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NO. 37677-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY T. FLOWERS,

Appellant.

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

The Honorable James Orlando, Judge
The Honorable Sergio Armijo, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's exclusion of evidence relevant to a key prosecution witness's motive to lie violated appellant's constitutional right of confrontation.

2. The trial court failed to count crimes that encompassed the same criminal conduct as a single offense in calculating appellant's offender score.

3. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with assault, unlawful possession of a firearm, malicious mischief, and intimidating a witness. There was evidence that the two alleged victims were arguing at the time of the incident and one was crying hysterically before appellant became involved. Although the defense theory was that she was actually assaulted by the other alleged victim, the court excluded evidence that she had previously said she was frightened of him because of his abuse. Did this exclusion of evidence relevant to the key prosecution witness's motive to lie violate appellant's constitutional right of confrontation?

2. Two of the assault counts were based on testimony that appellant hit the alleged victim in the face with a fist, then hit her in the

back of the head with a gun, warning her not to call the police. Where the assaults were committed in rapid succession during the same brief encounter for the same purpose, does the court's failure to treat them as the same criminal conduct require remand for resentencing?

3. One count of unlawful possession of a firearm was based on an officer's testimony that he saw someone he believed was appellant drop a gun. The subject was not apprehended, and no one corroborated the officer's testimony that it was appellant. The prosecutor argued in closing that in order to acquit, the jury had to find that the officer was lying. Where there is a substantial likelihood this flagrant prosecutorial misconduct affected the verdict, was appellant denied a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Jerry Flowers by amended information with three counts of second degree assault, second degree malicious mischief, two counts of second degree unlawful possession of a firearm, and intimidating a witness. CP 12-15; RCW 9A.36.021; RCW 9A.48.080; RCW 9.41.040; RCW 9A.762.110. The information included firearm allegations on five of the counts. CP 12-15.

The case proceeded to jury trial before the Honorable James R. Orlando. The jury returned guilty verdicts on all but the second firearm possession count, being unable to reach a verdict on that charge. CP 62-68. The court imposed concurrent standard range sentences and consecutive firearm enhancements totaling 222 months of confinement. CP 80-81. A retrial on the second firearm possession count was held before the Honorable Sergio Armijo. The jury returned a guilty verdict, and the court imposed a standard range sentence of 33 months, to run consecutively to the sentences imposed on the other six counts in the amended information. CP 117, 127.

Flowers filed timely notices of appeal of each judgment and sentence. CP 119, 136. This Court consolidated the appeals.

2. Substantive Facts

a. **June 25, 2007**

On June 25, 2007, Brian Lehr and Geneva Runyan returned home around 6:00 p.m. to discover that someone had vandalized Runyan's car. 2RP¹ 178. A neighbor told them that she had seen two boys who lived at their apartment complex, Brandon and Austin Murphy, break into the

¹ The Verbatim Report of Proceedings is contained in seven consecutively-paginated volumes, designated as follows: 1RP—2/19, 25-26/08; 2RP—2/27-28/08; 3RP—3/3-5, 26/08; 4RP—4/9/08; 5RP—4/10/08; 6RP—4/14/08; 7RP—5/2/08.

vehicle. 2RP 179. Lehr and Runyan saw the boys and some others in the alley behind their apartment and confronted them. 2RP 179, 288. That confrontation resulted in the charges against Jerry Flowers. CP 12-15. The witnesses to the confrontation gave inconsistent description of the circumstances.

Runyan testified that Lehr was angry, screaming, and cussing when they went to the alley to confront the boys. 2RP 207. Brandon and Austin denied breaking into Runyan's car, and Lehr and Runyan went back upstairs to their apartment. 2RP 205-07. At that point, Runyan changed her mind about confronting the boys further, and she and Lehr argued about that. 2RP 180, 206. Lehr would not listen to her, and she was upset and crying. 2RP 180.

