejudicial effect to the extent it may or may not prove accomplice liability.

So, from my perspective, you know, I have separated out the conspiracy charge, so the jury is not to consider a separate conspiracy charge. But to establish the accomplice liability, the State has the opportunity to present the relationship and what is happening. I don't see that as necessarily 404(b). That indeed appears to me to be accomplice liability evidence.

RP 74-75.

b. Propensity evidence is not admissible.

Under ER 404(b),⁸ evidence of other crimes is inadmissible to prove that a person has a propensity to commit a crime. ER 404(b) 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 with that character.” State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Thus, evidence that Job had sold drugs in the past could not be used to determine that he was complicit in the failed drug sale on October 25, 2012. See, e.g., State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (premise of “once a thief, always a thief.” is not legally relevant under ER 404(b)).

ER 404(b) evidence may be admissible for a non-propensity

⁸ “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.” ER 404(b).

purpose. See Gresham, 173 Wn.2d at 420. To be admissible, the trial court must (1) find that the act occurred, (2) identify the legitimate purpose of the evidence, (3) determine that the evidence is relevant, and (4) weigh the probative value against any unfair prejudicial effect. Id. at 421. “That a prior act ‘goes to intent’ is not a ‘magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].” State v. Wade, 98 Wn. App. 328, 334, 989 P.2d 576 (1999) (quoting State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

c. The court erred in admitted propensity evidence.

In Wade, the defendant was charged with possession with intent to deliver. Id. at 331. The court admitted evidence of two prior drug dealing acts for the purpose of showing intent on the current charge. Id. at 332. This Court held this was improper because it invited the jury to infer that the defendant had intent to deliver drugs because he had been proven to have that intent in the past:

Using Wade's prior bad acts to prove current criminal intent, however, is tantamount to inviting the following inference: Because Wade had the same intent to distribute drugs previously, he must therefore possess the same intent now. ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime.

Id. at 336. The same error occurred here.

The prosecutor purportedly offered Krystal's testimony that Job was involved in previous drug transactions to show Job's knowledge and intent as to the failed drug transaction on October 25, 2012. As in Wade, this was tantamount to inviting the jury to conclude that Job must have been complicit in the planned transaction because he had participated in drug transactions in the past. This was error.

d. Admission of the propensity evidence requires reversal.

The error was prejudicial as to the two drug convictions. Had the ruling been otherwise, the State could not have elicited testimony from Krystal that Job had participated in illicit drug activity prior to October 25, 2012. For example, Krystal testified that Job had been in "business" with Michael and her. RP 156. She further testified that Job sold drugs to his friends and Michael before. RP 158. She testified that Job earned an income over the years through selling drugs. RP 149, 161. This was propensity evidence. The jury would have improperly reasoned that because Job sold drugs in the past, he must have also been guilty of the current drug charges brought by the State.

Given the paucity of evidence supporting the drug convictions and highly prejudicial nature of propensity evidence, Job meets his burden to establish prejudice. See Everybodytalksabout, 145 Wn.2d at 480-81

(reversing conviction where State relied on impermissible ER 404(b) evidence to establish accomplice liability).

7. Admission of irrelevant and prejudicial evidence deprived Job of his right to a fair trial.

a. Job objected to admission of irrelevant evidence.

Job objected to the admission of evidence showing that there was a gasmask, gasmask filters, bullet-resistant vest, and knife in his home, arguing they were not relevant. RP 67, 69-70, 255, 257, 279-80. The gasmask, filters, and knife were found in Job's room. The vest was found in Michael's room. The prosecutor asserted that these items, along with the brothers' lawfully possessed firearms, tended to show illicit knowledge and intent necessary for proof of the drug charges. RP 67-70. More precisely, the prosecutor argued the items showed that the Edwards brothers were "ready for war," be it against the police or criminals. RP 69. The court overruled Job's objection. RP 69-70.

b. Evidence of a knife, gas-mask, and bullet-resistant vest in the home was irrelevant and prejudicial.

Evidence that is not relevant is not admissible. ER 402. "Relevant evidence' means evidence having any tendency 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.

