

NO. 36983-4

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

SEGHON D. RORIE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 06-1-03984-1

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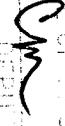
**BRIEF OF RESPONDENT**

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

1. Did the trial court correctly determine that each of defendant's four assault convictions constituted separate units of prosecution?
2. Did the trial court correctly determine that each of defendant's four assault convictions were separate and distinct acts, and as such did not constitute the same criminal conduct?
3. Has defendant failed to prove prosecutorial misconduct where the prosecutor made appropriate arguments during closing?

B. STATEMENT OF THE CASE.

1. Procedure

The State originally charged defendant, Seghon Rorie, on August 25, 2006, with one count of attempted murder in the first degree, and one count of assault in the second degree. CP 1-2. The State amended the charges on July 2, 2007, to add the charges of burglary in the first degree and felony harassment. CP 5-7. On August 6, 2007, the State filed a second amended information that added one count of assault in the first degree and two more assault in the second degree charges. CP 8-12, RP 3-4. The court accepted the amended information over defense counsel's objections. RP 4-7. Trial commenced on August 20, 2007, in front of the

Honorable Brian Tollefson. RP 1, 12. The court accepted an amended information on August 27, 2007. RP 104. The amended information clarified the statutory language on the domestic violence aggravator in regards to a child being present during the crimes. CP 43-7, RP 98-104.

On September 12, 2007, the jury found defendant not guilty of attempted murder in the first degree, and instead found defendant guilty of attempted assault in the second degree with a deadly weapon, as well as the domestic violence enhancement. CP 167, 181, 188, RP 948-9. The jury also found defendant guilty of four counts of assault in the second degree: two included the deadly weapon finding, three were found to be in sight of a minor child, and two were found to have been between members of the same household. CP 169, 174, 176, 178, 182, 185, 190, 194-7, RP 949-955. The jury also found defendant guilty of one count of harassment without the threat to kill. CP 172, 193, RP 949, 953. The jury found defendant not guilty of burglary. CP 171, RP 949.

Sentencing followed on October 26, 2007. RP 966. Both sides filed sentencing memorandum. CP 198-207, 208-226. The guilty finding on attempted assault in the second degree merged into the finding of assault in the second degree in count six. CP 231-244, RP 967. Argument was heard as to whether the two assaults against each victim subjected defendant to double jeopardy or should be considered part of the same criminal conduct. RP 970-3, 984-7. Defendant had an offender score of ten which put him in 63-84 month range on all four assault counts. CP

231-244, RP 268. Defendant also had two counts with deadly weapon sentencing enhancements of twelve months apiece. CP 231-244, RP 268-9. Count six was the only count eligible for an exceptional sentence. CP 231-244, 198-207, RP 970. The court adopted the State's analysis finding that defendant was not subject to double jeopardy issues, nor that same criminal conduct applied, and followed the State's recommendation for 180 months (96 months on count six consecutive to the 84 months on the other counts) which was supposed to include 24 months of flat time. RP 968-70, 973, 1001-2. On January 11, 2008, the math was corrected as to the second deadly weapon enhancement and the final sentence was for 192 months. CP 275-276, RP 1015. Defendant filed this timely appeal. CP 250-64.

## 2. Facts

Defendant Seghon Rorie and victim Kim Douglas began dating in October 2005. RP 122-3. Defendant and Ms. Douglas moved into an apartment together. RP 123. Ms. Douglas' nine year old daughter, A.D., also lived with them. RP 123.

On August 23, 2006, A.D. was getting loud in the backseat of the car and defendant told her to shut up. RP 125, 128. Ms. Douglas told him not to talk to her daughter like that and defendant got upset. RP 128. Defendant said the devil was taking away his joy. RP 128. Defendant told Ms. Douglas to pull over. RP 128. Defendant kept repeating that the

devil was trying to take his joy, and that the devil needed to leave. RP 128. Defendant got out of the car, prayed and then got back in the car. RP 129. Defendant asked if the devil was gone and then got out again, prayed and got back in the car. RP 129. Once at their apartment, Ms. Douglas became uncomfortable and concerned about her daughter being around defendant. RP 131. As Ms. Douglas and her daughter were leaving the apartment she shared with defendant, defendant followed behind them saying the devil was trying to steal his joy. RP 132.

Ms. Douglas called her mother, Jeanne Jackson. RP 133-4. Ms. Jackson talked to defendant on the phone and then came to pick up Ms. Douglas and A.D. RP 134, 219. Once back at the apartment, Ms. Jackson asked defendant to leave. RP 136, 221. Ms. Douglas was concerned about her safety and stayed in the car with A.D. RP 136, 220. Ms. Jackson gave defendant some money and he finally left the apartment. RP 137, 223-4.

After defendant left, Ms. Jackson decided to stay the night at the apartment with Ms. Douglas and A.D. RP 139, 225. Defendant called Ms. Douglas multiple times. RP 140-2. At one point, defendant left a message that everything had been taken away from him so he was going to take everything away from her. RP 141-2, 205, 717.

Ms. Douglas and Ms. Jackson were awakened the next morning by the sound of crashing glass. RP 143, 226. Neighbors were also awakened by the glass breaking and screams and called 911. RP 531, 543, 547, 554.

Ms. Douglas ran down the hall and saw broken glass in the kitchen along with torn blinds, blood and defendant's hands coming out of the window. RP 144. Ms. Jackson was behind her. RP 227. Defendant kicked in the front door, and asked Ms. Douglas how dare she kick him out of the house. RP 145. Defendant then punched Ms. Douglas in-between the eyes and knocked her to the floor. RP 145, 228. Ms. Douglas said defendant punched her like she was "a grown man." RP 145. Ms. Jackson was thrown into the doorjamb. RP 228. Ms. Douglas cried, screamed and begged defendant to stop. RP 146. Instead, defendant grabbed her hair and throat. RP 146. Ms. Jackson jumped on defendant's back and screamed at him to stop. RP 146, 148, 230-1. Defendant dropped Ms. Douglas, but then picked her up by her throat so that she could not breathe and slammed her against a wall, smashing her head. RP 146-7, 229. Defendant continued to punch Ms. Douglas including behind her right ear. RP 148, 229. Ms. Douglas then crawled to her bedroom and tried to call 911. RP 148-9, 232. She had a bloody nose and the back of her head was bleeding. RP 148, 231.

Once in the bedroom, Ms. Douglas attempted to call 911 and to calm her daughter who was lying in the bed hooked up to a feeding tube. RP 142, 149. Defendant spoke with Ms. Jackson in the hallway, telling her to leave, and then came into the bedroom. RP 149, 232. Ms. Douglas was sitting on the bed rubbing her daughter's leg when defendant began to punch Ms. Douglas in the face. RP 149-50. Ms. Jackson jumped on top

of Ms. Douglas trying to shield her. RP 150, 233-4. Ms. Jackson begged defendant to stop hitting Ms. Douglas. RP 150. Defendant hit Ms. Douglas at least ten times and Ms. Jackson at least twice. RP 150, 234, 276. A.D. stayed curled up in the corner of the bed during the attack. RP 151. Defendant then stopped and said he had to get his weapon of choice. RP 152, 236, 261, 756. Defendant said the devil had gotten into Ms. Douglas and she had ruined his family. RP 235, 760. Defendant left and closed the door to the bedroom. RP 152, 236. Defendant returned a minute later with a hammer. RP 152-3, 237-8, 405, 749. Defendant stated, "Oh, you called the police, now you're going to have to die." RP 159, 205, 238, 756. Defendant stood in front of Ms. Douglas and raised the hammer above his head in a striking motion before trying to get on the bed near her head. RP 160-2, 238-9, 278, 767, 776. Neighbors overheard a woman's voice say, "put the hammer down." RP 554. Defendant put his knee on the bed, A.D. screamed and the hammer flew across the room. RP 162, 240-3, 746. It was at this point that the police barged into the room with guns drawn. RP 162, 241, 482, 595.

The police arrested defendant although defendant resisted. RP 242-3, 295, 485-6, 600-2. Ms. Douglas was bleeding profusely from the head and was taken by ambulance to the trauma center at St. Joe's Hospital. RP 166, 294, 453. A CAT scan was done of Ms. Douglas and showed a bruise to her scalp. RP 673, 784. Ms. Douglas sustained hearing loss and a permanent scar on her forehead. RP 171, 747. Ms.

Jackson's arm was black and blue and swollen for months. RP 229, 246, 408. A.D. refuses to talk about the incident and refuses to sleep by herself. RP 173-4.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DETERMINED THAT EACH OF THE FOUR ASSAULTS COMMITTED BY THE DEFENDANT CONSTITUTED A SEPARATE UNIT OF PROSECUTION.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibits the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is constitutional, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*, 125 Wn.2d at 776. The court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.*

When a defendant is convicted of multiple violations of the same statute, the double jeopardy analysis focuses on what the legislature intends as the "unit of prosecution," that is, what act is punishable under

the statute. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). That question may be answered by examining the plain language of the relevant statute. *Westling*, 145 Wn.2d at 610. The “unit of prosecution” is the legislatively defined scope of the criminal act. *Adel*, 136 Wn.2d at 634-35. This inquiry is resolved by examining the relevant statute in order to ascertain what the Legislature intended. *Id.*; *In re Davis*, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of prosecution, “the ambiguity should be construed in favor of lenity.” *Adel*, 136 Wn.2d at 634-35. Absent a threshold showing of ambiguity, a court derives a statute’s meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The first step in determining legislative authorization for punishment is to review the statutes proscribing the offenses. In this case, defendant was convicted of four counts of assault in the second degree. CP 169, 174, 176, 178, RP 949-955. Two of these counts were against victim Kim Douglas, and two were against victim Jeanne Jackson. CP 169, 174, 176, 178, RP 949-955. Defendant argues that the unit of prosecution was dependant on the victim, and that the defendant should have been convicted of only one assault per victim. A plain reading of the statue shows that the unit of prosecution in this case was applied correctly.

Assault in the second degree is defined by RCW 9A.36.021. Under RCW 9A.36.021(c), a person commits second degree assault when,

“under circumstances not amounting to assault in the first degree,” he “assaults another with a deadly weapon”. In *State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004), this court examined assault in the second degree in terms of a unit of prosecution. This court found, “assaulting another with a deadly weapon comprises the criminal activity measured by the ‘unit of prosecution.’” *Id.*

Under RCW 9A.36.021(a), a person commits second degree assault when “under circumstances not amounting to assault in the first degree,” he “intentionally assaults another and thereby recklessly inflicts substantial bodily harm”. Based on the plain reading of the statute, as well as the analysis above, intentionally assaulting another and recklessly inflicting substantial bodily harm constitutes a unit of prosecution.

a. Defendant committed two different assaults on Kim Douglas.

Defendant committed two separate and distinct assaults against Kim Douglas. The first assault occurred when defendant recklessly inflicted bodily harm against Ms. Douglas when he punched her repeatedly, choked her and smashed her into a wall. RP 145-50, 228-9. These actions constitute one unit of prosecution under the statute. Defendant then left the bedroom where Ms. Douglas was bleeding profusely from the beating she has received at the hands of defendant, and went to get his “weapon of choice”: a hammer. RP 152-3, 236-8, 261, 405, 749, 756. Defendant returned to the bedroom, and approached the

bed with the hammer above his head in a striking position while Ms. Douglas lay on the bed. RP 160-2, 238-9, 278, 767, 776. This assault with the deadly weapon constitutes a separate unit of prosecution based on the statute and case law. The hammer is a different mechanism of injury. RP 446. The jury was asked to find both courses of conduct and they returned guilty verdicts on each. Different facts were used to support each assault charge, and one count did not necessarily prove the other count. Based on the statute and case law, the defendant committed two different assaults on Ms. Douglas.

b. Defendant committed two different assaults against Jeanne Jackson.

Defendant committed two separate assaults on Ms. Jackson. The first assault occurred when defendant recklessly inflicted bodily harm against Ms. Jackson. Ms. Jackson was trying to protect her daughter and was pushed into the doorjamb when defendant savagely punched Ms. Douglas. RP 228. In addition, defendant repeatedly punched Ms. Jackson as she tried to shield Ms. Douglas from defendant. RP 150, 233-4, 276. These actions constitute one unit of prosecution under the statute. The second assault occurred when the defendant came back with the hammer. RP 152-3, 237-8, 405, 749. Ms. Jackson was still on the bed trying to shield her daughter. RP 237, 239. One or both of them was pleading with defendant not to hurt them. RP 239, 480, 554. Defendant instead continued to advance toward the bed with the hammer above his head. RP

160-2, 238-9, 278, 767, 776. Defendant went so far as to put his knee on the bed with the hammer still above his head. RP 162, 240-3, 746. This assault with the deadly weapon constitutes a separate unit of prosecution based on the statute and case law. Different facts were used to support each assault charge, and one count did not necessarily prove the other count. The jury returned guilty verdicts on each separate course of conduct. Based on the statute and case law, the defendant committed two different assaults on Ms. Jackson.

2. THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT'S CRIMINAL ACTS WERE NOT PART OF THE SAME CRIMINAL CONDUCT BECAUSE EACH ASSAULT WAS A SEPARATE AND DISTINCT ACT.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether

two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000).

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. To find the objective intent, the courts should begin with the intent element of the crimes charged. See *Flake*, 76 Wn. App. at 180; *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *Dunaway*, 109 Wn.2d at 215.

The Supreme Court of Washington has held that objective intent is "measured by determining whether one crime furthered another." *Lessley*, 118 Wn.2d at 778. Defendant does not argue that he committed the first assault in order to commit the second, only that the motivation behind both assaults was the same. Defendant's motivation, however, is irrelevant, and the trial court should not attempt to speculate as to what was going on inside defendant's head at the time of the crimes.

Defendant's actions constitute separate and distinct criminal conduct. In *State v. Grantham*, 84 Wn. App. 854, 932 P.3d 657 (1997). Grantham was convicted of two counts of second degree rape. After

Grantham and his victim attended a party together, he took her to an apartment and tried to kiss her, but she resisted and asked to go home. *Id.* at 856. Grantham slapped his victim, called her names, forcibly removed her clothes, and repeatedly slammed her head into the wall. *Id.* He then forced his victim to her knees facing into the corner of the room and anally raped her. *Id.*

After Grantham withdrew his penis from his victim's anus, she remained crouched in the corner. *Id.* Grantham began kicking her and telling her to get up and turn around. *Id.* When she still did not comply, Grantham forced her to turn around by grabbing her face and chin. *Id.* He demanded his victim perform oral sex on him and when she kept her mouth closed, he slammed her head against the wall and forced her to comply. *Id.*

The trial court found Grantham's two convictions were separate and distinct criminal conduct. *Id.* at 857. In addressing the issue of whether the two counts were same criminal conduct, the reviewing court noted that while the crime occurred at the same place and against the same victim, the two crimes were committed "not simultaneously, although relatively close in time." *Id.* at 858. The court framed the critical issues as:

the question is whether the combined evidence of a gap in time between the two rapes and the activities and communications that took place during that gap in time, and the different methods of committing the two rapes, is

sufficient to support a finding that the crimes did not occur at the same time and that Grantham formed a new criminal intent when he committed the second rape.

*Id.* The court also mentioned that it was important to consider the impact of repeated sexual penetrations on the victim:

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, -- an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

*Id.* at 861 (quoting *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979)). A period of time between assaults, therefore, not only defeats the "same time" prong of the same criminal conduct test, it also defeats the "same objective intent" prong, because:

If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment and he must be treated as accepting the risk whether he in fact knew of it or not.

*Grantham*, 84 Wn. App. at 861 (again quoting *Harrell*, 88 Wis.2d at 466).

The court noted Grantham finished one act of rape before committing the other, that he had the presence of mind between rapes to threaten his victim not to tell, and that he used new physical force to gain

the victim's compliance a second time. *Grantham*, 84 Wn. App. at 859. That evidence was sufficient to establish that Grantham "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Id.* Grantham "chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous." *Id.* Thus, the trial court properly concluded the crimes were not same criminal conduct because they did not occur at the same time and did not involve the same objective intent. *Id.*, at 661.

In the instant case, the assault's committed by defendant were separate and distinct criminal acts. First, Ms. Douglas and Ms. Jackson are two separate victims. Second, one assault did not further the other. Defendant did not have to beat Ms. Douglas in order to assault her with the hammer. Similarly, defendant did not have to hit Ms. Jackson in order to assault her with the hammer. Defendant instead quit using his hands to inflict injury on his two victims, left the room and returned with a weapon to commit a different assault. RP 152-3, 236-8, 261, 405, 794, 756.

Defendant's actions were similar to those of Grantham's except he committed assaults instead of rapes. Defendant did not commit one continuous assault, but sequential assaults. In addition to assaulting two distinct victims, defendant committed separate and distinct assaults as charged by the State, argued during trial, and found by the jury. His actions were essentially divided into two parts. He assaulted Ms. Douglas

when he first broke into the apartment and continued to assault Douglas and Jackson in the bedroom. RP 145-50, 234, 228-9, 276. He then changed tactics and announced that he was going to get his weapon of choice. RP 152, 236, 261, 756. When defendant left and returned with the hammer, he was at a fork in the road, but decided to return and commence new and separate assaults on both Douglas and Jackson with the hammer. RP 160-2, 238-9, 278, 767, 776. Those separate and distinct assaults were committed by a different method, charged, argued during trial, and found by the jury. Defendant could have left, but he chose to escalate his actions and commit additional assaults, this time with a deadly weapon. Each of the acts of assault for which defendant has now been convicted was a separate and distinct criminal act.

The trial court properly followed the standard set forth in case law. The trial court correctly determined defendant's objective intent in each crime and whether his multiple crimes were part of the same criminal conduct. RP 1001-2. Defendant's offender score was correctly calculated and his sentence should be affirmed.

3. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR IN THE CLOSING ARGUMENT DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v.*

*Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). 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)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

The State's argument in rebuttal closing was addressing the argument made by defense counsel in her closing argument. "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Russell*, 125 Wn.2d 24, 86; 882 P.2d 747 (1994), citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in

the argument and the instructions given to the jury. *Russell*, 125 Wn.2d at 85-6, citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

In the instant case, the State responded to defense counsel's repeated calls for justice. Defense counsel made arguments appealing to the notion of justice and insinuating that defendant was really taking responsibility for his actions. The defense started their closing argument by indicating that defendant apologized for assaulting the two victims. RP 872. She then went on to state, "justice and truth and a just verdict in this case is going to involve an assault of Kim Douglas and assault on Jeanne Jackson and harassment. Justice is not a shotgun approach, throw everything against the wall and see what sticks." RP 873. The defense also sought to minimize the conduct based on the police action. Defense indicated that this wasn't a serious crime because there was no money spent to investigate it and because the police didn't do any studies. RP 886, 896. The defense then ended their closing with:

"the State's not the only party that wants justice, Mr. Rorie apologizes and he wants justice and takes responsibility for what he did. And what he did is two counts of assault in the second degree and one count of harassment. No more, no less.

RP 902. The defense's statements repeatedly focused on the notion of justice and tried to curry favor with the jury by stating that defendant

apologized and took responsibility for his actions, despite the fact that defendant has not testified and there was no evidence of this.

Defense counsel also focused on the concept of doubt in her closing. Defense counsel incorrectly stated the law when she told the jury, “if you have a doubt about proof on an element you must find him not guilty.” RP 884. She went on to state, “a reasonable doubt is a moral certainty.” RP 884. In talking about an abiding belief, defense stated, “abiding belief is for you, so if you wake up in a year or 10 years or a month, you do so with a clear conscience. You feel you’ve done the right thing.” RP 884. Defense counsel also stated, “if any of you are thinking right now I wish there had been a video camera there so we would have known what happened, you have a reasonable doubt.” RP 885. Twice, defense counsel stated that if the jury had *any* doubts, they were to turn to the lesser crime. RP 894, 898.

In response to the repeated emphasis on doubt, the State responded by reminding the jury that a doubt is not the same as reasonable doubt.

“She told you that if you have a doubt you have a reasonable doubt. That’s not true. That’s not the law. She also said if you have a reason to doubt then you have a reasonable doubt. That’s not the law either. She also said if it’s not a moral certainty, if it’s not a moral certainty, then there’s reasonable doubt, that’s not the law either. No where in those jury instructions, no where in that law are you going to see—telling you you need to have a moral certainty to convict him of these crimes beyond a reasonable doubt.”

RP 925. The State then went through an analogy about pieces of the puzzle and reminded the jury that the standard was reasonable doubt and not a 100% certainty. RP 926. “Reasonable doubt is not an impossible standard, it’s not a moral certainty...” RP 927.

The State continued to respond to defense’s arguments and the repeated appeals for justice for defendant, by reminding the jury that both sides are entitled to a fair trial. RP 927. The State went on to state, “and to give him a break, to give him the benefit of the doubt that *the defense is asking for...*” RP 928. Defense counsel objected at this point arguing a misstatement of the law. But it’s clear from the State’s words that the prosecutor is directly referring to the defense counsel’s confusion between any doubt and reasonable doubt. Defense counsel asked the jury to find defendant not guilty based on a doubt, not on a reasonable doubt as the law states. The State’s argument was in clear response to the defense closing argument.

The State continues by emphasizing that giving defendant the “breaks” his counsel was asking for would be an “insult to the victims” and “an insult to the notice of justice.” RP 929. Defense counsel again objects as to burden shifting. RP 929. Again, the State is arguing in direct response to defense counsel’s repeated pleas for justice for defendant by

minimizing the crimes, declaring that defendant is really taking responsibility for his actions and by telling the jury that a doubt is sufficient to find defendant not guilty.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). The remarks by the State were in direct response to defense counsel's appeals for justice for defendant and misstatements of the law. However, if this court finds they were improper, defendant cannot show prejudice from the statements. Defendant did not ask for a curative instruction. The court could have given an instruction that the prosecutor's statement was to be stricken but such an instruction was not requested by defense so reversal is not required. However, the trial court did instruct the jury that they were to follow the law. RP 929. The jury instructions in this case gave the jury the correct definition of reasonable doubt. CP 86-155 (Instruction 2). When a court gives an instruction to the jury, the jury is presumed to follow the instruction. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173

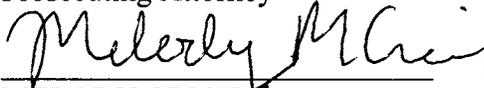
(1976). It is presumed that the jury followed this instruction. Any prejudice flowing from the prosecutor's argument was eliminated by this instruction.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm defendant's conviction and sentence.

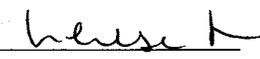
DATED: July 16, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
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Deputy Prosecuting Attorney  
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Certificate of Service:

The undersigned certifies that on this day she delivered <sup>by U.S. mail or</sup> 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.

7.16.08   
Date Signature

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