95472-1

Supreme Court No. _____

(Court of Appeals No. 74029-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ETON MARCEL POPE,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Statutes

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Eton Pope, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Pope*, No. 74029-6-I (Slip Op. filed December 4, 2017). A copy of the opinion is attached as Appendix A. The Court of Appeals denied a motion to reconsider on January 5, 2018. A copy of the order is attached at Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Some courts have held that when circumstances significantly change after a defendant waived his right to counsel, a trial judge must readvise the defendant of his constitutional right to counsel and ask if he wishes to have an attorney appointed. This Court has not yet addressed the issue. Where the charges are amended to significantly increase the maximum potential penalty, must a defendant be readvised of his constitutional right to counsel? RAP 13.4(b)(3), (4).

2. Under the totality of circumstances, was Eton Pope deprived of his constitutional right to counsel where: (a) the information was amended seven months after Mr. Pope waived counsel; (b) when Mr. Pope expressed confusion about the new charges, the court did not ask if he wished to have counsel reappointed and instead admonished him that he had chosen to represent himself; (c) the court never appointed standby counsel even when Mr. Pope requested it; and (d) before motions in

limine, when Mr. Pope again expressed confusion about the new charges and asked about reappointment of counsel, the court said, "your time to have an attorney has passed"? RAP 13.4(b)(3).

3. May a trial court admit prior acts evidence under ER 404(b) for purposes *not* advanced by the party seeking admission? RAP 13.4(b)(4).

4. Did the trial court abuse its discretion in admitting evidence under ER 404(b) where: (a) the prosecutor offered the evidence to explain an alleged delay in reporting, but the court admitted it for the additional purposes of showing motive and intent; (b) both Mr. Pope and the prosecutor proposed a jury instruction limiting consideration of the evidence to explain a delay in reporting, but the court instructed the jury it could use the evidence to show motive, intent, and the complaining witness's credibility?

5. Was the admission of prior acts to show credibility contrary to this Court's opinion in *State v. Gunderson*, because the complaining witness did not recant or change her story? RAP 13.4(b)(1).

6. Did prosecutorial misconduct deprive Mr. Pope of a fair trial, where the prosecutor falsely told the jury Mr. Pope targeted the complaining witness for abuse the moment he saw her, described the complaining witness as "brave," and "courageous," and characterized a guilty verdict as the "right" thing to do? RAP 13.4(b)(4).

7. Do the rape and assault convictions violate double jeopardy, where the alleged assault formed part of the proof of "forcible compulsion" for the rape? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Eton Pope and Erma Simmons dated for a few months in 1993, then reconnected twenty years later when they happened upon each other at a bus stop. The two dated again for a few months in the summer and fall of 2013. RP (Vol. F) 112-16, 118-21, 220-25; RP (Vol. G) 285-86. Although Ms. Simmons described their 1993 relationship as a positive experience, she alleged that during their 2013 relationship Mr. Pope raped and assaulted her. RP (Vol. F) 198-204, 212-24.

She alleged that this incident occurred on September 15. She called police within a week or two of that date, but they told her there was nothing they could do. RP (Vol. F) 212-13. She called again on October 23, and this time the police took a report and referred the case to the prosecutor's office. RP (Vol. F) 224.

On April 14, 2014, the State charged Mr. Pope with one count of second-degree assault and one count of second-degree rape. CP 1-2. On July 7, 2014, Mr. Pope waived his right to counsel and proceeded pro se after being advised of the charges he faced and their consequences. RP (Vol. A) 5-12; CP 614-15. Seven months later, on February 6, 2015, the

State moved to amend the information to add aggravating factors that could have resulted in a determinate life sentence. CP 577-59. Mr. Pope was confused about the new charges, but the court did not ask him if he wished to revoke his waiver of counsel and did not conduct a colloquy on the question. Instead, the court admonished Mr. Pope that he'd chosen to represent himself and would be held to the standards of a lawyer. RP (Vol. B) 46-57.

On February 23, the court heard motions in limine. RP (Vol. E) 3-22. Before addressing those motions, Mr. Pope again alerted the court to his discomfort regarding the proceedings on February 6. The court was unsympathetic:

> THE COURT: Well, that's the problem when you represent yourself. But you've already gone through that colloquy with the judge that allowed you to represent yourself.

RP (Vol. E) 4. Mr. Pope said, "So, to even request counsel at this time is out of order? How does that work?" RP (Vol. E) 5. The court said, "Your time to have an attorney has passed. So we'll go through the trial memo and then break until tomorrow." RP (Vol. E) 5.

The State sought admission of prior bad act evidence under ER 404(b). RP (Vol. E) 12. Ms. Simmons had alleged that Mr. Pope was verbally and physically abusive throughout their relationship, and the prosecution wanted to introduce this evidence "to explain delay in

reporting." RP (Vol. E) 12-13; CP 593. Mr. Pope denied the allegations and said, "I would object to it even being brought in." RP (Vol. E) 14. The court overruled the objection and granted the State's motion to admit the 404(b) evidence. RP (Vol. E) 12-14; CP 128-29. Even though the State sought the evidence only to explain a delay in reporting, the court said, "And it would be admissible to explain delay in reporting, also as proof of motive and intent." RP (Vol. E) 13; CP 128-29 (written order states the alleged prior incidents "are admitted to explain the victim's delay in reporting and to show the defendant's motive and intent").