Runyan and Lehr then went back down to the alley to confront the boys again. 2RP 211. Brandon and Austin were in the back seat of a vehicle, and Flowers was in the front. Lehr did not have a chance to say anything, because Flowers stepped out of the car. 2RP 181. Runyan testified that Lehr then told her to go upstairs, which she did, but she could still see what was happening. 2RP 182.

According to Runyan, Flowers walked toward Lehr, telling him to leave it alone, while Lehr walked backward to the street. 2RP 186. She said they were fighting, and Flowers was holding a gun for a short time,

although she did not see him take it out or put it away. 2RP 187. They moved to the middle of the street, with Flowers, Brandon and Austin circling Lehr. 2RP 187-88. Brandon hit Lehr in the back of the head, and Lehr jumped over a fence into a neighbor's yard. 2RP 188, 232-33. Runyan did not see anyone else go over the fence. 2RP 188, 217.

Runyan said she ran down the stairs, thinking she could stop the fight. 2RP 188. Flowers was standing by Lehr's truck, and she saw him pick up a brick and throw it through the windshield. 2RP 189. Runyan testified that Flowers then came over to her, grabbed her hair, and said he would kill her and her daughter if she called the police. 2RP 190, 192. He hit her in the face with a fist, then hit her with the gun twice in the back of the head. 2RP 190-91.

Lehr's description was somewhat different. He testified that Runyan did not want him to confront Brandon and Austin about the vandalism until they determined if anything was missing from the car, and she tried to stop him from going downstairs. 2RP 269. Lehr testified that Runyan was not crying and was only upset because her car had been broken into. 2RP 289. He ignored her and went to the alley to ask the boys if they had seen anyone in Runyan's car. 2RP 268. They shook their heads no, and Flowers asked if he was accusing them. Lehr said he did not want any problems, but Brandon, Austin, and Flowers came at him

aggressively, so he backed up. 2RP 269. At first Lehr testified that Brandon, Austin, and Flowers circled him and started to hit him. 2RP 272. He later admitted that only Brandon had hit him. 2RP 291. Lehr said Flowers then pulled a gun out and pointed it at him, and he ran off and jumped over a fence. 2RP 273. No one chased after him. 2RP 275.

Lehr pounded on a neighbor's door, but no one answered. He then remembered he had his cell phone with him, and he called 911. 2RP 276. While he was on the phone, Lehr saw Flowers break the front and side windows of his truck. 2RP 278. According to Lehr, when Runyan came downstairs, Flowers grabbed her by the hair, hit her once with the gun, then pointed it to her face. He hit her with the gun again and then took off running. 2RP 279. Lehr never saw Flowers hit Runyan with a closed fist. 2RP 295.

Glenda Wheeler, a tenant in the apartment complex, testified that she heard Runyan crying hysterically and looked out her window. 2RP 123. She saw Runyan near her apartment, and she saw Lehr and Flowers come from the back alley. 2RP 125. She could tell they were arguing, but she never saw Flowers strike Lehr. 2RP 142. Unlike Runyan and Lehr, Wheeler testified that she had a clear view of Flowers's hands, and she never saw him holding anything. 2RP 141-42.

Lehr took off running and jumped over a fence into a neighbor's yard, with Flowers following. Wheeler said she lost sight of them when they ran to the side of the house, but she heard some scuffling. 2RP 125-26. Wheeler testified that she heard Lehr bang on the neighbor's door yelling for help. A woman in the house then handed him a phone, and Lehr called the police. 2RP 127.

According to Wheeler, Runyan went downstairs and stood by a vehicle. Flowers then returned to the parking lot and broke the windows in Lehr's truck with a tire iron and a cement block. 2RP 127-28. After that, Wheeler saw Flowers approach Runyan and grab her hair with his left hand. She heard him say, "Don't you say anything about me." 2RP 129. Although she saw some motion with Flowers's right hand, she could not tell what he was doing, and she did not see him strike Runyan. 2RP 129.