“Weapons or other articles not used in the commission of a crime are inadmissible.” State v. Robinson, 24 Wn.2d 909, 915, 167 P.2d 986 (1946). Washingtonians have a constitutional right to keep weapons and other items in their home for the purpose of self-defense. Const. art 1, § 24; U.S. Const. amend II; State v. Rupe, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984); McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 3050, 177 L. Ed. 2d 894 (2010); District of Columbia v. Heller, 554 U.S. 570, 635, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The State cannot use ownership of items used for self-defense to draw adverse inferences regarding the defendant's character. State v. Hancock, 109 Wn.2d 760, 767, 748 P.2d 611 (1988).

Job’s possession of a gas-mask, filters, and a knife did not tend to prove the drug charges. There was no testimony that these objects were associated with drug crimes. Owning a knife is not uncommon. As for gas-masks, many people possess these for lawful purposes.⁹ Job’s possession of these objects did not tend to show that he had illicit knowledge or unlawful intent on October 25, 2012.

As for the bullet-resistant vest, it also did not show that Job was complicit. The vest was found in Michael’s room. There was no evidence

⁹ See <http://www.nytimes.com/2001/09/21/us/a-nation-challenged-emergency-equipment-gas-masks-sell-but-may-not-protect.html> (describing increased sales of gas-masks in the wake of September 11, 2001) (last accessed October 9, 2014).

it was Job's or that he even knew it was there. Regardless, it does not follow that possessing a bullet-resistant vest shows complicity in drug crimes.

Because the items were irrelevant, the court abused its discretion in admitting evidence of these items. The error was prejudicial. As detailed below, the prosecutor improperly used this evidence to argue that Job was "living in an armed camp" and was prepared to combat police. RP 520. The improper purpose was plainly to paint Job and his brother as dangerous people who were a menace to law enforcement. Without this evidence, the force of the prosecutor's improper argument would have been mitigated. This Court should reverse the convictions.

8. Prosecutorial misconduct deprived Job of his right to a fair trial.

The right to a fair trial is a fundamental liberty secured by the United States Constitution and the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amend. XIV; Const. art. 1, § 3. Prosecutorial misconduct may deprive defendants of their constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04. When a defendant shows that the prosecutor's conduct was improper and prejudicial, the appellate court should reverse. See id. at 704. Reversal is required if there is a substantial likelihood that

the misconduct affected the jury verdict. Id. Flagrant and ill-intentioned misconduct excuses the lack of an objection when an instruction would not have cured the resulting prejudice. Id.

a. The prosecutor’s personal opinion that the case was like the movie “Pulp Fiction” was improper.

The prosecutor opened his argument by expressing his personal opinion that the case was “crazy,” “insane,” and was akin to the movie “Pulp Fiction”:

Hopefully what we gave you was a pretty interesting case. If you’ve sat on 10, 20, or 30 juries, I am gonna bet you never saw a case like this one before and you never will again. I liken it to the movie Pulp Fiction. It’s that crazy. It’s that insane. None of it really seems to make any sense from the average citizen’s point of view, but there it is. And it isn’t just a movie, it happened.

RP 505. As judicially noticed by a California court, “‘Pulp Fiction’ is a 1994 crime movie that depicts taunting and terrorizing of a victim before killing.” People v. Baker-Riley, 207 Cal.App.4th 631, 637, 143 Cal.Rptr.3d 737, 741 (2012). It is rated “R” for strong graphic violence and drug use.¹⁰

A “prosecutor's duty is to ensure a verdict free of prejudice and based on reason.” State v. Clafflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Personal opinions by a prosecutor are improper. State v. Lindsay,

¹⁰ <http://www.imdb.com/title/tt0110912/> (last accessed October 8, 2014).

180 Wn.2d 423, 437, 326 P.3d 125 (2014); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Here, the prosecutor’s personal opinion that the case was “crazy,” “insane,” and resembled a movie was irrelevant and improper. It was not supported by evidence. It was “an appeal to the jury's passion and prejudice.” Clafflin, 38 Wn. App. at 850 (use of poem during closing argument improper). This was flagrant and ill-intentioned misconduct.

b. The prosecutor’s argument that Job was living in an “armed camp” was improper.

Building upon the images of violence and drugs, the prosecutor opined that Job had been “living in an armed camp” and that DJ’s death was a foregone conclusion, not because DJ had tried to rob people in their home at gunpoint, but because Job had exercised his constitutional right to possess firearms and other items in his home for self-defense:

[T]hese guys are living in an armed camp. Anybody, any drug rip customer foolish enough to go into that house to try to steal drugs is gonna be real sorry. And had you known before DJ ever went in there what was in that house, you could have predicted that, and that what was predictable happened in a blaze of glory. They were ready for it. And when the time came, bam, they stepped into action, not just one of them, both of them.

RP 520. The prosecutor continued to emphasize the presence of lawfully possessed weapons and items, insinuating that their purpose was to combat law enforcement, rather than for protection:

And they have got what in there? An assault rifle with over a thousand rounds of ammo with vest-penetrating ammunition. What is the point of that? Is that to go after a drug rip customer? Probably not. Because who wears vests? Not drug rip customers.

They have got a gas mask with canisters. What is the point of that? Is a drug customer gonna be coming there to try to break into the house by throwing in tear gas? Not likely, but who might? Who would use tear gas to flush those guys out of that house?

You've got a bulletproof vest. I mean you've got -- it's an armed camp. That's what it is. They are loaded for bear, and whatever trouble comes their way they are gonna be prepared to fight to the death.

RP 520.

The prosecutor's contention that Job was living in an "armed camp" was improper. Our Supreme Court has taken "judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns." Rupe, 101 Wn.2d at 708. Job was not charged with illegally possessing firearms, ammunition, or other items. The ammunition was legal and sold in local stores. RP 387. The prosecutor's purpose was plainly to paint Job as a dangerous person who needed to be imprisoned. It was akin telling the jury that Job was part of a deadly group. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (inflammatory comments that defendant was part of a deadly group of madmen was misconduct). This was flagrant and ill-intentioned

misconduct.

c. The prosecutor's argument that Job was not justified in shooting the armed robber was improper.

Finally, though Job was not charged with homicide, the prosecutor focused the jury's attention on DJ's death:

And when that time came, they sprang into action, and DJ was a goner. I mean, there was no question about what was going to happen to DJ. DJ was not gonna come out of that house alive and he didn't. And he wasn't hit by just one gun. He was hit by both. And the odds are probably pretty good when you sit down to figure out the facts of how things went; that DJ was almost certainly dead by the time he hit the ground.

And when you think about the fact of how things played out, Michael didn't have enough time to get that shotgun and come back and hit DJ before DJ hit the ground. That shotgun blast was probably while DJ was laying there on the ground. So to some extent, it's somewhat gratuitous, but it shows you the mindset of the partners in this organization and what they were going to do and when they had to do it. They didn't have to stop and talk about it. They just acted.

RP 521.¹¹ Defense counsel, Mr. Kawamura, reminded the jury that Job was not charged with the death of DJ and that the jury could therefore infer Job was justified in shooting an armed robber in his home. RP 535. In rebuttal, the prosecutor, knowing that he was misleading the jury, argued that Job was not justified in killing DJ and that Job had not acted

¹¹ According to an autopsy, DJ was struck with five rounds from a handgun and one round from a shotgun. RP 302.

out of self-defense:

DJ's shooting, killing has been found to be justified. You didn't hear that from anybody in this case. Nobody ever once said that except Mr. Kawamura. We are not here to decide a murder case. That issue is off the table. Job didn't do anything to assist. Well, if you call killing somebody not doing anything, okay. But what was he doing when he killed DJ? What was he protecting?

RP 549.

Referring to uncharged crimes during closing argument is improper. State v. Boehning, 127 Wn. App. 511, 519–23, 111 P.3d 899 (2005). And commenting on the assertion of a constitutional right is also improper. See Rupe, 101 Wn.2d at 705. The prosecutor was well-aware that his office chose not to charge Job with homicide. The trial court acknowledged this during sentencing:

[Y]ou weren't charged with homicide. The State determined, based on their analysis, that they could not prove beyond a reasonable doubt that you did not act in self-defense, so we are not here on a homicide case.

1/6/2014RP 24. The prosecutor did not disagree. Yet during closing argument the same prosecutor focused on the killing of DJ, misrepresented the State's true position, and invited the jury to convict Job based on an uncharged act. This was flagrant and ill-intentioned misconduct. See Boehning, 127 Wn. App. at 519–23.

d. The cumulative effect of the misconduct justifies reversal.

Job did not object to the prosecutor's arguments. RP 504-526, 546-53. Nevertheless, because these arguments were flagrant and ill-intentioned, this Court may properly analyze whether there is a substantial likelihood the misconduct affected the verdict. Belgarde, 110 Wn.2d at 507-08. Here, viewed cumulatively, no instruction could have cured the resulting prejudice. Glasmann, 175 Wn.2d at 707.

There is a substantial likelihood that the misconduct affected the jury's verdicts. The prosecutor's improper arguments invited the jury to convict Job not on the evidence, but on emotional appeals and arguments that Job was a dangerous person. Moreover, the evidence of guilt, if not insufficient, was certainly tenuous. Because prosecutorial misconduct deprived Job of his right to a fair trial, the convictions should be reversed.

9. If the convictions are not reversed, most of the firearm enhancements should still be reversed.

The jury found that Job or an accomplice were armed with firearms on the convictions for possession with intent to deliver, unlawful imprisonment, and harassment. If the convictions are not reversed, six of the firearm enhancements should be reversed for insufficient evidence.

a. The State must prove that there was an adequate connection between the firearm and the crime, and that the firearm was readily available.

Consistent with their constitutional rights, Job and Michael kept firearms in their home. Const. art 1, § 24; U.S. Const. amend II; State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995 (2010); McDonald, 130 S. Ct. at 3050; Heller, 554 U.S. at 635. At the time of the attempted robbery, Job had a handgun and rifle in his room. Job had been planning to go shooting on the upcoming weekend with a friend. RP 436. Michael had a shotgun in his room.

To impose a firearm enhancement, the trier of fact must have found that “the offender or an accomplice was armed with a firearm.” RCW 9.94A.533(3). A person is armed with a firearm when he or she is within proximity of an easily and readily available firearm for offensive or defensive purposes and when there is proof of the requisite nexus. State v. O’Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007). A “person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime.” State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (plurality opinion). “Showing that a weapon was accessible during a crime does not necessarily show a nexus between the crime and the weapon.” State v. Brown, 162 Wn.2d 422, 432, 173 P.3d 245 (2007). “Adherence to the

nexus analysis is . . . important in harmonizing the mandatory sentence enhancements with the constitutional right to bear arms.” Id.

The jury was instructed that to find that a person is armed at the time of the crime, the State was required to prove beyond a reasonable doubt that there was a connection between the firearm and the crime:

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime [sic] the type of weapon.

CP 713.

b. Sufficient evidence does not support the firearm enhancements on the possession with intent to deliver count.

On count 1, possession with intent to deliver a controlled substance, the jury found that Job or an accomplice were armed with an SKS 7.62 semi-automatic rifle, a Bennilli 12 gauge shotgun, and a .40 caliber Glock handgun. CP 720-22. At the time of the offense, the handgun and rifle were in Job’s room downstairs. The shotgun was upstairs in Michael’s bedroom.

The State failed to prove that these firearms were connected to the offense. Concerning the handgun and rifle, these were merely in Job's room when the failed drug transaction occurred. Other than possibly supplying some pills at an unknown point in the past, Job was not involved with the failed drug sale. The State admitted as much. The State did not contend, and the evidence did not prove, that Job had knowledge of the drug transaction and that he was in his room waiting to assist with weapons. Thus, they were unconnected to the crime.

This analysis is consistent with our Supreme Court's decision in Brown. There, the Court held that the State had failed to prove a nexus between the crime of burglary and the firearm. Though there was evidence that the defendant or his accomplice had picked up and moved a rifle during the burglary, the Court held this was inadequate. There was no evidence that the defendant "or his accomplice handled the rifle on the bed at any time during the crime in a manner indicative of an intent or willingness to use it in furtherance of the crime." Brown, 162 Wn.2d at 432. The Court reasoned that "proximity alone does not establish a nexus between the crime and the weapon." Id. Similarly, Job's mere proximity to weapons in his room was disconnected from the crime.

The evidence also did not prove that Michael was armed with the shotgun because it was not easily and readily accessible during the

commission of the crime. The shotgun was not on Michael's person during the attempted drug transaction. It was in his room. When Michael started to walk toward his bedroom, DJ held him at gunpoint and a struggle ensued. While Michael was able to recover the shotgun, by that time any intent to deliver the oxycodone to DJ or Colton had plainly ended. Hence, the shotgun was only accessible after the crime had ended.

Caselaw supports this conclusion. In Valdobinos, the defendant was convicted of intent to deliver while armed with deadly weapon, a rifle. State v. Valdobinos, 122 Wn.2d 270, 274, 281, 858 P.2d 199 (1993). The Court reversed because the State only proved that the gun was later found under the defendant's bed. Id. at 282.

Similarly, our Supreme Court reversed a firearm enhancement to a conviction for possession of a controlled substance in State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005). There, the defendant was arrested for driving with a suspended license. Id. at 136. After searching the defendant's vehicle, police found a pistol and drugs in a backpack that was in the backseat. Id. While the stipulated facts stated the backpack was within arm's reach of the defendant, the facts did not support an inference that the defendant could have reached around the driver's seat and accessed the gun. Id. at 143. Thus, the evidence did not prove that the gun was readily and easily accessible. Id. at 143.

The State was required to prove that the firearms were connected to the crime of possession of oxycodone with intent to deliver it to Colton or DJ. The State also had to prove the firearms were readily available. Job's firearms were not connected to the crime and Michael's shotgun was not accessible. These three firearm enhancements should be vacated.

c. Sufficient evidence does not support two of the firearm enhancements on the harassment count.

On count 5, felony harassment, the jury found that Job or an accomplice were armed with a shotgun, a Glock handgun, and .45 caliber Taurus handgun. CP 726-28. The shotgun was used by Michael. The Glock handgun was the gun Job used to shoot DJ. The Taurus handgun was DJ's. If this court affirms the conviction for harassment, the firearm enhancements for the Glock and Taurus should be vacated for lack of sufficient evidence.

The firearm enhancement for the Taurus should be vacated because it was unconnected with the harassment. Michael threatened to kill Colton while holding a shotgun. RP 99. Sometime after the threat was made, Michael picked up DJ's gun, the Taurus, and put it in his waistband. RP 104-05. By this point, the harassment had ended. While Michael picked up the Taurus, this was unconnected with the harassment. See Brown, 162 Wn.2d at 432. There was no evidence that Job ever held the

Taurus. Accordingly, there was insufficient evidence to impose a firearm enhancement for the Taurus on the count of harassment.

The State also failed to prove that Job knew that Michael had armed himself with DJ's gun. "Knowledge of the presence of a firearm is not a requirement of a deadly weapon allegation and need not be included in a firearm enhancement jury instruction." State v. Barnes, 153 Wn.2d 378, 387, 103 P.3d 1219 (2005). However, in interpreting analogous federal law, 18 U.S.C. § 924, the United States Supreme Court recently held that the government must prove that the defendant knew in advance that a confederate will carry a gun before suffering the enhanced penalty. Rosemond v. United States, ___ U.S. ___, 134 S. Ct. 1240, 1249, 188 L. Ed. 2d 248 (2014). Here, the State did not prove that Job knew Michael had armed himself with the Taurus handgun. Applying the logic of Rosemond, the evidence was insufficient.

The enhancement for the Glock should also be vacated because it was also unconnected with the harassment. As argued earlier, Job was not present when Michael threatened DJ. The evidence did not show that Job's gun was connected with the purported harassment.

d. Sufficient evidence does not support one of the firearm enhancements on the unlawful imprisonment count.

On count 4, unlawful imprisonment, the jury found that Job or an

accomplice were armed with a shotgun, a Glock handgun, and a Taurus handgun. CP 723-25.

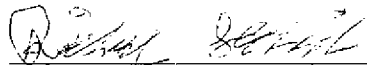
The firearm enhancement for the Taurus should also be vacated on this count for the same reason as argued above, failure to prove that Job knew Michael had armed himself with the Taurus. Further, the Taurus was unconnected with any unlawful imprisonment. Colton testified that Michael picked up DJ's gun and secured it on his waistband. RP 104-05. He did not testify that Michael threatened him with the gun. RP 105. As in Brown, where the defendant picked up and moved a gun during the crime, the evidence did not show a nexus.

F. CONCLUSION

This Court should reverse the convictions for insufficient evidence. Alternatively, the convictions should be reversed for failure to instruct on self-defense of persons or property, erroneous admission of evidence, and prosecutorial misconduct.

DATED this 9th day of October, 2014.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

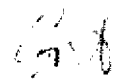
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Respondent,)	
)	
v.)	NO. 45764-4-II
)	
JOB EDWARDS,)	
)	
Appellant.)	

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