The next day, the court asked Mr. Pope if he had any procedural questions before trial commenced, because "once we start trial, then you are on your own." RP (Vol. E) 26. Mr. Pope asked if he could have standby counsel. RP (Vol. E) 26. The court said, "You said you wanted to represent yourself, then that's what you're stuck with. There's no right to standby counsel." RP (Vol. E) 26. The court and parties proceeded with voir dire and jury selection. RP (Vol. E) 30-198.

At trial, Ms. Simmons testified that Mr. Pope strangled and raped her on September 15, 2013. She testified about some positive aspects of their relationship up to that point, but she also testified at length about Mr. Pope's alleged mistreatment of her throughout the relationship. RP (Vol. F) 108-226.

Contrary to the parties' proposals, the court gave a limiting instruction for this evidence stating that the jury could use the alleged prior act evidence "for the purpose of evaluating the defendant's motive and intent and Erma Simmons['s] credibility." CP 141. Both parties had proposed limiting instructions that permitted consideration of the evidence "only for the purpose of examining the delay in the reporting of alleged acts from September 15th, 2013." CP 175 (State's proposed limiting instruction), 250 (Defense proposed limiting instruction).

During closing arguments, the prosecutor told the jury that Mr. Pope had planned to rape Ms. Simmons from the moment he saw her at the bus stop in May of 2013, that Ms. Simmons was "brave" and showed "courage" (but that she wanted someone to "save" her), and that the "right" thing for the jury to do would be to find Mr. Pope guilty. Mr. Pope objected to much of this misconduct but the court overruled all of his objections. RP (Vol. F) 66-67; RP (Vol. I) 473-74, 485, 502.

The jury found Mr. Pope guilty of both second-degree rape and second-degree assault. CP 599-600. The court sentenced Mr. Pope to an indeterminate life sentence with a minimum term of 220 months in prison. RP (Vol. B) 24; CP 601-13.

The Court of Appeals ruled that Mr. Pope was not deprived of his constitutional right to counsel and that the trial court was not required to

readvise him of this right after the charges were significantly amended. Slip Op. at 3-7. The court further ruled the trial court did not abuse its discretion in admitting alleged prior incidents under ER 404(b), but the court did not address the problem of the trial judge admitting the evidence for multiple purposes not advanced by the State. Slip Op. at 7-9. Nor did the court acknowledge the inconsistency between the limiting instruction given by the court and that proposed by the parties. *Id.* The court reasoned the evidence was admissible to evaluate the complaining witness's credibility – even though the complainant did not recant or change her story – because she had waited a couple of weeks before calling the police. *Id.*

The court also rejected arguments regarding prosecutorial misconduct and double jeopardy. Slip Op. at 9-13. The court denied a motion to reconsider. App. B. Additional facts are in the opening brief at pages 4-10.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **This Court should grant review because the question of when a defendant must be readvised of his Sixth Amendment right to counsel is a significant question of constitutional law and a matter of substantial public interest.**

Because the Sixth Amendment right to counsel is fundamental, any waiver of the right must be knowing, intelligent, and voluntary. *Faretta v.*

California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010); U.S. Const. amend. VI. Other courts have held that if there is a substantial change in circumstances after a defendant waives his right to counsel, the court must ask the defendant if he wishes to revoke his waiver. *State v. Modica*, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff'd on other grounds*, 164 Wn.2d 83 (2008) ("a substantial change in circumstances will require the [trial] court to inquire whether the defendant wishes to revoke his earlier waiver.") (quoting *United States v. Fazzini*, 871 F.2d 635, 643 (7th Cir. 1989)). It does not appear that this Court has weighed in on the issue.

This Court should grant review on this important issue of constitutional law. RAP 13.4(b)(3), (4). It should hold that under circumstances like those in Mr. Pope's case, readvisement is required.

When Mr. Pope waived his right to counsel, he did so after being warned of the dangers of self-representation and the charges he faced. But the State later amended the information at omnibus to add charges that could have resulted in a determinate life sentence, and which factually had nothing to do with the charges Mr. Pope was prepared to defend against. *see also* CP 577-59 (amended information); RCW 9.94A.535(3)(h)(i); RCW 9.94A.537(6); RCW 9A.20.021(a)(a) (newly alleged aggravating factors could have resulted in determinate life sentence).