While Lehr had testified that he knew Flowers's friend, Ryan Dowell, but did not see him that day, both the defense witnesses testified that he was present and involved in the confrontation. 2RP 270. Flowers's girlfriend, Lisa Bunta, testified that she had gone to the apartment complex that day with Flowers, Brandon, Dowell, and Amanda Berry. 3RP 310. They parked in the alley behind the apartments, and Austin came outside to join them. 3RP 325-26. Lehr came downstairs

and asked Brandon if he and his brother had broken into their car. 3RP 313. Runyan came downstairs as well and yelled at the boys until Lehr told her to go back upstairs. 3RP 314, 327. When Brandon and Austin denied having anything to do with the vandalism, Dowell and Flowers told Lehr to talk to the boys' parents. 3RP 341. Brandon, Austin, and Lehr then headed around the corner. 3RP 314, 316. Bunta heard a conversation between Lehr and Brandon which started calmly at first but ended with Lehr yelling and cussing. 3RP 315. Flowers was not part of the argument. 3RP 316.

Bunta did not walk to the front of the apartment complex. Instead, she walked back and forth between the car and the breezeway. 3RP 333-35. She could see what was happening in front of the apartments when she was in the breezeway. 3RP 317-18. She saw Lehr jump over the fence and yell that he was going to call the police. 3RP 318-19. Bunta testified that if Flowers struck Runyan or damaged Lehr's truck, she did not see it. 3RP 337. Further, Bunta was with Flowers the entire day, and she did not see him with a gun. 3RP 319-20.

Finally, Ryan Dowell described the incident. He testified that he drove Flowers, Bunta, Berry, and Brandon to the apartment complex to drop Brandon off, and Austin came outside when they parked in the alley. 3RP 352, 354. Lehr approached and accused Brandon and Austin of

breaking into Runyan's car. 3RP 355. When the boys denied the accusations, Runyan came around the corner screaming at them and calling them thugs. Lehr told her to go back upstairs. 3RP 356-57.

When Lehr insisted that Brandon and Austin owed him money, Dowell told him to go talk to the boys' parents. Lehr, Brandon, and Austin then walked through the breezeway toward the front of the building. 3RP 358-59. Dowell and Flowers heard Lehr yelling at the boys, and they ran around the corner to see what was happening. 3RP 360-61.

Austin told Runyan and Lehr that he had been with a group of people earlier in the day who broke into Runyan's car. At that point Runyan told Lehr to forget about it. Lehr swore at Runyan, saying she had him arguing with these guys for nothing. He then he turned and tried to swing at Brandon. 3RP 366. Dowell stepped between them and pushed Lehr back, and Flowers pushed Brandon out of the way. 3RP 367. Dowell yelled at Lehr, then walked away with Brandon, and Flowers picked up a rock and threw it through the window of Lehr's truck. 3RP 367.

Lehr had started walking upstairs, yelling at Runyan, when he heard the crash. He ran back downstairs and across the street, saying he was calling the police. 3RP 367-68. Dowell and Flowers went back to

Dowell's car and drove away. 3RP 369. Dowell testified that he never saw Flowers assault Runyan or point a gun at anyone. 3RP 370.

Paramedics and police responded to Lehr's 911 call. 1RP 36. Runyan reported that she had been hit in the back of the head with a pistol and punched in the face with a closed fist. 1RP 37. She was scared and crying, saying that Flowers had assaulted her and threatened her and her family using a firearm. 1RP 38, 51-52. Runyan was taken to the hospital. She complained of facial pain and neck tenderness. There was an abrasion to her left eyebrow, and her nose was broken. 2RP 107-08.

Although Lehr was in the parking lot, he did not approach when Runyan was being interviewed by police or treated by the paramedics. 1RP 39-40, 59, 63. Lehr spoke to police after Runyan was moved to an ambulance. 2RP 283. While both Runyan and Lehr reported that Runyan had been assaulted with a firearm, Lehr said Runyan was struck in the face with a gun, but Runyan did not. 1RP 67, 69. A neighbor who had witnessed the confrontation told police he did not see a firearm. 1RP 61.

The parties stipulated that Flowers had been adjudicated on a felony matter and was not permitted to possess a firearm. 2RP 298. The court also permitted Runyan to testify, over defense objection, that she had known Flowers for a year and a half and he had a gun every time she saw him. 2RP 169-70, 176-77.

In closing argument, defense counsel pointed out that none of the witnesses' stories matched, arguing that the discrepancies provided reasonable doubt. 3RP 427. Counsel noted that Runyan was seen to be crying hysterically before the incident happened, suggesting that something happened between Runyan and Lehr and that Lehr was the one who assaulted Runyan. 3RP 431. The fact that Lehr kept his distance from Runyan while she was in the parking lot, rather than coming over and trying to help, also suggested he was at fault. 3RP 432-33.

b. July 2, 2007

On July 2, 2007, Tacoma Police Officer Christopher Martin was on patrol when he spotted three young men at the end of an alley, about 50 feet away. 5RP 507-08. He had seen photographs of Flowers at the beginning of his shift, and he believed one of the men was Flowers, so he drove into the alley to make contact. 5RP 507-08. He stopped his car in front of the three men, but when he started to get out, they ran away. 5RP 509. Martin followed them on foot. 5RP 510.

The subject Martin believed was Flowers separated from the other two, and Martin followed him. 5RP 513. From 30 to 40 feet away, Martin could see the man's hands in front of his waist as he was running. 5RP 513. Martin saw the man run up to a yard waste container, lift the lid,

remove a dark object from his waist area, and drop the object on the ground near the container. The man then continued running. 5RP 514.

About five seconds later, Martin reached the container. He found a black gun on the ground, and took it into evidence, believing it was the object he had seen the man drop. 5RP 515-16. Martin called for other units to assist with a search, but the man he had chased was not apprehended. 5RP 518-19. The gun was test-fired and found to be operational, but no fingerprints were recovered from the weapon. 5RP 535-36, 542.

Flowers was charged with unlawful possession of a firearm in relation to this incident. The jury hung on this count after the first trial but entered a guilty verdict after a retrial. CP 66, 117.

At the second trial, the defense counsel argued in closing that since Flowers was not apprehended on July 2, the jury could not be sure he was in possession of the gun Martin found. Although the officer had seen photographs of Flowers, the jury was not shown those photographs, and there was no corroboration of the officer's testimony that it was Flowers he had seen. Martin could have been mistaken. 6RP 565.

In response to defense counsel's argument, the prosecutor told the jury,

Defense stated that it would be a mistake, it wouldn't be lying. But it would be lying for the officer to write in his report that the defendant was who he saw without a doubt, and it would be lying for him to come up on the stand, take an oath, and state that without a doubt the person he saw was the defendant.

6RP 568. Defense counsel did not object to this argument.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED FLOWERS'S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE STATE'S KEY WITNESS ABOUT HER MOTIVE TO LIE

Prior to trial the prosecutor moved to exclude reference to domestic violence between Runyan and Lehr. 1RP 7. Defense counsel objected, explaining that twice in the past year Runyan had filed for protection orders against Lehr, although she did not follow through with obtaining the orders. 1RP 9. In April 2007, just two months before the incident in question, Runyan stated in her petition for a protection order that Lehr throws things, puts holes in the wall, is very abusive, grabs her and pushes her, and she is afraid he will do it again. 1RP 13. Counsel argued that the relationship between Lehr and Runyan was relevant because there was evidence that at the time the charged assaults occurred, Lehr and Runyan were screaming at each other. 1RP 13. Evidence that Runyan was afraid of Lehr because of his past assaultive behavior showed

Runyan's motive to fabricate, saying Flowers assaulted her rather than Lehr. 1RP 9.

The state responded that the evidence was irrelevant, because none of the witnesses saw Lehr assault Runyan. 1RP 10. Although there would be testimony that Lehr and Runyan were arguing, the prosecutor argued that this evidence did not sufficiently point to Lehr as another suspect to allow evidence of their past domestic violence. 1RP 10-11.

Defense counsel pointed out that the defense has a right to cross-examine the state's witnesses to reveal bias and prejudice and asked the court to allow the evidence on this basis. 1RP 12. The court ruled, however, that evidence of prior domestic violence between Lehr and Runyan would be relevant to impeach Runyan only if she testified they never fight, but unless she opened the door in that manner, the evidence would not come in. 1RP 13-14.

The Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). Confrontation is a fundamental "bedrock" protection in a criminal case. Crawford v. Washington, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L.

Ed. 2d 177 (2004). See Davis v. Alaska, 415 U.S. at 315. The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. Davis, 415 U.S. at 316; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. Davis, 415 U.S. 316; Darden, 145 Wn.2d at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question... As such, the right to confront must be zealously guarded.” Darden, 145 Wn.2d at 620 (citations omitted). Because cross examination is so integral to the adversarial process, “a criminal defendant is given extra latitude in cross examination to show motive or credibility, especially when the particular prosecution witness is essential to the State’s case.” State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

In Davis, the defense sought to question a key prosecution witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police to shift the blame from himself and identify a perpetrator. The trial court disallowed this cross-examination, on the basis of a statute protecting the secrecy of juvenile records. Davis, 415 U.S. at 311, 313-14. The Supreme Court reversed,

holding that the defendant's Sixth Amendment right of confrontation was violated when the court's ruling prevented him from establishing the factual record necessary to argue his bias theory. Davis, 415 U.S. at 318-20.

As the Supreme Court explained, “[c]ross examination is the principle means by which the believability of a witness and the truth of his testimony are tested.” Davis, 415 U.S. at 316. The jury was entitled to have the benefit of the defense theory so that it could make an informed judgment as to the weight to place on the key witness's testimony. Thus, defense counsel should have been permitted to expose the jury to facts from which it could determine the reliability of the witness. Davis, 415 U.S. at 318. The Court held that since the juvenile was a key witness for the state, and the excluded evidence would have raised serious questions as to his credibility, the defendant's right of confrontation was paramount to the state's interest in protecting the juvenile offender. Davis, 415 U.S. at 319.

In this case, as in Davis, the excluded evidence would have established that Runyan had a motive to lie. There was evidence that she and Lehr had been arguing right before the confrontation which led to these charges, and Runyan was crying hysterically. The defense theory was that it was Lehr, not Flowers, who assaulted Runyan but Runyan lied

about it because she was afraid of Lehr. Although Runyan denied that Lehr assaulted her, evidence that Runyan had previously said she was afraid of Lehr because of his abuse would establish a motive to lie in this instance. See State v. Cook, 131 Wn. App. 845, 853-54, 129 P.3d 834 (2006) (evidence of past domestic abuse admissible to help assess victim's motive to fabricate and fear of retaliation). Defense counsel should have been permitted to present the jury with this information through cross examination so that the jury could determine Runyan's reliability. Exclusion of this evidence denied Flowers the right of effective cross examination.

The state's objection that the past abuse was impermissible "other suspect" evidence was a red herring. There is no question that there was evidence which pointed to Lehr as the guilty party. See State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (Other suspect evidence must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party and establish a nexus between the other suspect and the crime), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). Several witnesses testified that Lehr and Runyan were arguing. Runyan tried to persuade Lehr not to confront the boys, but Lehr insisted on doing so, and Runyan was crying hysterically before Flowers ever became involved. Contrary to the state's suggestion,

the defense is not required to produce an eyewitness in order for other suspect evidence to be admitted. See State v. Clark, 78 Wn. App. 471, 474, 480, 898 P.2d 854 (sufficient nexus between other suspect and charged arson, even though his whereabouts at the time the fire started were unknown), review denied, 128 Wn.2d 1004 (1995).

A violation of the Confrontation Clause is subject to harmless error analysis and requires reversal unless the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 126 S. Ct. 2266 (2006). Because the court's erroneous ruling kept from the jury information regarding the motivation of a key prosecution witness to lie, the error cannot be considered harmless.

A similar situation existed in State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981). There, the defendant was charged with raping a tenant of the apartment building he managed. The defense offered to prove that the alleged victim threatened to sue the owner of the building as a result of the rape, when he refused to refund her security deposit after she moved out. The trial court excluded both testimony from the building owner and cross-examination of the alleged victim about the threat. Whyde, 30 Wn. App. at 164. The Court of Appeals reversed, holding that the possible financial motive for accusing the defendant was relevant to

the witness's credibility. Id. at 166. Although defense counsel addressed the potential that the victim fabricated the rape story for her financial benefit, the trial court's improper exclusion of evidence prevented the defense from making a factual record to support this contention. The court's error could therefore not be considered harmless. Id. at 167.

Here, as in Whyde, the court excluded evidence relevant to the key witness's credibility. Although defense counsel pursued the theory that Runyan was lying because she was afraid of Lehr and argued in closing that Lehr assaulted Runyan, that theory and argument lacked teeth because of the unwarranted restriction on cross examination. Given the inconsistent descriptions of the incident leading to the charges in this case, the state cannot prove beyond a reasonable doubt that the jury would have convicted Flowers if it had known of Runyan's motive to lie. The court's error was not harmless, and reversal is required.

2. THE COURT'S FAILURE TO RECOGNIZE THAT THE TWO ASSAULTS ENCOMPASSED THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING.

Under the Sentencing Reform Act, multiple current offenses are generally counted separately in determining the offender score. If the sentencing court finds that two or more offenses encompass the same criminal conduct, however, those offenses are counted as a single crime.

RCW 9.94A.589(1)(a). Crimes encompass the same criminal conduct if they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” Id. While the sentencing court has discretion to determine whether offenses encompass the same criminal conduct, an appellate court must reverse a decision that is manifestly unreasonable or based on untenable grounds. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

At the sentencing hearing following the first trial in this case, defense counsel argued that the two counts of second degree assault involving Runyan occurred at the same time and place and involved the same victim and same intent. Counsel asked the court to “run those counts concurrent as the same course of conduct.” 3RP 471. Counsel cited to a case² in which this Court analyzed the same criminal conduct provision of RCW 9.94A.589(1)(a). Although counsel did not use the phrase “same criminal conduct,” it is clear from the discussion which followed that the parties and court were addressing that provision of the statute.

The prosecutor responded that the two offenses involved different intents, because the first count was based on Flowers punching Runyan in the face, while the second count was based on causing reasonable apprehension and fear by pointing a gun at her. 3RP 471-72. Defense

² State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007).

counsel argued that the fear related more to the intimidating a witness charge and suggested the jury erred when it found two counts of assault. 3RP 472-73.

The court did not believe the two assaults constituted the same course of conduct, because they were done for different purposes. The first assault was to cause physical injury, while the second assault was to make Runyan believe she was at risk of being shot. 3RP 473. The court stated that the jury was told in closing arguments and in the instructions what the specific alleged assaults were, it made those separate findings, and the court would not treat the offenses as the same. 3RP 473. The court's decision was manifestly unreasonable and based on untenable grounds, and it must be reversed.

First, the prosecutor never argued at trial that one count of assault was based on the allegation that Flowers hit Runyan with a fist while the other was based on the allegation that he pointed a gun at her. Rather, as to the counts involving Runyan, the prosecutor told the jury,

The things that he did, these are the crimes that he's been charged with: Assault in the second degree, for breaking Geneva's nose; assault in the second degree, for striking Geneva with a gun; intimidating a witness for putting a gun to Geneva's forehead and threatening to kill [her daughter] if she called the police.

3RP 407. The prosecutor further argued,

Assault in the second degree. