

Original

NO. 34335-5-II
(Consolidated with 36262-7 and 35660-1)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CORY LAMONT THOMAS, APPELLANT

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY
CLERK OF COURT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 05-1-04377-8

BRIEF OF RESPONDENT

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A1. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Did the prosecutor commit misconduct where his remarks, to which there was no objection, were not improper or prejudicial?

3. Has defendant met his burden of showing ineffective assistance of counsel where neither prong of Strickland is satisfied?

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A2. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION #35660-1-II.

1. See A1 (4) above.

A3. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION #36262-7-II.

1. Where defendant committed a single assault against a single victim, do defendant's convictions for second degree assault and fourth degree assault constitute double jeopardy?

B. STATEMENT OF THE CASE.

1. Procedure

On September 6, 2005, the State charged CORY LAMONT THOMAS, defendant, with first degree burglary in count I, second degree assault in count II, intimidating a witness in count III, and telephone harassment in count IV. CP 1-5. On counts I through III, the State alleged unscored misdemeanor criminal history as an aggravating factor. Id.

The jury convicted defendant of the lesser included offense of fourth degree assault in count I, second degree assault as charged in count II, and telephone harassment as charged in count IV. CP 214-19. The jury acquitted defendant on count III, intimidating a witness. Id.

At sentencing, the State argued to the court that defendant had 19 misdemeanor convictions, all of which were unscored, resulting in a presumptive sentence that was “clearly too lenient” in light of the purpose of the SRA. RP 370, CP 350. Based on that unscored criminal history, the State requested an exceptional sentence of 120 months. RP 371. Defendant’s standard range is 43-57 months. CP 352. The trial court sentenced defendant to an exceptional sentence of 75 months on count II. RP 383. The court was concerned about defendant’s risk of re-offending and the safety of the community. Id. On counts I and IV, the gross misdemeanors, the court sentenced defendant to 365 days in jail, and

suspended the 365 days on various conditions. CP 274-76. This timely appeal follows.

On June 16, 2006, defendant filed a pro se Motion to Modify or Correct Sentence and Judgment. The motion was transferred to this Court to be treated as a Personal Restraint Petition (PRP) under case number 35660-1-II. On February 26, 2007, this Court, on its own motion, consolidated the PRP with the direct appeal. The issue raised in the PRP is the same issue contained Appellant's Opening Brief (AOB), Assignment of Error #2. The State addresses that issue in Section C4 herein.

On May 15, 2007, this Court approved the transfer of defendant's pro se "Plea of Former Jeopardy and Motion to Modify ..." as a personal restraint petition, assigning it case # 36262-7-II. On its own motion, this Court consolidated this new PRP to the existing consolidated appeal herein. Defendant raises the issue of double jeopardy in this second PRP. The State addresses that issue in Section C5 herein.

2. Facts

Lavisha Bonds, 24, and defendant have known each other for twelve years. RP 85. Lavisha and defendant began dating when Lavisha was a teenager. RP 85, 87. Defendant is the father of Lavisha's six-year-old son. RP 85, 87. Since the birth of their son, the couple have dated on and off. RP 87. At the time of these offenses, August 2005, Lavisha and

her son lived in a triplex in Tacoma. RP 86. No one else was living with them at the time. Id.

The night before the incident that gave rise to the charges herein, Lavisha had a former boyfriend over at her house. RP 88-89. His car was parked outside. RP 88. Defendant called her that night asking who was at her house. RP 88-89. Defendant was upset because he thought that Lavisha had gotten back together with the boyfriend. RP 89. He threatened Lavisha telling her, "I told you about that dude, you black bitch." RP 121. He also told her, "I'm going to beat your ass." Id.

Later that night, Lavisha went out with a friend, Danielle. RP 90-91. Danielle lived across the street and the two arranged for a babysitter at Danielle's. RP 90. The women returned to Lavisha's house at about 2:00 or 2:30 AM. RP 91. Danielle spent the night. RP 90.

The next morning, Lavisha awoke to defendant in her house. RP 91. He began hitting Lavisha and she swung back trying to defend herself. RP 92, 94. Defendant repeatedly punched her in the face. RP 191. While he was punching her, defendant said, "You think I am playing with you, bitch?" RP 212. Lavisha fell from the bed to the floor and defendant stomped on her and began kicking her in the small of her back, her buttocks, and especially over her tailbone. RP 191, 224. Lavisha got to the bathroom and tried to close the door, yelling for Danielle to get defendant off of her. RP 93, 141. Defendant went after Lavisha into the bathroom. RP 141. Lavisha was screaming and defendant knocked her up

against the wall. RP 142. Defendant again struck Lavisha and blood splattered onto the wall. RP 144. Defendant again knocked Lavisha to the ground. RP 145. Defendant then struck Lavisha with an aluminum broom handle, so hard that it bent the handle. RP 96, 114, 145, 162.

Danielle called 9-1-1. RP 93, 147. Defendant realized what was going on and he picked up his bag and left. RP 93. Defendant said, "It ain't over with." RP 212, 223.

Not 10 minutes later, defendant called and told Danielle that she made a mistake calling the police and that it was none of her business. RP 149.

Defendant had entered Lavisha's house by crawling through the bathroom window. RP 92. He had entered her house that way in the past. RP 102. He did not have a key to the residence, but he showered there occasionally and had some of his clothes there. RP 101.

When police arrived, Lavisha was on the couch holding a bloody towel on her face. RP 176. She had blood all down her front and on her arms. RP 209. She was crying and emotionally distraught. RP 209. Lavisha was unable to complete a written statement for police because her hands were shaking so badly. RP 216. There was blood on the wall in the residence and in the bathroom. RP 155.

Lavisha's injuries were treated in the Emergency Room. RP 190. She was tearful and complained of facial pain, back pain, and foot pain. RP 191, 202. The treating physician discovered Lavisha had a broken

nose and bruising on her tailbone. RP 194, 196. Although additional bruising was not visible, the physician testified that bruising often does not develop until hours after the injury. RP 200. Lavisha ended up with two black eyes. RP 116.

Defendant not only called Danielle 10 minutes after the incident, he continued to call to try to talk to Lavisha. He called ten to fifteen times while the police were at Lavisha's residence. RP 150, 179. During one call, Danielle told defendant he could talk to the police. RP 150. She handed the phone to Officer Peterson who identified herself. RP 179. Defendant refused to identify himself and said, "What do you want? I don't want to talk to you." Id.

In the days following the incident, Danielle stayed with Lavisha because she was so scared. RP 152. Defendant continued making phone calls. When they blocked his calls, defendant began calling Danielle's cell phone again. RP 152. Defendant would tell Danielle that it was none of her business and he would want to talk to Lavisha, who did not want to talk to him. RP 154. Danielle described the frequency of defendant's calls as "pretty constant." RP 154. She repeatedly told defendant that she did not want to talk to him and to quit calling. RP 179.

Prior to trial, Lavisha typed a statement recanting her report to the police. RP 100. In that statement, she said that she tried to grab a bag from defendant and that caused her to fall to the ground. RP 104. She denied that defendant did anything wrong. RP 105. She stated that

defendant would go through her bathroom window to access her house when she was not home. Id. At trial, Lavisha testified that the statement was false and that her report to police was accurate. RP 100. She explained that she wrote the letter in order to get defendant a lighter sentence so that her son could see his father. RP 99. Lavisha did not want to testify against defendant and only did so because the court had issued a material witness warrant. RP 70, 117, 134.

Defendant testified that Lavisha clawed his face and hit him and that when he pushed her away, she fell. RP 256. He claimed that she was drunk and jealous of his new girlfriend. Id. However, neither the emergency room physician nor police observed any signs of intoxication on Lavisha. RP 201, 218. Defendant denied threatening Danielle. RP 257. He also denied speaking to the police on the phone when they were at Lavisha's. RP 271.

C. ARGUMENT.

1. EVIDENCE OF DEFENDANT'S PRE-ARREST SILENCE DID NOT AMOUNT TO AN IMPERMISSIBLE COMMENT WHERE (1) OFFICER PETERSON'S TESTIMONY WAS LIMITED TO A NARRATIVE ABOUT THE INVESTIGATION AND (2) THE EVIDENCE WAS USED IN CLOSING ARGUMENT TO REBUT DEFENDANT'S TESTIMONY.

The privilege against self-incrimination is based upon the fifth amendment to the U.S. Constitution which provides that "no person... shall be compelled in any criminal case to be a witness against himself[.]"

State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). The purpose of the right is to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government. Id.

Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda*¹ constitute an "implicit assurance" to the defendant that silence in the face of the State's accusations carries no penalty. State v. Easter, 130 Wn.2d at 236. The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process. Id.

A police witness may not comment on the silence of the defendant to imply guilt from a refusal to answer questions. State v. Henderson, 100 Wn. App. 794, 798, 998 P.2d 907 (2000)(citing State v. Lewis, 130 Wn.2d at 705). But a mere reference to silence, which is not a comment on the silence, is not reversible error absent a showing of prejudice. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). Testimony about an accused's silence is a "comment" only if used to suggest to the jury that the refusal to talk is an admission of guilt. State v. Lewis, 130 Wn.2d at 707.

The Washington Supreme Court distinguished mere reference to silence and improper comment on silence in two companion cases: Easter

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

and Lewis. In Easter, the court held that police officer testimony that the defendant was a “smart drunk” who refused to answer questions violated the defendant’s right to silence. State v. Easter, 130 Wn.2d at 241. The Easter officer testified at trial that defendant was a “smart drunk,” which meant the defendant was evasive, “wouldn’t talk,” and was hiding something. Id. at 235. The prosecution used this silence as a “central theme” in closing argument. Id. at 230.

However, in Lewis, the court held that an officer’s indirect reference to the defendant’s silence was not a “comment” inferring guilt. State v. Lewis, 130 Wn.2d at 706. There, the officer testified that he told the defendant that “if he was innocent he should just come in and talk to me about it.” Id. at 703. The court held that this did not amount to a comment on the defendant’s silence because the officer did not say that the defendant refused to talk to him or reveal the fact that the defendant failed to keep his appointment. Id. at 706.

Similarly, in Sweet, an officer testified that the defendant had said he would be willing to take a polygraph examination and give a written statement after speaking with his attorney. State v. Sweet, 138 Wn.2d at 480. However, no evidence of a polygraph examination nor any written statement by defendant was ever introduced as evidence. Id. The Sweet court distinguished Easter, citing Lewis for the proposition that the officer’s testimony was a mere reference to silence. Id. Therefore,

“[e]ven assuming it might have been error to admit the testimony, any error was harmless.” Id.

- a. The record in this case does not support a finding that a “comment” occurred during Officer Peterson’s testimony.

Under Sweet and Lewis, “references” to silence are harmless absent a comment about that silence. Lewis at 706-07. Here, Officer Peterson testified in direct examination as follows:

- Q. What was happening while you were talking with Danielle?
- A. Her cell phone kept ringing.
- Q. And did she answer it?
- A. Yes.
- Q. And do you recall what she said?
- A. She just kept telling – saying, you know, “Quit calling. She doesn’t want anything to do with you. What you did, that’s not love.” Just constantly and then she would hang up and –

[DEFENSE COUNSEL]: Objection, hearsay, Your Honor.

THE COURT: I’ll sustain.

- Q. Do you recall how many times that happened?
- A. I would say ten, 15 times.
- Q. Did she ever give the phone to you?
- A. Yes, she did.
- Q. And describe that.
- A. One time she handed me the phone and said this is Cory and he wants to talk to you.
- Q. And did you take the phone?
- A. I did.
- Q. And what did you say?
- A. I identified myself as Officer Peterson and I asked who I was speaking to.

- Q. And what happened?
A. He wouldn't tell me.
Q. Did he tell you anything?
A. No. He just said, "What do you want," and I said, "Well, I was handed the phone and told you wanted to speak to me." That was pretty much the conversation. "I don't want to talk to you," and I said, "Okay."
Q. Did that happen once, more than once?
A. I believe I was handed the phone once.
Q. After you've [sic] spoken with the victim and with the witness, what did you do?
A. We cleared the call and either handled the next one or went out and wrote the report. I don't remember if we got another call right away.

RP 178-80. The officer merely provided a narrative of the events. She made no statements that suggest that defendant's silence was indicative of guilt. Therefore, there was no impermissible comment on that silence.

- b. There is no prejudice to defendant under the Supreme Court's explicit rationale in State v. Lewis.

The Lewis court explicitly held that: "[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." State v. Lewis, 130 Wn.2d at 706. Thus, it held that "mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice[.]" Id. at 706-07. Here, the testimony showed that defendant was insistently and repeatedly calling Danielle's cell phone to express his anger with her and tell her that it was none of her business and to use Danielle to get Lavisha

on the line. There can be no prejudice to defendant because jurors know defendant has a right to remain silent.

- c. The prosecutor's remarks in closing argument were used to rebut defendant's testimony and to impeach his credibility.

Although the officer did not comment on defendant's pre-arrest silence during testimony, the prosecutor did in closing argument. Pre-arrest silence may be properly used for the limited purpose of impeachment. In Easter, the Washington Supreme Court stated:

. . . **Pre-arrest silence**, which lacks such "implicit assurance" from the State about its punitive effect in future proceedings, **does not implicate due process principles**, although the constitutional inquiry does not end at that point.

The cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment after the defendant has taken the stand, and not as substantive evidence of guilt when the defendant has not testified. Fletcher v. Weir, 455 U.S. 603, 606-07, 102 S. Ct. 1309, 71 L.Ed.2d 490 (1982) (post-arrest silence could be used for impeachment when no *Miranda* warnings given); n6 Jenkins v. Anderson, 447 U.S. 231, 239, 100 S. Ct. 2124, 65 L.Ed.2d 86 (1980) (pre-arrest silence can be used to impeach defendant's exculpatory testimony); Raffel v. United States, 271 U.S. 494, 46 S. Ct. 566, 70 L.Ed.1054 (1926) (silence at first trial permissible to impeach defendant's testimony at second trial). *See also* State v. Watkins, 53 Wn. App. 264, 273, 766 P.2d 484 (1989); State v. Hamilton, 47 Wn. App. 15, 20-21, 733 P.2d 580 (1987). *See generally* Barbara Rook Snyder, A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials, 29 Wm. & Mary L. Rev. 285 (1988).

n6 *But see State v. Davis*, 38 Wn. App. 600, 605, 686 P.2d 1143 (1984) (use of **post-arrest silence** by the State to impeach or as substantive evidence violated a defendant's state constitutional right to due process regardless of whether *Miranda* warnings were given).

Easter at 236-37 [emphasis added].

Throughout his closing argument, the prosecutor emphasized two points. One was credibility of the witnesses² and the other was that defendant's flight³ from the scene of the crime showed he was guilty.

In the first alleged comment in closing argument that defendant complains about, the prosecutor was arguing to the jury about the number of telephone calls defendant made to Danielle and the nature of the calls. RP 311. Defendant's conduct in this regard was at issue because he was charged with telephone harassment and intimidating a witness under RCW 9.61.230, and RCW 9A.72.110(1)(d), respectively. The prosecutor stated:

Calls. Calls keep coming. Officer sitting there. Finally, Danielle sick of this, "Here you want to talk to the cops?" Officer Peterson: "Hello? Yeah, I don't want to talk to you. I don't want to talk to you." He's just been accused of a crime, I mean, he knows that that's what's going on. The cops showed up there for a reason. "I don't want to talk **to you**. I don't want to talk to you [sic] my story. I don't want to say anything. I'm done." Click. **He calls back. Calls back.** Why? He doesn't want to talk to the cops.

"Shut your mouth." That's his message. "I just finished with you once. I'll do it again, if I have to.

² RP 306, 308, 311, 312, 317, 318, 322, 323.

³ RP 305, 309, 324.

Keep your mouth shut. And, Danielle, this is none of your business.”

RP 311 [emphasis added]. Although he mentioned the silence several times, he was emphasizing how many times defendant called and how he was threatening and trying to threaten the witnesses. It may have been inartful, but clearly this argument pertained to the evidence that defendant was single-minded in his attempts to get his point through to Danielle and Lavisha to silence them, contrary to his testimony that he never threatened anyone and contrary to his testimony that he did not call repeatedly. RP 259. Defendant did not want to talk to anyone other than Danielle and Lavisha. This argument was not directed at defendant's silence, but at his credibility as it pertained to the charges of telephone harassment and intimidating a witness.

In the second alleged comment, the prosecutor again referenced the brief telephone conversation between Officer Peterson and defendant, again in regard to a credibility determination. The prosecutor stated:

Officer Peterson testified. Officer Peterson gets there, heard **Danielle on the phone**. First observation: “Corey, she’s not your girl any more.” That’s the first thing she hears about this incident, upon arriving. Went inside, saw Lavisha bloody, beat up, blood everywhere. **And the defendant keeps calling, keeps calling.** Won’t talk to Officer Peterson.

What is Officer Peterson’s **bias** here? Never met Corey Thomas before. Has no gripe with him, doesn’t know him, heard his name before. Heard his name before, that’s it.

RP 312 [emphasis added]. This was immediately followed by the prosecutor arguing Officer Watter's credibility by pointing out that he had no bias against defendant either. Id.

This argument impeaches the credibility of defendant's testimony because he denied that he was ever on the phone with the officer when both the officer, who is unbiased, and Danielle testified that the conversation did occur. RP 150, 179, 271. This impeachment of defendant's credibility is a proper use of pre-arrest silence.

Here, the prosecutor did not say that his failure to tell his story was evidence he was guilty. He did not say that an innocent man would talk to the police and a guilty one would refuse to. The focus was on defendant's attempts to silence the witnesses and the sheer number of calls he made which related directly to the elements of the crimes of intimidating a witness and telephone harassment.

Next, defendant alleges that the prosecutor inferred to the jury that defendant should have gone back to the residence while the police were there to deny the allegation. AOB at 22. However, the prosecutor was not commenting on defendant's silence, rather he was emphasizing that defendant fled the scene. The jury heard defendant testify that Lavisha was drunk, she scratched his face, he did not do anything wrong, and he did not know the police were there. RP 255, 256, 270, 271. The reference was proper because defendant was obviously desperate to talk to Danielle and Lavisha as evidenced by the repeated phone calls. He did not go back

to the scene to talk to them, however, because he knew the police were there. RP 93. Instead he flees. There are two inferences to be drawn from the evidence. One inference is defendant's lack of credibility because defendant testified he did not know the police were at the residence when he actually spoke to Officer Peterson while she was there. The second inference is that defendant's flight shows that he is guilty.

It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence. The rationale of the principle is that flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution. [Citations omitted.]

The law makes no nice or refined distinctions as to the manner or mode of flight, and the range of circumstances which may be shown as evidence of flight is broad.

State v. Blanchey, 75 Wn.2d 926, 936-37454 P.2d 841 (1969). *See also* State v. Porter, 58 Wn. App. 57, 62, 791 P.2d 905 (1990).

Defendant's reliance on State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002), is misplaced. It is distinguishable from the present case because the officer in Romero testified that Romero would not waive his *Miranda* rights or talk to investigators *after* arrest. As discussed above, the present case involves pre-arrest silence.

Officer Peterson's recitation of the facts did not constitute a comment on defendant's pre-arrest silence. The prosecutor's two references to silence in closing argument did constitute comments, but

were for the purpose of impeaching defendant's exculpatory testimony. Therefore, due process principles are not implicated. The prosecutor's argument was proper and defendant's claim must fail.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHERE HIS REMARKS, TO WHICH THERE WAS NO OBJECTION, WERE NOT IMPROPER OR PREJUDICIAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct were improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (*quoting State v. Brown* 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [*italics in original*]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so **flagrant and ill-intentioned** that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id. [Emphasis added.]

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. *See* State v. McNallie, 64 Wn. App. 101, 823 P.2d 1122 (1992), *aff'd* at 120 Wn.2d 925, 846 P.2d 1358 (1993).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). In the present case, none of the prosecutor's remarks prompted an objection by defendant at trial. Therefore, the issue is waived unless defendant can show that the remark was so flagrant and ill-intentioned that the prejudicial effect could not have been cured by an instruction. McKenzie, 157 Wn.2d at 52.

- a. The prosecutor did not misstate the standard of proof of beyond a reasonable doubt.

In his closing argument, the prosecutor discussed the burden of proof of "beyond a reasonable doubt" and referred the jury to the court's instruction. RP 318. He re-read the court's instruction, verbatim, to the jury. RP 319. The prosecutor then argued the meaning of "abiding

belief.” RP 319. These arguments, objected to by defendant for the first time on appeal, were actually endorsed by defendant in his closing argument:

[DEFENSE COUNSEL]: . . . But **Mr. Sheeran** [the prosecutor] **is right**, an abiding belief is one that you have to live with. . . .

RP 338.

The prosecutor and defense did not completely agree on each other’s examples of what constitutes a reasonable doubt, but when viewed in the context of the entire closing argument, the prosecutor’s remarks are not improper, do not convey to the jury that it should do other than follow the court’s instructions, and do not trivialize the burden of proof. The prosecutor’s remarks were designed to help the jury to understand the terms used to define the burden of proof.

Defendant is unable to cite any *Washington* authority for his claim that this argument is improper. Not only does the defendant have the burden of showing the conduct was improper, but where, as here, defendant does not object below, he must also show that the remarks were ill-intentioned and flagrant. *See Binkin*, 79 Wn. App. at 293-94.

Defendant does not attempt to explain how the remarks rise to this level. The record actually reveals that the prosecutor painstakingly went through the wording of the court’s instruction to the jury. RP 319. He made no effort to minimize or downplay the seriousness of the standard.

Similarly, the jigsaw puzzle analogy was merely an effort to demonstrate that a person could obtain a fairly high level of certainty regarding an issue even when every single piece of information is not available. RP 320. In other words, it is possible to be certain about an issue even when some details are missing. The puzzle analogy merely illustrates this point and does not mitigate the burden of proof or contradict the court's instructions to the jury.

The fact that defense counsel did not object to this argument indicates a perceived lack of prejudice, and the trial court's written jury instructions minimized the risk of any possible prejudice. CP 132 (Instruction # 3).

The prosecutor's remarks were not improper, nor were they ill-intentioned and flagrant. Even if they were improper, defendant cannot show enduring prejudice that would deprive defendant of a fair trial. This claim must fail.

- b. The prosecutor did not misstate the jury's role or the burden of proof by arguing that defendant was not credible and that there was no reasonable doubt to warrant acquittal.

In his brief, defendant argues that the prosecutor told the jury that they were required to believe the defense in order to acquit. BOA at 35. However, that interpretation of the prosecutor's remarks is not supported by the record. RP 325. The prosecutor argued that the jury should acquit

defendant if they believed his story that it was a police conspiracy against him, or if they believed Lavisha was lying. He was arguing the lack of reasonable doubt. RP 324-25. He stated:

[PROSECUTOR]: But that's the only reason you should think of acquitting him. Because, like I said, if he could tell you a truthful story that would acquit him, he could have. Instead you got the one we heard. . .

The State carries the burden of proof beyond a reasonable doubt. **I'm not trying to diminish that one bit.** But when the defendant puts on a case, you look at that case with the same eye that you would the State's case. You ask the same questions of it. Does it hold water? Does it make sense? . . .

RP 325. The prosecutor was arguing lack of reasonable doubt and defendant's lack of credibility. He reiterated that the State carried the burden and did not attempt to shift the burden. Defense counsel, present while the words were spoken, did not take them to be improper which is evident by the lack of objection, lack of request for curative instruction, and no motion for mistrial. Defendant's argument on appeal is without merit.

c. The prosecutor's comments about the juror's oath was proper.

Citing State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), *review denied*, 125 Wn.2d 1017 (1995), defendant concedes that it is proper argument for the "prosecutor to tell the jury they would have to ignore the evidence in order to acquit and ignoring the evidence would be

a violation of their oath.” BOA at 37. That is essentially what happened in the present case. While defendant argues that prosecutor stated the jury would violate their oath if they disagreed with the State’s theory of the case, that did not occur here.

The prosecutor was obviously concerned that the jury would hold it against him, or the State, that he sought a material witness warrant to secure the testimony of Lavisha. RP 344. The fear was that the jury would render a verdict of not guilty to punish the State for having this young, single parent, the victim of a crime no less, arrested and held in jail. Id. That is what the comments referenced.

The prosecutor mentioned that “the fact that Lavisha went to jail” should not prevent them from returning a verdict that speaks the truth. Id. He urged them not to abandon their oath for negative feelings they may have about what the State should or should not have done in that regard. Id. He asked them to “**Look at the evidence** and return a verdict that speaks the truth. That’s all.” RP 334 [emphasis added]. The prosecutor did not tell the jury that to disagree with the State’s theory *on the merits* would be a violation of their oath. In fact, he reminded them to evaluate the evidence in making this argument. This was not misconduct, which again is evidenced by defendant’s lack of objection.

- d. The prosecutor properly argued facts supported by the record.

A prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. Jones, 71 Wn. App. 798, at 808. However, prosecutors have wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Hoffman, 116 Wn.2d at 94-95.

Here, defendant complains that the prosecutor stated facts not in evidence by arguing to the jury that defendant fled the scene after Danielle told him that she was calling the police. BOA 41. Defendant claims that “nothing in the evidence supported the prosecution’s claims that [defendant] had been told the police were being called and had then fled.” BOA at 42.

Lavisha testified:

[LAVISHA]: After Danielle realized what happened, she picked up the phone and called 9-1-1 and [defendant] realized what was going on and he grabbed his bag and walked out the door.

RP 93.

Danielle testified:

[QUESTION]: Did you tell [defendant] you were calling the police?

[DANIELLE]: I don’t think so. I don’t think I told him. ...

[A]s he was walking out the front door I had the phone and I was dialing because I was going to try to get the license plate... Not ten minutes later [defendant] was calling.

[QUESTION]: He was calling before the police even got there?

[DANIELLE]: Yeah, he called before they got there...

[QUESTION]: What did he say?

[DANIELLE]: That I made a mistake by calling the police and I shouldn't have called the police and that it wasn't my business.

RP 147-49. Lavisha testified that defendant left when he realized Danielle was calling the police. Danielle was on the phone when defendant left.

Defendant verified that he knew the police were called by telling Danielle she shouldn't have called the police.

The prosecutor did no more than argue that defendant fled when police were called. While he stated that Danielle *told* defendant the police were called, when Danielle actually testified she did not "think" she had told him. The point was that defendant fled once he *knew* the police were on the way. His knowledge on that issue was confirmed by Danielle's testimony about defendant's phone call just minutes later when defendant told her she should not have called police. Any misstatement of the facts was harmless as the point was defendant's knowledge at the time, not how he acquired that knowledge.

Because counsel did not object to this argument, defendant must show it was flagrant and ill-intentioned. *See State v. McKenzie*, 157

Wn.2d at 52. The minor, insignificant discrepancy here was most likely an honest mistake, the gist of which did not impart evidence which could not be inferred from the record. Defendant fails to meet his burden that this was misconduct.

- e. The prosecutor did not commit misconduct in cross-examination of defendant by asking him if he was refusing to give responsive answers to questions. Nor did the prosecutor express a personal opinion or appeal to the passions and prejudices of the jury.

“The law allows cross-examination of a witness into matters that will affect credibility by showing bias, ill-will, interest, or corruption.” State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994). The scope of cross-examination is within the sound discretion of the trial court. State v. King, 113 Wn. App. 243 at 289, 54 P.3d 1218 (2002). “Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” Russell at 85.

During the direct examination of defendant, the prosecutor made four objections, all of which were sustained, because defendant was providing non-responsive answers. RP 250, 252, 258 (line 13-14 and line 18-19). The trial court had to repeatedly admonish defendant to answer the question. Id. During cross-examination by the prosecutor, defendant

was similarly non-responsive, taking every opportunity to advance his own agenda. RP 261-278. The court, sua sponte, ordered defendant to answer the question twice during cross-examination. RP 261, 263.

During brief re-direct examination, defendant had to be admonished by the court two more times to respond to the question asked. RP 279, 283. This conduct occurred in front of the jury who could plainly see that defendant was evasive, at best. Defendant was ordered by the judge to answer the question asked a total of eight times. RP 250-283. In spite of defendant's claims of prosecutorial misconduct, he did not object at trial to the prosecutor's conduct, he did not request a curative instruction, nor did he move for a mistrial. On this issue, the Washington Supreme Court has stated:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is **waived by failure to make an adequate timely objection and request a curative instruction**. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. **The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.** Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal."

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(*citing Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, *review denied*, 90 Wn.2d 1013 (1978))
[footnotes omitted] [emphasis added].

The failure to move for mistrial is also important because “the trial court is clearly in a much better position than an appellate court operating from a cold record to evaluate whether a remark can be cured by admonition or requires a mistrial based on the whole flow of the trial and context of the remark.” State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993).

An objection and request for a curative instruction early on would have accomplished two things. First, the court could have alleviated any prejudice as jurors are presumed to follow the court’s instructions. Russell, 125 Wn.2d at 84. Second, if these remarks were improper, an objection from defense counsel would have prevented repetition of the remarks that defendant now challenges on appeal. *See* McKenzie, 157 Wn.2d at 523, n.2. Defendant fails to show enduring prejudice that could not be cured by an instruction, especially in light of his own conduct.

Defendant claims that the prosecutor's cross-examination and closing argument was designed to "incite the jury to decide the case on an emotional or improper basis." BOA at 44.

The prosecutor is afforded wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). The defendant bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Russell, 125 Wn.2d at 85. Where the defendant asserts improper argument, a reviewing court does not reverse where the error could have been obviated by a curative instruction and the defendant did not request one. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). "In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." Russell, 125 Wn.2d at 86.

Again, defendant fails to meet his burden to establish that the statements in closing were improper. "Arguments that courts characterize as improper appeals to passion or prejudice include arguments intended to 'incite feelings of fear, anger, and a desire for revenge' and arguments that are 'irrelevant, irrational, and inflammatory . . . that prevent calm and dispassionate appraisal of the evidence.'" State v. Elledge, 144 Wn.2d 62,

85, 26 P.3d 271 (2001) (*citations omitted*). Nothing in the State's closing argument rises to this level, and one could reasonably conclude that the State was simply drawing inferences from the evidence.

Moreover, unlike the present one, the cases finding improper argument involve egregious and inexcusable attempts to inflame the jury and obtain a verdict based on prejudice. *See, e.g., State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988) (prosecutor told jurors the defendant was involved in the American Indian Movement, which he characterized as "a deadly group of madmen" and "butchers that kill indiscriminately," and invited the jury to consider the events at Wounded Knee); *State v. Reed*, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar, stated that defendant did not have a case, and argued that the defense witnesses lacked credibility "because they were from out of town and drove fancy cars"); *State v. Claflin*, 38 Wn. App. 847, 849-51, 690 P.2d 1186 (1984) (prosecutor read poem that used vivid and inflammatory imagery to describe the emotional effect of rape on its victims).

The most arguably egregious comments the prosecutor made here was to call defendant a "pathetic abuser". RP 305. But this was merely a fair comment on the evidence that was only made one time in a lengthy closing argument. *See State v. McKenzie*, 147 Wn.2d at 52 ((1) not

prejudicial misconduct for prosecutor to label defendant “rapist,” “murderer,” “pimp,” or “killer,” if the evidence indicates defendant is a particular kind of criminal; (2) not misconduct for prosecutor to argue defendant is a “liar” if other evidence contradicts defendant’s testimony; (3) not personal opinion for prosecutor to argue from the evidence that defendant is “guilty”).

- e. Even if any of the comments were misconduct, none were so prejudicial that they resulted in a substantial likelihood that they affected the jury’s verdict.

Improper comments, if any, are not deemed prejudicial unless “there is a *substantial likelihood* the misconduct affected the jury’s verdict.” State v. McKenzie, 157 Wn.2d at 52 (*quoting State v. Brown* 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original].

Here, the instructions to the jury would have cured any impropriety. The trial court instructed the jury that “[t]he attorneys’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.” CP 130 (Instruction #1). Juries are presumed to follow the court’s instructions to disregard improper evidence. Russell,

125 Wn.2d at 84. Defendant fails to demonstrate that any of the comments prejudiced the verdict.

Here, it is evident that the jury was not prejudiced against defendant. The jury's verdicts appropriately reflect the strength of the State's evidence on each count. The jury acquitted defendant of the most serious charge, first degree burglary. RP 350. While there was little doubt defendant was in Lavisha's residence that morning, there was some question as to whether the State proved that the entry or remaining was unlawful, which is an element the State was required to prove beyond a reasonable doubt. CP 140. The evidence was undisputed that defendant had clothing at Lavisha's residence, that he showered there on occasion, that his young son lived there, and that he stayed there off and on. RP 101. Although defendant did not have a key to the residence, there was testimony he had entered through the window previously. RP 101-102. After weighing the evidence, this was enough for the jury to have a reasonable doubt that the entry was unlawful because the jury could easily infer that defendant had permission to come and go as he pleased.

Similarly, the jury acquitted defendant on the charge of intimidating a witness. RP 350. While his repeated calls telling Danielle she made a mistake by calling police and that it was none of her business could be interpreted as threatening, this is arguably weak evidence. This

evidence, coupled with Danielle's testimony that defendant never threatened her, very likely gave rise to a reasonable doubt as to defendant's guilt on this count.

Conversely, there was very strong evidence defendant assaulted Lavisha. The jury accordingly convicted him of second degree assault. RP 350. Danielle witnessed part of the beating, Lavisha had corresponding injuries, the police and treating physician testified to Lavisha's statements about the incident, there was blood all over the residence, and Lavisha was distraught and fearful. RP 141-46, 208-24, 190-94. Although Lavisha later recanted in a letter, this would have done little to erase the assault, given the strong evidence proving it. In the letter, she claimed that she grabbed at the bag and fell. RP 104. This explanation is inconsistent with a broken nose, injuries to her back and tail bone, and her extreme emotional state following the assault. Defendant's testimony that Lavisha fell when he pushed her is equally inconsistent with the circumstances, the injuries, and the other compelling testimony of physician and police who witnessed the aftermath of the assault. RP 256.

The jury also convicted defendant of telephone harassment. RP 351. That defendant called Danielle repeatedly was proven by compelling evidence. Danielle testified defendant called her constantly. RP 154. Officer Peterson testified to how Danielle's cell phone kept ringing and

ringing during their contact with her and the conversation made it apparent defendant was the caller. RP 179. Additionally, defendant did not comply with Danielle's request that he stop calling her. Id.

These verdicts clearly show that the jury rationally weighed the evidence and applied the burden of proof. They convicted defendant of the offenses where the proof was compelling and acquitted on the offenses where the proof was weaker. If the jury had been so prejudiced against defendant by the remarks or cross-examination of the prosecutor, or if the verdicts were based on emotion, the jury would have convicted defendant on all counts. Instead, the verdicts reflect that the jury calmly and dispassionately appraised the evidence. *See Elledge*, 144 Wn.2d at 85. Accordingly, any possible misconduct was harmless and defendant's claim must fail.

3. DEFENDANT CANNOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE NEITHER PRONG OF STRICKLAND IS SATISFIED: DEFICIENT PERFORMANCE NOR ACTUAL PREJUDICE.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in

Washington, a defendant must satisfy the two-prong test laid out in Strickland. *See also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. *Id.* To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

a. No Deficient Performance.

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (*citing Strickland*, 466 U.S. at 689). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (*citing State v.*

Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

Defendant alleges that his counsel was deficient for failure to (1) object to Officer Peterson's testimony regarding defendant's pre-arrest silence; (2) failure to object during the prosecutor's cross-examination of defendant; and (3) failure to object during the prosecutor's closing argument. BOA at 26; 49. Defendant devotes very little analysis to this issue in his brief, which makes it difficult to respond to the broad, sweeping claim of error.

First, as discussed above, it was not prejudicial error for Officer Peterson to testify regarding the facts of her investigation. She did not provide any testimony or comment that the jury should infer guilt from defendant's silence. RP 179. Because the evidence would have been properly admitted to impeach defendant's credibility and his version of events, any objection by defendant would have been properly overruled. Lewis, 130 Wn.2d at 705. Thus, there was no deficient performance by trial counsel.

Second, the failure to object to the prosecutor's cross-examination of defendant may well have been a tactical decision. The decision when or whether to object is a classic example of trial tactics. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "Only in egregious circumstances, on testimony central to the State's case will the failure to

object constitute incompetence of counsel justifying reversal.” Id.

Defense counsel may have thought that the prosecutor’s conduct might backfire and actually operate to the defendant’s advantage. *See Dickerson*, 60 Wn. App. at 748. The failure to object and request a mistrial can also work to a defendant’s advantage if defendant believes the State’s case has weaknesses that the State can cure in the event of a retrial. Id. In any event, this is a tactical decision made by trial counsel to which this Court should defer. *See Madison* at 763.

Third, failure to object during closing argument was not deficient either. As discussed above, the prosecutor did not misstate the burden of proof, the jury’s role, the facts in evidence, or inferences to be drawn therefrom. Nor did he appeal to the passions and prejudices of the jury.

A review of the entire record shows that defense counsel made objections, presented evidence on behalf of defendant, and argued to the jury that his client should be acquitted. Defendant has failed to demonstrate that his attorney was so woeful that he was effectively left without counsel.

b. No prejudice.

To satisfy the second prong, prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing

is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further." Hendrickson, 129 Wn.2d at 78.

Even if any of the prosecutor's remarks were improper, defendant cannot show that result of the case would have been different had counsel objected. As discussed above, the jury's verdicts demonstrate that counsel was not only effective, but highly effective, in getting acquittals on the two charges that had evidentiary weaknesses. There was substantial and very compelling evidence supporting the charges that resulted in convictions.

Defendant cannot meet his heavy burden of showing deficient performance or resulting prejudice. His claim of ineffective assistance of counsel is without merit.

4. THE TRIAL COURT DID NOT VIOLATE
DEFENDANT'S CONSTITUTIONAL RIGHTS
BY FINDING THAT HIS 19 PRIOR UNSCORED
MISDEMEANOR CONVICTIONS JUSTIFIED
AN EXCEPTIONAL SENTENCE 18 MONTHS
BEYOND THE STANDARD RANGE.

Under the Sentencing Reform Act (SRA), a sentence within the standard range is not appealable. RCW 9.94A.585(1). However, a sentence outside the standard range is subject to appeal by the defendant

or the State. RCW 9.94A.585(2). To reverse a sentence which is outside the standard range, this Court must find:

(a) Either the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4). The Washington State Supreme Court has construed this statute to establish three prongs, each with its own standard of review.

An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by the evidence in the record? As to this, the standard of review is **clearly erroneous**.
2. Do the reasons justify a departure from the standard range? This is a question reviewed **de novo** as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is **abuse of discretion**.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (*citing State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997) (*citing former RCW 9.94A.210(4); State v. Branch*, 129 Wn.2d 635, 645-46, 919 P.2d 1228 (1996); and State v. Allert, 117 Wn.2d 156, 163, 815 P.2d 752 (1991))) [emphasis added].

The SRA further provides that review of a sentence outside the standard range shall be made solely upon the record that was before the sentencing court. RCW 9.94A.585(5). A trial court imposing an exceptional sentence is required to enter written findings of fact and conclusions of law setting forth the reasons for its decision. RCW 9.94A.535. The trial court's oral ruling may be considered in interpreting the findings of fact and conclusions of law, but it has no final or binding effect unless formally incorporated into the findings and conclusions. State v. Mallory, 69 Wn.2d 532, 533-534, 419 P.2d 324 (1966) (citations omitted).

a. Statute is constitutional.

In 2005, the Legislature amended the SRA to “conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004).” Laws of Washington 2005 c 68 section 1. In amending the statute (“Blakely fix”), the Legislature further noted the “need to restore judicial discretion that has been limited as a result of the *Blakely* decision.” Id. The Blakely fix sets forth the aggravating circumstances to be considered and imposed by the court and those to be considered by a jury and subsequently imposed by the court. RCW 9.94A.535(2), (3).

The Blakely fix became effective on April 15, 2005. Laws of Washington 2005 c 68 section 7. The Blakely fix applies to all cases in which trial had not begun before its enactment. State v. Pillatos, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007). In the present case, trial began in January of 2006. Therefore, the Blakely fix is applicable to this case. *See Pillatos*.

With regard to the relevant aggravating circumstance in the present case, the SRA provides:

(2) Aggravating Circumstances – Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(b) The defendant's **prior unscored misdemeanor** or prior unscored foreign criminal history results in a presumptive sentence that is **clearly too lenient** in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

RCW 9.94A.535(2) [emphasis added].

Defendant claims that his exceptional sentence violates his sixth amendment right to jury trial as outlined in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); AOB 17-21. In support of his claim, defendant relies on State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), *reversed in part on other grounds by Washington v.*

Recuenco, ___ U.S. ___, 126 S. Ct 2586, 165 L.Ed.2d 466 (2006). AOB
18-21.

However the holding in Hughes is distinguishable from the present case for several reasons. First, the exceptional sentence in Hughes was based on former RCW 9.94A.535. The Supreme Court issued its opinion in Hughes on April 14, 2005, one day before the effective date of the Blakely fix. Second, the issue before the Supreme Court in Hughes was the constitutionality of a different aggravating factor than at issue in the present case. The holding in Hughes pertains to the aggravating factor in the former statute:

(i) The operation of the **multiple offense policy** of RCW 9.94A.589⁴ results in a presumptive sentence that is **clearly too lenient** in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

Former RCW 9.94A.535(2)(i) [emphasis added]; Hughes at 136; 138. The Hughes court held:

The conclusion that allowing a **current** offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following *Blakely*.

⁴ Other current offenses increase offender score, but are sentenced *concurrently*. *Consecutive* sentences for other current offenses constitute an exceptional sentence. RCW 9.94A.589(1).

Hughes at 140 [italics in original; bold added]. Third, the present case does not involve the multiple offense policy or the possibility of allowing a current offense to go unpunished.

In State v. Washington, 135 Wn. App. 42, 143 P.3d 606 (2006), Division One found the holding in Hughes applicable to unscored misdemeanor history. However, Division One summarily applied the conclusion in Hughes without considering the underlying reasons articulated by the Supreme Court. Washington at 52. In Hughes, the Supreme Court recognized prior case law outlined specific *factual* findings a court must show to support a too lenient conclusion under the aggravating factor regarding the multiple offense policy. Id. at 136-37. These facts are: (1) egregious effects of defendant's multiple offenses or (2) the level of defendant's culpability resulting from the multiple offenses. Id. at 137.

These facts relate to the actual facts of the underlying *current* offenses before the sentencing court. In the case of the aggravating factor of prior unscored misdemeanor convictions, as here, the focus is not on the facts of the current case, nor on facts of the underlying convictions. The focus is on the existence of defendant's criminal history in the form of prior misdemeanor convictions. RCW 9.94A.353(2)(b). "[T]he fact of a

prior conviction” that increases the penalty for a crime beyond the prescribed statutory maximum is specifically excluded from the holding in Blakely, which requires facts *other than prior convictions* to be tried to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 301. Therefore, Washington actually expands the holding in Hughes by assuming, without analysis, that “clearly too lenient” is always a factual determination for a jury.

The holding in Hughes applies to the multiple offense policy as it relates to unpunished current offenses as set forth in the former statute. The holding should not be expanded to prior unscored misdemeanor criminal history where the court makes no factual findings about the egregious effects of the crime or the level of defendant’s culpability, but merely looks to the fact of the prior conviction(s) and the sheer number thereof. *See Hughes*, 154 Wn.2d at 137-40; *See also* RCW 9.94A.535(2)(b).

The Blakely fix mandates that prior unscored misdemeanor criminal history is an aggravating circumstance to be considered and imposed by the court. There was no violation of defendant’s sixth amendment right as set forth in Blakely. Blakely, 542 U.S. at 301; RCW 9.94A.535(2)(b). Thus, the statute is constitutional.

- b. The trial court did not consider improper factors in imposing the exceptional sentence.

The court found that defendant had nineteen (19) prior unscored misdemeanor convictions. CP 353 (FF VII). The court further found that “defendant’s prior unscored misdemeanor criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of the SRA as expressed in RCW 9.94A.010.” CP 353 (FF VIII). The court followed the letter of the law and specifically referred to RCW 9.94A.010, subsections 1, 2, 4, and 7 in finding the exceptional sentence appropriate for defendant. CP 353. That statute provides in pertinent part:

9.94A.010 Purpose. The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but *does not eliminate, discretionary decisions affecting sentences*, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the *offender’s criminal history*;
- (2) Promote respect for the law by providing punishment which is just;
- ...
- (4) Protect the public;
- ...
- (7) Reduce the risk of *reoffending* by offenders in the community.

[Emphasis added]; CP 353.

Defendant urges this court to look to the court's oral ruling in reviewing whether the exceptional sentence was properly imposed. However, the trial court's oral ruling may be considered in interpreting the findings of fact and conclusions of law, but it has no final or binding effect unless formally incorporated into the findings and conclusions. State v. Mallory, 69 Wn.2d 532, 533-534, 419 P.2d 324 (1966) (citations omitted).

Here, the court's written findings of fact and conclusions of law clearly set forth defendant's criminal history, which shows 19 unscored misdemeanor convictions, and the court's reliance on appropriate reasons for the imposition of the exceptional sentence. CP 349-55. The court's oral ruling is not needed to interpret the findings and conclusions, nor was it formally incorporated into the written ruling by reference. Id. Because the oral ruling has no final or binding effect, it may not be relied upon to review this issue as urged by defendant. *See Mallory supra.*

Defendant's claims of "prosecutorial misconduct" and basing the sentence on an "uncharged aggravating factor" similarly fail. Even if the prosecutor had urged the court below to impose the exceptional sentence on improper grounds, or had argued an uncharged aggravator, defendant cannot show prejudice because the written findings demonstrate that trial court did not do so. CP 349-55. Defendant's unsupported claim fails.

- d. This Court should not reverse defendant's exceptional sentence.

As stated above, Law requires this Court to answer three questions utilizing the indicated standard of review:

1. Are the reasons given by the sentencing judge supported by the evidence in the record? As to this, the standard of review is **clearly erroneous**.

2. Do the reasons justify a departure from the standard range? This is a question reviewed **de novo** as a matter of law.

3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is **abuse of discretion**.

RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (citations omitted).

Under this analysis, the exceptional sentence should stand. First, defendant has 19 unscored misdemeanor convictions. CP 353 (FF VII). Defendant has not assigned error to this finding. An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). The trial court was not clearly erroneous for imposing the exceptional sentence for this reason.

Second, defendant's 19 misdemeanor convictions justify the imposition of an exceptional sentence because, contrary to defendant's assertions, his lengthy misdemeanor history is not reflected in his offender score or in his standard range by any other means. Therefore, defendant's standard range sentence is not proportionate to his offending behavior compared to an offender with only one or two prior misdemeanor convictions. *See* RCW 9.94A.(2)(b) and 9.94A.010(1), above.

Further, defendant is at extremely high risk for reoffending as well as a danger to the community as evidenced by his frequent and numerous violations of the law. The sheer number of defendant's misdemeanor convictions is indicative of defendant's lack of respect for the law and his need for additional punishment. These are specific considerations to be made by the sentencing court when determining whether unscored misdemeanors warrant an exceptional sentence. RCW 9.94A.(2)(b); RCW 9.94A.010(2), 9.94A.010(4) and 9.94A.010(7).

The trial court's sentence is supported by case law. The presence of five prior unscored misdemeanors has been held to be sufficient justification for an exceptional sentence. *State v. Atkinson*, 113 Wn. App. 661, 669, 54 P.3d 702 (2002) (jury found defendant guilty of second degree assault; court imposed exceptional sentence based on five unscored misdemeanors that were unspecified in nature). Three unscored misdemeanor convictions have been found sufficient to justify an

exceptional sentence when the three convictions were of a type related to the current offense. State v. Roberts, 55 Wn. App. 573, 579, 779 P.2d 732 (1989) (three negligent driving offenses prior to defendant's current conviction for vehicular homicide constituted "substantial and compelling" reasons to justify an exceptional sentence). *See also* State v. Wilson, 96 Wn. App. 382, 389-91, 980 P.2d 244 (1999) (defendant's one prior unscored misdemeanor for failing to register as a sex offender was a legally sufficient reason to impose an exceptional sentence for defendant's current sex crimes of abduction of women). The exceptional sentence is legally justified.

Third, the trial court did not abuse its discretion in sentencing defendant to 75 months in prison. His standard range is 43-57 months. CP 259. Defendant only received 18 months (a year and one-half) more than the high end of his standard range. CP 261. This sentence is not clearly excessive. Given that an exceptional sentence was certainly warranted, the trial court did not abuse its discretion, but rather acted conservatively, in imposing the 75 months.

The trial court's imposition of an exceptional sentence should be affirmed.

5. DEFENDANT'S CONVICTION FOR BOTH SECOND AND FOURTH DEGREE ASSAULT CONSTITUTE A DOUBLE JEOPARDY VIOLATION WHICH REQUIRES THE TRIAL COURT TO SENTENCE ON THE CRIME CARRYING THE GREATER SENTENCE AND TO VACATE THE CRIME CARRYING THE LESSER SENTENCE.

The double jeopardy clauses of the Fifth Amendment of the United States Constitution and article 1, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. State v. Weber, 127 Wn. App. 879, 884, 112 P.3d 1287 (2005)(citing State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995); State v. Maxfield, 125 Wn.2d 378, 886 P.2d 123 (1994)). The State conceded at trial, and concedes on appeal, that the convictions for second degree assault (count II) and fourth degree assault (count I) constitute double jeopardy because both convictions involve a single assault against a single victim, Lavisha.

To remedy a double jeopardy violation when two convictions punish the same offense, “the court must vacate the crime carrying the *lesser* sentence.” Weber at 888 [bold italics added]. Therefore, the trial court correctly sentenced defendant on count II, the second degree assault conviction. CP 257-67.

The prosecutor argued at sentencing that defendant was to be sentenced on second degree assault and told the court, “There is no assault 4 left in this case. That conviction is vacated.” RP 376. However, the

fourth degree assault conviction is listed on the Judgment and Sentence (Misd. And/or Gross Misd.) and on the Conditions on Suspended Sentence, along with the conviction for telephone harassment. CP 358-59; 274-76. The trial imposed sentence without ruling on this issue. RP 382-83. It is not clear from the record or the sentencing paperwork if the sentence imposed in the misdemeanor Judgment and Sentence pertains only to the telephone harassment conviction (count IV), or if it pertains to the fourth degree assault (count I) as well.

In a recent case, the Washington Supreme Court held that where there exists a double jeopardy violation in this situation, “vacation of the convictions [with lesser sentence(s)] is required.” State v. Womac, ___ Wn.2d ___, ___ P.3d ___ (2007)⁵. The Court issued its opinion on June 14, 2007.

Therefore, this Court should remand this matter to the trial court to vacate count I pursuant to Womac, and clarify the sentence on count IV.

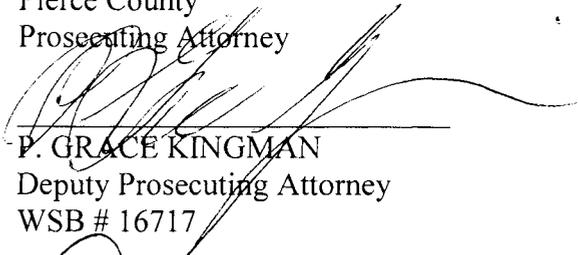
⁵ Supreme Court No. 78166-4; 2007 Wash. LEXIS 462.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions on counts II and IV and sentences thereon, and remand the case for vacation of count I.

DATED: June 21, 2007.

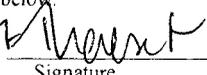
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Certificate of Service:

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

6.22.07 
Date Signature