This Court should also hold that even if readvisement was not required, the trial court erred in failing to consider reappointing counsel when Mr. Pope requested reappointment before motions in limine. The judge told Mr. Pope he was *not permitted* to exercise his right to counsel – no matter the change in circumstances – because he had waived it seven months prior. RP (Vol. E) 5 ("Your time to have an attorney has passed."). The trial court erred as a matter of law by refusing to exercise its discretion to consider reappointment of counsel. *See State v. Canedo-Astorga*, 79 Wn. App. 518, 525, 903 P.2d 500 (1995) ("In exercising discretion, a trial court should consider all the facts and circumstances of the case. ... the request for reappointment should be granted absent reasons to deny.").

Mr. Pope was entitled to reappointment of counsel under the totality of circumstances. When Mr. Pope requested reappointment, seven months had passed since he had waived counsel. Mr. Pope had never been afforded standby counsel, and the court had never confirmed his continuing desire for self-representation. The State added two allegations of aggravating factors that could have resulted in a determinate life sentence. Voir dire had not yet started, and there was no indication that Mr. Pope was trying to manipulate the system; instead, he expressed genuine discomfort with continuing to represent himself in light of the

new charges. Under all of those circumstances, Mr. Pope was entitled to reappointment of counsel. This Court should grant review. RAP 13.4(b)(3).

2. This Court should grant review because the question of whether a trial court may admit evidence of prior acts for purposes not advanced by the party seeking admission is a matter of substantial public interest.

The ER 404(b) rulings in this case were unusual. The State alleged that Mr. Pope was verbally and physically abusive throughout the relationship with Ms. Simmons, and it sought admission of this evidence to explain Ms. Simmons's supposed delay in reporting the September 15 rape – even though Ms. Simmons called the police within a week or two of the incident. RP (Vol. E) 12-13; RP (Vol. F) 212-13, 224; CP 593. The court ruled the evidence was admissible for this purpose, but *also* ruled the evidence was admissible to show motive and intent. RP (Vol. E) 13; CP 128-29. The State had not sought admission for these purposes. *See* RP (Vol. E) 12-13 (prosecutor orally requests admission to explain delay in reporting); CP 593 (State's written trial memorandum requests admission to explain delay in reporting); CP 175 (State's proposed limiting instruction limits consideration of the evidence to evaluate delay in reporting).

This Court should grant review to address whether a trial court may act as a second prosecutor and advance its own purposes for introducing the evidence. RAP 13.4(b)(4). It should hold that such advocacy is improper, and that trial judges should instead evaluate the party's suggested non-propensity purposes for the evidence. *See State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (court must "identify the purpose for which the evidence *is sought to be introduced*") (emphasis added); *cf. City of Seattle v. Clewis*, 159 Wn. App. 842, 247 P.3d 449, 453 (2011) (assuming without deciding that "the judge did create the appearance of bias against Clewis by advocating steps the prosecutor should take to keep the case alive").

The court then shifted the landscape again by giving the jury a limiting instruction which differed from its ruling and differed from the instruction the parties jointly proposed. Consistent with its original motion, the State proposed an instruction that that permitted consideration of the evidence "only for the purpose of examining the delay in the reporting of alleged acts from September 15th, 2013." CP 175. Mr. Pope proposed a similar instruction. CP 250. Without explaining its deviation from the parties' proposal, the trial court instead instructed the jury that it could consider the evidence for the purposes of evaluating Ms. Simmons's credibility and Mr. Pope's motive and intent. CP 141.

This Court should also grant review because the admission of alleged prior incidents to show credibility was contrary to *Gunderson*, *supra*. RAP 13.4(b)(1). Ms. Simmons did not recant or change her story, and therefore it was improper to admit prior acts evidence to bolster her credibility. *Gunderson*, 181 Wn.2d at 925 (evidence of alleged prior domestic violence against complainant should not have been admitted to show credibility in domestic violence case where complainant's story did not change).

The evidence was also inadmissible to show motive and intent. Mr. Pope's state of mind was not an issue in the case and the evidence of alleged constant abuse was extraordinarily prejudicial. *See State v. Saltarelli*, 98 Wn.2d 358, 362-67, 655 P.2d 697 (1982) (evidence of prior attempted rape should not have been admitted in rape case; "motive" and "intent" may not be used as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names."). Although intent is an element of assault, it is not an element of rape, which was the more serious charge in the case. *See* CP 146. Furthermore, Mr. Pope did not contest the *mens rea* element of the assault; he argued the incidents did not occur at all. RP (Vol. H.) 488-500. Accordingly, the prior-act evidence was substantially more prejudicial than probative, and should not have been admitted to prove motive or

intent. *See State v. Wilson*, 144 Wn. App. 166, 177-78, 181 P.3d 887 (2008) (prior assaults and threats improperly admitted where intent was not an element of the more serious charge and defendant did not contest the intent element on the lesser charge).

This Court has cautioned that when evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Powell*, 126 Wn. 2d 244, 264, 893 P.2d 615,627 (1995). That is the case here. The bulk of the trial was spent discussing Mr. Pope's alleged mistreatment of Ms. Simmons throughout their relationship, with the question of whether he committed the offenses on September 15 a secondary focus. *See* RP (Vol. F) 112-224. Thus, the trial became a referendum on Mr. Pope's character rather than a trial on the charged crimes. The admission of the evidence was improper, and this Court should grant review.

