

63548-4

63548-4

NO. 63548-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES RUFFIN,

Appellant.

2010 MAR 29 PM 2:48

~~COURT OF APPEALS~~
DIVISION I
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Whether the defendant may raise his claim that the victim's out-of-court statements violated his right to confrontation for the first time on appeal where any error was not a manifest error affecting a constitutional right.

2. Whether the admission of the victim's statements to the 911 operator violated the right to confrontation under the federal constitution where they were not testimonial.

3. Whether the admission of the victim's statements to medical providers violated the right to confrontation under the federal constitution where they were not testimonial.

4. Whether the admission of the victim's statements to medical providers violated the right to confrontation under the state constitution where they were not testimonial and independent state constitution analysis is not warranted.

5. Whether the defendant has failed to establish that the prosecutor engaged in misconduct in closing argument where the challenged portions of the prosecutor's argument contained reasonable inferences supported by the record.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

James Derrick Ruffin was convicted by jury trial of the crime of assault in the second degree. CP 72, 79. He received a standard range sentence of 146 days of confinement. CP 80-82.

2. FACTS OF THE CRIME.

Around midnight on December 28, 2008, Deputies Cissna and Goding of the King County Sheriff's Office responded to a 911 call at Ruffin's home in Renton, Washington. 4RP 32-36, 93-96.¹ Ruffin was standing on the front porch when Deputy Cissna arrived. 4RP 36-37. Ruffin was calm and uninjured. 4RP 37, 53. Inside the home, Naomi Wilson, Ruffin's longtime girlfriend, was being treated by medics. 4RP 39. She was crying, and had red marks and scratches on her neck, a swollen eye and a bloody nose. 4RP 39, 98-100. She smelled of alcohol but did not seem intoxicated. 4RP 50. Deputy Goding testified that her balance

¹ The Verbatim Report of Proceedings will be referred to herein as follows: 1RP refers to April 20, 2009; 2RP refers to April 21, 2009; 3RP refers to April 22, 2009; 4RP refers to May 4 and May 5, 2009; 5RP refers to May 6, 2009; 6RP refers to May 7, 2009; 7RP refers to May 11, 2009; and 8RP refers to May 12 and 22, 2009.

seemed fine, her speech was not slurred, and she was able to walk around without difficulty. 4RP 101.

Naomi Wilson's mother, Judy Neumann, testified that she was downstairs in the home when she heard Ruffin and Wilson arguing upstairs. 4RP 72. She next heard a thud on the floor, and walked upstairs. 4RP 71-73. She saw Wilson bending over and covering her face, which was bleeding. 4RP 73. Wilson was upset and stated "he hit me." 4RP 73. Wilson called 911. 4RP 74. The couple's small daughter came out of the bedroom crying after Wilson called 911. 4RP 75. Ms. Neumann testified that at the time of trial, Wilson was pregnant and due in 18 weeks. 4RP 80.

Dr. Sternfeld treated Naomi Wilson at the Valley Medical Center emergency room on December 28, 2008. 5RP 140, 145. She came into the emergency room at 1:50 a.m. 5RP 145. She was initially interviewed by a nurse, and told the nurse that her boyfriend had hit her in the stomach, face and neck. 5RP 147-48. She told the nurse that he punched her in the face and abdomen after she asked him to move out. 5RP 148. She also stated that he strangled her, sat on her and kneed her in the stomach. 5RP 148. She reported that her face was very painful, her abdomen and ribcage hurt, and that she was having trouble

breathing. 5RP 149. She ranked her pain as an 8 on a 10-point scale. 5RP 150. Wilson's eye was bruised and nearly swollen shut and she had tenderness in her abdomen. 5RP 157. The hospital administered CT scans of Wilson's head, face, and abdomen. 5RP 153. The facial CT scan revealed a fracture in the bone surrounding her eye. 5RP 158. Dr. Sternfeld testified that such a fracture would be very painful and sometimes requires surgery. 5RP 161. The abdominal CT scan revealed no internal injuries but some abdominal contusions. 5RP 163.

Naomi Wilson did not testify at trial. On May 6, 2009, prior to the testimony of Dr. Sternfeld, the State reported to the court and defense that Wilson had checked into the hospital but had been released. 5RP 137. Because stress was impacting her pregnancy and she was experiencing bleeding, the victim informed the State that she did not wish to testify. 5RP 137. The State elected not to have Wilson arrested on a material witness warrant. 5RP 137.

James Ruffin testified in his own defense. Ruffin, who is 6'4" and weighs 210 pounds, testified that he acted in self-defense. 6RP 266. Naomi Wilson is 5'5" and weighs 165 pounds. 6RP 238, 277. Ruffin testified that on December 28, 2008, Wilson came home from work at 7:55 p.m. 6RP 223. The two of them watched

television together and drank beer. 6RP 223. Wilson went to the store for more beer at 9:30 p.m. 6RP 223. Eventually, the pair's conversation turned toward separation. 6RP 230. According to Ruffin, Wilson was drunk, became verbally abusive and threw a cup of beer at him. 6RP 230. Ruffin testified that he sat down on the couch and Wilson followed him, standing over him and yelling. 6RP 232. Wilson then began hitting Ruffin with both hands. 6RP 233. Ruffin put his hand on Wilson's chest and began to push her away from him. 6RP 234. He claimed that his hand slipped up to Wilson's neck, but she continued striking him even though her airway was constricted and she was "turning red." 6RP 234-35. Ruffin claimed that when he stood up, Wilson struck him in the face so hard that it knocked his glasses off, and that he hit her back. 6RP 236. Ruffin testified that Wilson then grabbed his shirt with her left hand and continued striking him with her right hand, although "she was actually not really connecting with my head or anything." 6RP 239. Ruffin hit her again. 6RP 239. Ruffin testified that Wilson tried to pull Ruffin to the ground, and both fell on the ground with Ruffin falling on top of Wilson. 6RP 240. Wilson's head hit the

floor and her nose started to bleed. 6RP 240. Ruffin stood up and the altercation was over. 6RP 241-42.

The State played the 911 tape for the jury on cross-examination. 6RP 264. In the tape, a sobbing Wilson repeatedly states "I need the police." Ex. 18, 24.² During the call, Wilson stated that "Derrick," her boyfriend, hit her "bad," that she was bleeding from her nose and that Derrick was still inside the house. Ex. 18, 24.

On cross-examination, Ruffin confirmed that he had no visible injuries from the altercation other than a cut to the inside of his cheek. 6RP 278. He also confirmed that he had previously been convicted of assaulting Wilson on three separate occasions in 2004. 6RP 285.

The jury found Ruffin guilty of assault in the second degree, but found that the State had failed to prove that the assault occurred within sight and sound of the victim's child for purposes of an aggravating circumstance. CP 66, 72, 73.

² The transcript of the 911 tape, which was admitted at trial as Exhibit 18, is attached as Appendix to Appellant's Opening Brief.

C. ARGUMENT.

1. RUFFIN FAILED TO PRESERVE ANY OBJECTION TO THE 911 TAPE OR THE MEDICAL RECORDS AS VIOLATING HIS RIGHT TO CONFRONTATION.

For the first time on appeal, Ruffin contends that admission of the victim's statements in the 911 tape and the victim's statements for purposes of medical treatment at the emergency room violated his right to confront witnesses under the federal and state constitutions.

In general, an appellate court will not consider contentions made for the first time on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). In Guloy, the defendants objected at trial to hearsay statements that were admitted as statements of coconspirators pursuant to ER 801(d)(2)(v). Id. at 419. On appeal, the defendants claimed that the trial court failed to weigh the probative value of these statements against their prejudicial impact pursuant to ER 403. Id. at 421. The state supreme court refused to address the ER 403 claim because the defendants made no objection on that particular basis at trial. Id. at 421. The supreme court recently adhered to the rule set forth in Guloy in State v. Powell, 166 Wn.2d 73, 81-82, 206 P.3d 321 (2009), explaining "[w]e will not reverse the trial court's decision to admit evidence

where the trial court rejected the specific ground upon which the defendant objected to evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial."

In the present case, the defense never objected to the hearsay statements that were admitted as violating his right to confrontation. The rules of hearsay and the constitutional right to confront witnesses are independent of each other. Statements may fall within a hearsay exception and nonetheless violate the right to confrontation because the witness is unavailable, and conversely, statements may be inadmissible as hearsay but not violate the right to confrontation because the witness is available in court. See Crawford v. Washington, 541 U.S. 36, 60-61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, Ruffin's objection to the statements at issue as inadmissible hearsay did not give notice to the trial court of his Confrontation Clause objection. Ruffin failed to object to the out-of-court statements as violating his right to confrontation below.

Nonetheless, a Confrontation Clause claim may be raised for the first time on appeal if the defendant establishes a manifest error affecting a constitutional right pursuant to RAP 2.5(a). State v. Kronich, 160 Wn.2d 893, 900, 161 P.3d 982 (2007). The defendant

must establish both that a constitutional error occurred and that the error had practical and identifiable consequences. Id. at 901. Ruffin cannot meet this burden in the present case. For the reasons stated below, the evidence was not testimonial and there was no constitutional violation. Ruffin has failed to establish a manifest error affecting a constitutional right.

2. THE STATEMENTS OF THE VICTIM ON THE 911 TAPE WERE NOT TESTIMONIAL.

Ruffin claims for the first time on appeal that admission of Wilson's statements on the 911 tape violated his right to confrontation under the federal constitution. These statements did not violate his right to confrontation because they were not testimonial.

The Sixth Amendment of the federal constitution provides that the accused has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment bars "testimonial" statements made by witnesses who do not appear at trial and thus are not subject to cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224

(2006). Hearsay that is not testimonial is not barred by the Sixth Amendment. Id. at 821.

In Davis v. Washington, the Supreme Court held that statements made in the course of a police interrogation are not testimonial if they were made under circumstances that objectively indicate the primary purpose of the interrogation was to enable the police to respond to an ongoing emergency. Id. at 822.

Statements to police agents are testimonial if the primary purpose was to establish or prove past facts. Id. Four factors are used to determine whether the primary purpose of a police interrogation is to enable police to respond to an ongoing emergency. State v. Pugh, 167 Wn.2d 825, __ P.3d __ (2009). The factors are (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events, (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency, (3) whether the questions and answers show that the statements were necessary to resolve the emergency, and (4) the level of formality of the interrogation. Id. at 832.

In State v. Pugh, 167 Wn.2d at 829, the victim called 911 to report that "my husband was beating me up really bad." She stated that he was just outside, walking away, and that she needed an

ambulance. Id. When police arrived, the victim was upset and crying and had a bruised face and a chipped tooth. Id. at 829-30. The 911 tape was admitted at the defendant's trial for violation of a court order. The state supreme court found that the victim's statements were not testimonial because the circumstance showed that the primary purpose of her call was to ensure her safety and obtain medical assistance, even though some of the statements appeared to describe past events. Id. at 833-34.

The present case is much like Pugh. At the time of the 911 call, Wilson had just been assaulted by Ruffin and he remained in the house. She was bleeding profusely and had an orbital fracture. Ruffin argues that there was no ongoing emergency because Wilson did not request medical assistance. However, the analysis for whether statements are testimonial focuses on the surrounding circumstances, not on whether the victim utters certain talismanic phrases. The circumstances establish that Wilson was in need of medical assistance. The fact that she requested police assistance before requesting medical treatment does not change the nature of the ongoing emergency. As in Pugh, the circumstances showed that Wilson's primary purpose in calling 911, and the 911 operator's primary purpose in posing questions to Wilson, was to allow police

to respond to a present and ongoing emergency. The statements made during the 911 call admitted at trial were not testimonial.

3. THE STATEMENTS OF THE VICTIM TO MEDICAL PROVIDERS AT THE EMERGENCY ROOM WERE NOT TESTIMONIAL.

Ruffin claims for the first time on appeal that admission of Wilson's statements to the medical providers at the emergency room violated his right to confrontation under the federal constitution. Like the statements on the 911 tape, these statements did not violate his right to confrontation because they were not testimonial.

The United States Supreme Court has not been called up to decide whether statements made for the purpose of medical diagnosis are testimonial. However, in a recent decision, the Court indicated that it will not view such statements as being testimonial. In Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in a footnote distinguishing cases that had been cited by the dissent, the majority of the Court stated, "Others are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today."

Washington cases that have addressed this issue have concluded that statements made for purposes of medical treatment are not testimonial. In State v. Fisher, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005), the court held that the child victim's statements to a treating physician that the defendant struck him were not testimonial where it was clear that the doctor's questions were part of her efforts to provide proper treatment. In State v. Moses, 129 Wn. App. 718, 730, 119 P.3d 906 (2005), this Court held that the victim's statements to a treating doctor at the emergency room that the defendant had hit and kicked her in the face were not testimonial because the purpose of the examination was for medical treatment of the victim's significant injuries. In State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007), the court held that the victim's statements to emergency room staff that the defendant assaulted her were not testimonial. The court explained that statements made for purpose of medical diagnosis are not testimonial where they are made for diagnosis and treatment purposes, where there is no indication that the witness expected the statements to be used at trial, and where the doctor is not employed by the State. Id. at 537.

Significantly, the Ninth Circuit recently upheld this Court's conclusion in Moses that statements for purposes of medical diagnosis are not testimonial. Moses v. Payne, 555 F.3d 742 (2009). On habeas review, the Ninth Circuit held that this Court's conclusion—that statements made by the victim to her doctor following an incident of domestic violence were not testimonial—was a reasonable application of established federal law. Id. at 755. Other federal courts that have addressed this issue are in agreement that statements made for the purpose of medical diagnosis are not testimonial. United States v. Santos, 589 F.3d 759, 763 (5th Cir. 2009); United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005).³

Ruffin argues that the "Davis factors" demonstrate that Wilson's statements to medical personnel at the emergency room were testimonial. However, the test set forth in Davis is a test that applies to statements made in response to interrogations by *government agents*. 547 U.S. at 826. The treatment providers at

³See also T. Harbinson, Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 Mercer L. Rev. 569, 632 (2007).

Valley Medical Center were not government agents. The test set forth in Davis for police interrogations is inapplicable.

Moreover, even if the test applied to private medical providers, the statements here were made under circumstances objectively indicating that the primary purpose of the interview was to enable the medical personnel to assist in responding to a medical emergency. See Pugh, 167 Wn.2d at 832. At the time of the statements, Wilson was in need of immediate medical assistance, having suffered an orbital fracture that was extremely painful. She went to the emergency room less than two hours after the assault. Her intent, objectively viewed, was to obtain medical treatment. The medical personnel's intent, objectively viewed, was to properly diagnosis her injuries in order to provide her with treatment. Her statements made to medical personnel in order to obtain medical treatment were not testimonial.

To the extent that Ruffin may argue that Wilson's statements to the nurse as to the identity of her assailant were not necessary for medical treatment and thus were testimonial, such statements were cumulative and thus harmless beyond a reasonable doubt. The testimony of Wilson's mother established that Ruffin and Wilson were alone together and arguing at the time of the assault.

Wilson identified Ruffin as her assailant in the 911 tape. And finally, Ruffin himself testified to striking Wilson. 6RP 236, 239.

4. THE STATEMENTS OF THE VICTIM TO MEDICAL PROVIDERS AT THE EMERGENCY ROOM DID NOT VIOLATE THE STATE CONSTITUTION.

Ruffin argues that admission of Wilson's statements to the medical providers made for purposes of medical treatment violated article I, section 22 of the Washington state constitution. This is a question of first impression. Ruffin's claim should be rejected. Analysis of the Gunwall⁴ factors does not support an independent state constitutional analysis. Moreover, any error in the admission of this evidence was harmless where there was overwhelming untainted evidence that supports the jury's verdict.

Ruffin's argument that the state constitution must be interpreted differently than the federal constitution does not withstand scrutiny. Two state supreme court cases have suggested that the state constitution could be interpreted independently, but both cases held that the state constitution was,

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

under the facts of those cases, no broader. In State v. Shafer, 156 Wn.2d 381, 392, 128 P.3d 87 (2006), the court held that the child victim's statements to her mother and family friend were not testimonial, and that their admission did not violate the state constitution. In State v. Pugh, supra, 167 Wn.2d at 845, the court held that the victim's statements to the 911 operator were not testimonial and that their admission did not violate the state constitution. Thus, while both of these cases suggest that an independent analysis of the state constitution may be warranted, neither of them actually interpreted the state constitution to provide broader protection under the facts at issue than the federal constitution.

Even where an independent analysis of the state constitution has previously been employed, consideration of the Gunwall factors helps guide the court's inquiry under the facts presented in a particular case. Madison v. State, 161 Wn.2d 85, 93 n.5, 163 P.3d 757 (2007). The Gunwall factors are (1) the textual language, (2) differences in the texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences and (6) matters of particular state and local concern. State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

Turning to the first two factors, which focus on the text of the federal and state constitutions, independent state constitutional analysis is not warranted because the critical term is the same in both constitutions. Article I, section 22 of the state constitution provides that "[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face." It is similar, but not identical, to the Confrontation Clause of the Sixth Amendment, which reads, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. While the state provision guarantees the accused the right to "meet face to face" and the federal provision guarantees the accused the right to "confront," both constitutional provisions apply to "witnesses" against the accused. Because the drafters of the state constitution adopted the term "witnesses" from the federal constitution, it should be presumed that the drafters intended the term to have the same meaning.

As the United States Supreme Court has reasoned, only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. Davis, 547 U.S. at 821. If a statement is not testimonial, it is not subject to the

Confrontation Clause. Id. The result should be the same under the state constitution, because the critical term, "witness" is the same. The fact that the state constitution requires "face to face meeting" with "witnesses" does not alter the definition of "witness" itself. Wilson's statements to the medical providers would not violate either the federal or state constitution because the statements were not testimonial and admission of the statements did not make Wilson a "witness against the accused." Factors one and two do not favor a broader interpretation of the state constitution in this case.

Turning to the third factor, a plurality of the state supreme court has previously noted that constitutional history is not helpful in determining whether the drafters intended the state constitution to be broader than the federal Confrontation Clause. Foster, 135 Wn.2d at 460. In his concurrence and dissent in State v. Foster, Justice Alexander looked to Massachusetts, after determining that the "face to face" language in the Washington constitution was derived from that state's 1780 constitution, which was one of the original state declarations of rights. Foster, 135 Wn.2d at 490 (Alexander, J., concurring in part and dissenting in part). Recently, the Massachusetts high court held that the

state's constitution is not broader than the federal right to confrontation in cases involving the hearsay rules and its exceptions. Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158 (2005). Constitutional history does not favor a broader interpretation of the state constitution in this case.

The fourth factor is preexisting state law. Ruffin argues that the question of whether out-of-court statements violate the state constitution must be determined by examining Washington law at the time that the state constitution was adopted. The state constitution was adopted in 1889. As of that time, there were only nine years of reported decisions by the Supreme Court of the Washington Territory. Obviously, the court did not address all possible constitutional issues in those nine years. Ruffin has cited to no pre-1889 Washington case in which statements for the purpose of medical treatment were held to violate the right to confront witnesses. However, in State v. Glass, 5 Or. 73, 79 (1873), the Oregon Supreme Court recognized that statements made by a sick person to a medical attendant as to the nature of her malady were admissible.⁵ Also, in White v. Illinois, the United

⁵ In his opinion in Foster, Justice Alexander noted that Washington's confrontation clause is identical to Oregon's. 135 Wn.2d at 474.

States Supreme Court referred to the hearsay exception for statements made for the purpose of medical treatment as a "firmly-rooted" exception. 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). Moreover, in State v. Ortega, 22 Wn.2d 552, 563, 157 P.3d 320 (1945), the state supreme court noted that the law can evolve, stating "the privilege of confrontation has at all times had its recognized exceptions, and these exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right to confront the witnesses against him."

The fifth factor supports an independent constitutional analysis in every case. Foster, 135 Wn.2d at 458. In regard to the sixth factor, the concerns underlying the right to confrontation are not unique to Washington. Id. at 465.

In sum, only the fifth Gunwall factor supports an independent analysis of the state constitution in regard to the question presented here. In regard to statements for the purpose of medical treatment, the state constitution does not provide broader protection than the federal Confrontation Clause. Because Wilson's statements to the medical providers were not testimonial, their admission did not

violate either the federal or the state right to confrontation of witnesses.

However, even if admission of Wilson's statements to medical providers violated Ruffin's right to confrontation under the state constitution, the error was harmless beyond a reasonable doubt. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). In the present case, Wilson's statements to the 911 operator and to her mother established that Ruffin had assaulted her. Ruffin himself admitted to striking the victim twice. Ruffin did not dispute that the orbital fracture that the victim suffered constituted substantial bodily harm. The case focused on the credibility of Ruffin's claim of self-defense. Clearly, the jury did not believe that Ruffin, who was almost a foot taller than the victim and 50 pounds heavier, needed to inflict substantial bodily harm in order to protect himself from the victim's allegedly drunken blows, which he testified were "not really connecting with my head or anything." 6RP 239. Ruffin admitted to punching Wilson, stating "I hit her

another punch with my right hand, and pulled away from her to try to break the grasp that she had on my shirt." 6RP 239-40.

Wilson's injuries could not be explained by Wilson and Ruffin falling to the floor together, as Ruffin testified. Any reasonable juror would view Ruffin's testimony in light of the medical testimony of the victim's injuries—orbital fracture, welts and scrapes to her neck, abdominal contusions—and conclude that the uninjured Ruffin used excessive force. This Court can conclude beyond a reasonable doubt that any constitutional error in admitting Wilson's statements to the medical providers was harmless beyond a reasonable doubt in light of the overwhelming untainted evidence that Ruffin committed assault in the second degree.

5. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Finally, Ruffin argues that the prosecutor committed misconduct in closing arguments. Many of the statements that Ruffin alleges were improper were not objected to below. None of the statements constitute misconduct. The prosecutor's argument was properly confined to facts supported by the record and reasonable inferences drawn from those facts.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the defense does not make a timely objection and request for a curative instruction, the misconduct is waived unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). It is not misconduct for the prosecutor to argue that the evidence does not support the defense theory. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Ruffin first argues that the prosecutor committed misconduct by arguing that Ruffin was responsible for Wilson's failure to appear. But the record reflects that the prosecutor did not draw this inference, and that her argument was firmly based on facts in the record. The prosecutor confined herself to facts established on the record: that Wilson did not testify and that Ruffin and Wilson had

been in contact on a weekly basis. 7RP 19. Defense counsel's objection was overruled. The prosecutor did not proceed further with this line of argument and at no time suggested that Ruffin had threatened or cajoled Wilson into absencing herself from trial.

Ruffin argues that the prosecutor referred to facts not in evidence by arguing that the defendant blamed Wilson for the assault by stating, "he basically said 'you made me do it.' And clearly those statements became her truth. She didn't come." 7RP 26. Ruffin's argument overlooks the fact that the defendant's own testimony was that Wilson was at fault for starting the altercation. The prosecutor's argument that this could have factored into Wilson's decision not to testify was a reasonable inference from the evidence. Moreover, Ruffin raised no objection to the argument, and it is not so flagrant and ill-intentioned that no curative instruction could have cured any prejudice.

Next, Ruffin argues that the prosecutor committed misconduct by urging the jury to convict Ruffin on improper grounds. Again, the record reflects that the prosecutor properly argued that the jury should convict the defendant based on the facts presented at trial. Essentially, the prosecutor urged the jury to convict the defendant because his testimony—that he acted in

self-defense against a drunken, enraged, and dangerous Wilson— was not credible. The prosecutor argued that when the defendant repeatedly disparaged Wilson's character as a violent drunk he was hoping to "distract you from his conduct in the case." No objection was raised. This line of argument contained reasonable inferences based on the record regarding the credibility of the defendant's testimony. It was not misconduct at all. It was certainly not flagrant and ill-intentioned misconduct causing prejudice that no curative instruction could have alleviated.

Ruffin's reliance on State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005), is misplaced. In Boehning, the prosecutor repeatedly referred to evidence of other sexual misconduct that the court had ruled was inadmissible. Id. at 522-23. No such misconduct occurred in Ruffin's case.

Finally, Ruffin argues that the prosecutor committed misconduct by stating that only one of the two versions of the events could be true. The prosecutor's argument that the defendant's version was not credible was not misconduct. It is misconduct for the prosecutor to argue that in order to *acquit* the defendant, the jury must find that the State's witnesses are lying. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991).

Such an argument misstates the jury's duty, because it need only entertain a reasonable doubt as to the State's evidence in order to acquit the defendant. Id. at 875-76. It is also misconduct for the prosecutor to argue that in order to believe a defendant's testimony it must find the State's witnesses are lying. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).

However, this Court explained in Wright that "where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts it must necessarily reject the other." Id. at 825. In that case, this Court concluded that the prosecutor's argument that, in order to believe the defendant, the jury had to believe the police "got it wrong," was not misconduct.

Here, the prosecutor made the argument that was expressly approved in Wright. The prosecutor argued that there were two versions of events: either Ruffin was the aggressor and assaulted Wilson, or Wilson was the aggressor and Ruffin reasonably acted in self-defense without using excessive force. The prosecutor properly pointed out that these two versions of the events were mutually exclusive. The prosecutor properly argued that the State's

version of events was true and that Ruffin's version of events was not. No objections were raised to this portion of the prosecutor's argument. 7RP 23. It is not misconduct for the prosecutor to argue that the defendant's testimony is not credible. Ruffin has failed to establish that the prosecutor committed misconduct in closing argument.

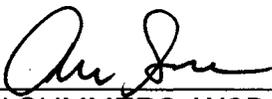
D. CONCLUSION.

Ruffin's conviction should be affirmed.

DATED this *26th* day of March, 2010.

Respectfully submitted,

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