3. This Court should grant review because prosecutorial misconduct deprived Mr. Pope of a fair trial.

The prosecutor committed multiple instances of misconduct in this case. Indeed, the State's presentation to the jury was filled with personal opinions and emotional appeals based on speculation and alleged facts not in evidence. Mr. Pope objected to most of the improper comments, but the objections were wrongly overruled. The pervasive misconduct rendered

the trial unfair, and this Court should grant review. *See Darden v. Wainwright,* 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (prosecutorial misconduct may deprive a defendant of his Fourteenth Amendment right to due process); *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012) (same); U.S. Const. amend. XIV.

A prosecutor may not misstate the facts or assume prejudicial facts not in evidence. *Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Indeed, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *State v. Pierce,* 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor committed such misconduct in this case.

In closing argument, the prosecutor made the inflammatory and baseless claim that from the moment Mr. Pope saw Ms. Simmons at the bus stop in May of 2013, he "knew what he had in store for her" and "knew ... that she would become the perfect victim." Mr. Pope's multiple objections to this misconduct were improperly overruled. RP (Vol. I) 473-75.

The prosecutor's narrative was a highly inflammatory fiction unmoored from the evidence. The evidence showed that Mr. Pope's and Ms. Simmons's relationship in 1993 was a positive experience for both of

them. The next time they saw each other was at the bus stop in May of 2013. No evidence showed that in the interim Mr. Pope had developed a plan to victimize Ms. Simmons the next time he saw her. No evidence showed that he "knew" the moment he saw Ms. Simmons again after 20 years that their relationship this time around would be different – let alone that he knew he planned to attack her. The story the State spun was wild speculation designed to inflame the passions of the jury. *See Pierce*, 169 Wn. App. at 555 (The "embellishments to the evidence were nothing more than an improper appeal to the jury's sympathy that encouraged the jury to decide the case based on the prosecutor's heart-wrenching, though essentially fabricated, tale of how the [crimes] occurred.").

The prosecutor also committed misconduct by expressing her opinions that Ms. Simmons was "brave" for finding the "courage" to testify. RP (Vol. I) 485. It is improper for a prosecutor to vouch for her witnesses and express her personal opinion. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015).

Finally, the prosecutor ended her closing argument by improperly expressing a personal opinion and issuing an emotional appeal: "And now, over a year later, I stand before you and ask that you finish this chapter the right way and hold the defendant – ." RP (Vol I.) 485. Mr. Pope objected, but the objection was overruled. *Id.* The prosecutor's exhortation was

improper, because the jury's job is not to do what the prosecutor believes is "right"; rather, the jury's job is to determine whether the State has proved the elements of the crime beyond a reasonable doubt. *Cf. State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002) (it is misconduct "to draw a cloak of righteousness around the State's position"). For all of these reasons, this Court should grant review.

4. This Court should grant review because the two convictions violate double jeopardy.

Finally, this Court should grant review because the two convictions for assault and rape violate the Fifth Amendment right to be free from double jeopardy. U.S. Const. amend. V.

To determine whether multiple convictions violate double jeopardy, courts apply the "same evidence" test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S.Ct. 180 (1932)). Under that test, absent clear legislative intent to the contrary, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *Id.*; *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In other words, two convictions violate double jeopardy when the evidence required to support a conviction on one charge would have been sufficient to warrant a conviction upon the other. *Freeman*, 153 Wn.2d at

772; *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013), *review denied*, 179 Wn.2d 1017, 318 P.3d 280 (2014).

Prosecutors may not "divide a defendant's conduct into segments in order to obtain multiple convictions." *Jackman*, 156 Wn.2d at 749. The merger doctrine precludes two convictions where an assault is committed in furtherance of another crime. *Freeman*, 153 Wn.2d at 778. For example, "courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing." *Freeman*, 153 Wn.2d at 774. The only exception is where the injury from the assault is "separate and distinct from and not merely incidental to" the other crime. *Id.* But in the usual case where the assault furthers the other crime, the assault conviction cannot stand. *Freeman,* 153 Wn.2d at 779 (holding second-degree assault and first-degree robbery merged); *accord In re the Personal Restraint of Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010) (vacating second-degree assault conviction under double jeopardy clause because it merged with first-degree attempted robbery conviction); *cf. State v. DeRyke*, 110 Wn. App. 815, 823-34, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906 (2003) (holding first-degree kidnapping conviction merged into attempted rape conviction).

The two convictions here violate double jeopardy under the merger doctrine. Ms. Simmons testified that the incident on September 15 constituted a single violent course of conduct, during which Mr. Pope strangled her on the couch, moved her to the floor, wrapped her belt around her mouth, held her arms over her head, and raped her. RP (Vol. F) 199-204. The prosecutor in closing argument similarly explained that the strangulation was part of the proof of the "forcible compulsion" element of the rape. RP (Vol. I) 478-79.

This Court's decision in *Johnson* is instructive. *See State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979). There, the defendant picked up two hitchhikers and took them to his cabin. *Id.* at 672. He gave one of them a note, threatening to kill her if she did not do as she was told. *Id.* He took her to the bathroom, held a knife to her neck, took off her clothes, and bound her hands and mouth. *Id.* Then, he went to the living room to retrieve the other girl, and directed her to the bathroom as well. *Id.*

He then took both girls to the bedroom, had them lie on the bed, and bound their hands to the bedpost. *Id.* at 672-73. He raped both of them on the bed. *Id.* at 673. Later, he took one of the girls to a wooded area and raped her again. *Id.* The defendant was ultimately convicted of two counts

each of first-degree rape, first-degree kidnapping, and first-degree assault. *Id.* at 672.

This Court reversed the assault and kidnapping convictions on double jeopardy grounds, holding those crimes merged with the rapes. *Johnson*, 92 Wn.2d at 681-82. The court explained, "the legislature intended that conduct involved in the perpetration of a rape, and not having an independent purpose or effect, should be punished as an incident of the crime of rape and not additionally as a separate crime." *Id.* at 676. Thus, even though the defendant assaulted and restrained the victims in the bathroom before moving them to the bedroom and raping them, the assault and kidnapping convictions violated double jeopardy. *Id.* at 680-81. Similarly here, the assault that occurred on the couch right before Ms. Simmons was moved to the floor and raped was incidental to the rape, and may not be punished separately. *See id.*

Because the convictions for both assault and rape violate Mr. Pope's Fifth Amendment right to be free from double jeopardy, this Court should grant review. RAP 13.4(b)(3).

E. CONCLUSION

This Court should grant review to address the novel questions of (1) when a court must readvise a defendant of his constitutional right to counsel and (2) whether a trial court may offer its own purposes for admitting evidence under ER 404(b). This Court should also grant review of the prosecutorial misconduct and double jeopardy issues.

Respectfully submitted this 19th day of January, 2018.

Lila J. Silverstein
WSBA #38394
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ETON MARCEL POPE, Appellant.	No. 74029-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 4, 2017

BECKER, J. — Appellant was convicted of rape and assault following a trial during which he represented himself. He contends his right to counsel was violated because after the State added an aggravator, the court did not reassess his desire to act pro se or consider reappointing counsel. The record does not show a violation of appellant's right to counsel. We affirm.

FACTS

The victim, ES, testified that she met the appellant, Eton Pope, in 1993, and they dated for a brief period. In May 2013, ES and Pope ran into each other in downtown Seattle. They started dating again. As the relationship progressed, Pope began subjecting ES to verbal abuse. Sometimes he was physically aggressive towards her, especially during sex. ES remained hopeful Pope would change and the relationship could work.

On September 15, 2013, Pope and ES were together at her apartment. They got into an argument. When ES refused to "be quiet," as Pope demanded, he grabbed her by the neck, pushed her against the wall, and choked her. He eventually let go. During a later conversation, Pope again demanded that ES "be quiet." She refused. Pope sat down on the couch next to ES and choked her until she fainted. When ES regained consciousness, Pope was moving her from the couch to the floor. She testified that Pope then raped her:

> He sat me on the floor, and then what he did, he—somehow I was—I was—had my robe on. It was a gray, terry cloth robe, and he—somehow—I don't know where the belt was. I don't know if it came out of the—out of the belt loops or not, but somehow he got the belt loop, and he wrapped it around my mouth, and at that point I knew something wasn't right. I knew this wasn't right.
>
> He put that belt loop around my mouth. He just wrapped it. And I started shaking my head, because I knew that wasn't right. Whatever was getting ready to happen, I knew it wasn't right.
>
> . . . .
>
> . . . And he laid me down. He laid me down, and then he held—with his left hand he held my hands above my head, and then he raped me.

ES did not call the police that day.

Pope and ES did not see each other until the end of October, at which point they agreed to get back together. Pope soon resumed his verbal abuse of ES. They broke up around October 22, 2013. On October 23, ES called the police and reported the rape that occurred on September 15.

Pope was charged with one count of second degree assault by strangulation and one count of second degree rape. Both offenses were alleged to be crimes of domestic violence. The State later amended the charge by

adding an aggravator for a history of domestic violence over a prolonged period of time, based on Pope's conduct towards ES as well as other women.

Pope represented himself during a bifurcated jury trial in March 2015. His defense was general denial or consent. A jury convicted him on both counts. In a separate trial, the same jury determined that the aggravator applied. The court imposed an indeterminate sentence with a minimum term of 220 months. The court did not use the aggravator in calculating Pope's sentence because the Supreme Court had recently decided State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (July 2, 2015). In that case, the court held that the pattern jury instruction on the aggravator amounted to an impermissible comment on the evidence because it defined the statutory term "prolonged period of time" to mean "more than a few weeks." Brush, 183 Wn.2d at 558-59.

Pope appeals the judgment and sentence.

RIGHT TO COUNSEL

Pope moved to proceed pro se during a hearing on July 7, 2014. The court engaged him in a colloquy about the consequences and details of pro se representation. The court granted Pope's request after finding that his decision was knowing and voluntary. Trial was set to begin on February 18, 2015.

The State requested to amend the information to add the history of domestic violence aggravator during an omnibus hearing on February 6, 2015. The court explained to Pope that if the aggravator was proven, he could face increased penalties. Pope expressed confusion; he said, "I feel like I'm being ambushed right now" and "I'm not clear on this. I don't understand it even though

you've gone over it." The court responded that Pope was being held to the same standard as a lawyer. The court entered an order allowing amendment of the information. Pope was arraigned on the aggravator.

On February 23, 2015, the parties appeared before the trial judge to discuss preliminary matters such as motions in limine. Pope again expressed confusion about the amendment. He told the judge "I don't understand the process" and asked whether requesting counsel was "out of order":

> [POPE:] So, at this point, obviously, it's things I'm unaware of and I'm just—I don't understand the process.
> [COURT:] Well, that's the problem when you represent yourself. But you've already gone through that colloquy with the judge that allowed you to represent yourself.
> . . . .
> [POPE:] So, to even request counsel at this time is out of order? How does that work?
> [COURT:] Your time to have an attorney has passed. So, we'll go through the trial memo and then break until tomorrow.

Pope later asked whether having standby counsel appointed was "doable." The trial court correctly informed him there is no right to standby counsel. State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

The jury was sworn in on March 2, 2015. Pope represented himself throughout the trial.

On appeal, Pope contends the trial court was required to engage him in a new colloquy about self-representation after the State added the aggravator. He further argues that the trial court did not adequately consider what he describes as his request for reappointment of counsel.

Criminal defendants have a right to waive assistance of counsel and to represent themselves at trial. DeWeese, 117 Wn.2d at 375. A waiver is valid if

made knowingly, voluntarily, and intelligently. State v. Modica, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). The preferred procedure for determining the validity of a waiver is a colloquy. Modica, 136 Wn. App. at 441; DeWeese, 117 Wn.2d at 378. Pope does not assign error to the thoroughness of the colloquy that occurred on July 7, 2014, or otherwise challenge the validity of his initial waiver. Rather, his argument is that the court should have reevaluated his pro se status when he expressed confusion as the trial drew near.

Pope characterizes the alleged error as a deprivation of counsel, a type of error that requires automatic reversal without any inquiry into prejudice, citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Chapman recognized that there are some constitutional rights, including the right to counsel, "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23 & n.8; Chapman does not provide the relevant standard for reviewing Pope's claim. We are not confronted with a deprivation of counsel. The issue is whether the court was obliged to appoint counsel for a defendant who had already validly waived the right to counsel.

A defendant who has validly waived counsel has relinquished the right to demand assistance of counsel as a matter of entitlement. Modica, 136 Wn. App. at 443. Whether counsel should be reappointed is a matter within the discretion of the trial court, considering all circumstances that exist when the request for reappointment is made. Modica, 136 Wn. App. at 443; State v. Canedo-Astorga,

79 Wn. App. 518, 525, 903 P.2d 500 (1995), review denied, 128 Wn.2d 1025 (1996). We held in Modica that the trial court was not required to *sua sponte* engage the defendant in a second full colloquy when the information was amended, approximately one week before the jury was empanelled, to add a charge of witness tampering. Modica, 136 Wn. App. at 440, 446. The trial court also did not abuse its discretion by denying the defendant's request for reappointment, made a day after the jury was empanelled. Modica, 136 Wn. App. at 440, 444. "The burdens imposed upon the trial court, the jurors, the witnesses, and the integrity of the criminal justice system increase as trial approaches or when trial has already commenced." Modica, 136 Wn. App. at 443. Thus, "the degree of discretion reposing in the trial court is at its greatest when a request for reappointment of counsel is made after trial has begun." Modica, 136 Wn. App. at 443-44.

Pope waived counsel in July 2014. He does not show a compelling reason why this waiver did not continue throughout the trial, as is the general rule. Modica, 136 Wn. App. at 445. He argues that amendment of the information on February 6, 2015, amounted to a substantial change in circumstances requiring a new colloquy, particularly because proving the aggravator would require evidence of other victims, and if proved, it carried the possibility of a life sentence. This argument is analogous to the claim rejected in Modica.

Pope asked about reappointment of counsel and appointment of standby counsel at the end of February 2015. He contends the trial court failed to

exercise its discretion to consider his request. We disagree. The judge told Pope his "time to have an attorney" had "passed." This comment reflects the court's consideration of the timeliness of Pope's request, a key factor bearing on whether reappointment was warranted. The record does not show that the trial judge categorically refused to reappoint counsel or was unaware of its discretion to do so.

It was not an abuse of discretion to deny reappointment under the circumstances. Had the court appointed counsel, the court likely would have been compelled to delay trial to allow new counsel adequate time to prepare. The likelihood of a trial delay was a primary reason reappointment was not warranted in Modica and Canedo-Astorga. Pope offered no reason why reappointment was necessary besides the fact that he was confused about the trial process. This is not a basis for reappointment because a defendant who chooses to represent himself "assumes the risk" of ineptitude. Canedo-Astorga, 79 Wn. App. at 526-27. "Self-representation is a grave undertaking, one not to be encouraged. Its consequences, which often work to the defendant's detriment, must nevertheless be borne by the defendant." DeWeese, 117 Wn.2d at 379. We conclude the trial court acted within its discretion by maintaining Pope's status as a self-represented defendant.

PRIOR MISCONDUCT EVIDENCE

The trial court agreed to admit evidence of prior acts of abuse by Pope against ES, over Pope's objection. Evidence was admitted of psychological abuse between May and September 2013, including a time when Pope

threatened to kill ES and told her no one would be able to find her body; an incident in July 2013 when Pope shook ES's shoulders "really, really hard" because she was not performing oral sex the way he wanted; an incident in August 2013 when Pope threw ES onto a bed, straddled her, and pushed her face into the mattress until she could not breathe; and Pope's strangulation of ES on September 15, 2013, before he committed the strangulation and rape underlying the charges. The court found that the acts were admissible to explain the victim's delay in reporting and as proof of motive and intent. The court also found, as required, that the acts had been proven by a preponderance of the evidence and their probative value outweighed any prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Pope assigns error to admission of the above evidence. Evidence of a defendant's prior misconduct is not admissible to show criminal propensity, but it may be admissible for other purposes. ER 404(b); State v. Woods, 198 Wn. App. 453, 458, 393 P.3d 886 (2017). We review for an abuse of discretion. Woods, 198 Wn. App. at 458.

The evidence was properly admitted to explain ES's delay in reporting and, relatedly, her credibility. The record establishes that ES did not report the strangulation and rape that occurred on September 15, 2013, until more than a month later. Because her delay in reporting could be interpreted by the jury as inconsistent with her accusation of rape, the trial court had discretion to admit evidence that Pope had previously assaulted and threatened her. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). A jury is entitled to evaluate the victim's

credibility "with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Grant, 83 Wn. App. at 108; see also Woods, 198 Wn. App. at 460 (evidence that the defendant previously promoted prostitution of the victim was relevant to jurors' understanding of the dynamics of their relationship). We find no abuse of discretion.

PROSECUTORIAL MISCONDUCT

Pope alleges four instances of prosecutorial misconduct. He must demonstrate that the conduct was improper, viewed in context of the circumstances of the case. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied, 175 Wn.2d 1025 (2012). He must also demonstrate the conduct was prejudicial. Pierce, 169 Wn. App. at 552. Conduct is prejudicial if there is a substantial likelihood that it affected the jury verdict. Pierce, 169 Wn. App. at 552.

A prosecutor commits misconduct by urging jurors to decide a case based on evidence outside the record. Pierce, 169 Wn. App. at 553. Mere appeals to the jury's passion or prejudice are also improper. Pierce, 169 Wn. App. at 552. "A prosecutor is not barred from referring to the heinous nature of a crime but nevertheless retains the duty to ensure a verdict 'free of prejudice and based on reason.'" Pierce, 169 Wn. App. at 553, quoting State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984). A prosecutor may comment on a witness's veracity so long as a personal opinion is not expressed and the comments are

not intended to incite the jury's passion. State v. Stith, 71 Wn. App. 14, 21, 856 P.2d 415 (1993).

First, in her opening statement, the prosecutor said that the victim's "eyes rolled in the back of her head" when Pope strangled her. Pope objected. He now contends there was no evidence at trial to support this image. It is true that ES did not specifically testify that her eyes rolled back in her head. But she did testify that Pope choked her until she fainted, a condition often associated with rolling back of the eyes. Even if the remark veered toward the edge of being inflammatory, it is unlikely that it substantially affected the jury verdict. ES testified in detail about the strangulation, and the jury received the standard instruction that instructions are not evidence.

Second, the prosecutor argued in closing that Pope "knew" ES "would become the perfect victim":

> [STATE:] When Eton Pope saw [ES] at that bus stop in May 2013, he knew.
> [POPE:] I object, Your Honor.
> [STATE:] He knew that he—
> [COURT:] Overruled.
> [STATE:] —could mold her, he knew that he could shape her, and he knew—
> [POPE:] I object, Your Honor.
> [COURT:] Overruled.
> [STATE:] —she would become the perfect victim. And we know he knew that because during that very first encounter he refused to give his last name.
> [POPE:] I object. That's not into evidence, Your Honor.
> [COURT:] Overruled.
> [STATE:] And that's likely because he knew what he had in store for her.
> And learn her, he did. He spent six weeks figuring out what [ES] was—
> [POPE:] Objection.
> [COURT:] Overruled.

> [POPE:] That's insinuation.
> [STATE:] Figuring out what she was desperate for, figuring out what she was hoping for. And, when he finally figured out what she believed a perfect man was, he briefly became that man and then quickly turned into exactly what she feared.
> [POPE:] I object, Your Honor.
> [COURT:] Overruled.
> [STATE:] Eton Pope played on [ES's] hope and desperation to slowly and methodically break her down, and, when he felt she was in the right place, properly destroyed, he went a little further. And each time she forgave him, each time she felt sorry for him, and each time she felt that she could fix him, he gained a little more power.

Pope challenges this line of argument on the basis that it was inflammatory and unsupported by the evidence, like the argument that led to reversal in Pierce. In that case, the prosecutor in rebuttal argument appealed to the jury's passion and prejudice "by asking it to place itself in the shoes of two victims of a brutal killing," by speculating on Pierce's thought process leading up to the crime, and by "fabricating an emotionally charged story of how the victims might have struggled with Pierce and pleaded for mercy." Pierce, 169 Wn. App. at 537. The improper remarks "encouraged the jury to decide the case based on the prosecutor's heart-wrenching, though essentially fabricated, tale of how the murders occurred." Pierce, 169 Wn. App. at 555.

The prosecutor's assertion that Pope knew ES would become the perfect victim is not analogous to the fabricated story challenged in Pierce. The record shows that Pope did subject ES to a pattern of intimidation and aggression. ES testified "He kind of came in and just kind of broke me." It was not an unreasonable inference from the evidence to describe Pope as calculating and manipulative.

Third, Pope contends that by describing ES as brave and courageous, the prosecutor improperly vouched for her credibility. We disagree. The remark is more reasonably understood as an inference based on ES's demeanor on the stand.

Fourth, Pope challenges the prosecutor's appeal to the jury to "finish this chapter the right way." This remark came at the end of the prosecutor's discussion of evidence supporting the elements of the crimes. The comment is reasonably understood as an assertion that guilty verdicts were warranted because the crimes had been proven. Viewed in context, the remark was not improper.

In sum, none of the challenged remarks lead to a conclusion that Pope did not have a fair trial.

DOUBLE JEOPARDY

Pope contends the assault conviction merged with the rape and should be vacated on double jeopardy grounds. We review this claim de novo. State v. Mandanas, 163 Wn. App. 712, 717, 262 P.3d 522 (2011).

Under the merger doctrine, "when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005). The rule applies only where the legislature has clearly indicated that in order to prove a particular degree of crime, the State must prove not only that the defendant committed that crime but also that the crime was accompanied by an act which is

defined as a crime elsewhere in the criminal statutes. Freeman, 153 Wn.2d at 777-78. Here, to elevate the act of sexual intercourse to second degree rape, the State had to prove that Pope used forcible compulsion. RCW 9A.44.050(1)(a).

Pope contends the State used the strangulation to prove forcible compulsion. We disagree. As ES described the strangulation, it occurred before the rape began. To prove forcible compulsion, the State relied on Pope's acts of holding ES's hands over her head and putting the belt in her mouth. This was not a case in which the sole purpose of the strangulation was to compel submission to rape. State v. Johnson, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948 (1980). The strangulation was a separate assault with a separate purpose: to quiet ES when she was talking back. The injury from strangulation was independent of the injury from rape. Pope has not shown a double jeopardy violation.

STATEMENT OF ADDITIONAL GROUNDS

Pope's statement of additional grounds alleges that the prosecutor engaged in misconduct by commenting on his failure to testify and knowingly eliciting false testimony from ES. The record does not support this claim.

Pope also claims a violation of his right to counsel, but he does not provide a basis for review that is different from the argument in the brief of appellant addressed above.

ERROR ON JUDGMENT AND SENTENCE

The jury determined by special verdict that the aggravator for a history of domestic violence applied. The sentencing judge vacated the aggravator under Brush, but there remains a check in the box on the judgment and sentence indicating that the aggravator applies. We remand for correction of the error.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Cox, J.

APPENDIX B

FILED
1/5/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. ETON MARCEL POPE, Appellant.	No. 74029-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Eton Pope, has filed a motion for reconsideration of the opinion filed in the above matter on December 4, 2017. Respondent, State of Washington, has not filed a response to appellant's motion. The court has determined that appellant's motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74029-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Carla Carlstrom, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[carla.carlstrom@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 19, 2018

WASHINGTON APPELLATE PROJECT

January 19, 2018 - 4:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74029-6
Appellate Court Case Title:	State of Washington, Respondent v. Eton Pope, Appellant
Superior Court Case Number:	14-1-02037-2

The following documents have been uploaded:

- 740296_Petition_for_Review_20180119164435D1557061_0212.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.org_20180119_161521.pdf

A copy of the uploaded files will be sent to:

- carla.carlstrom@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180119164435D1557061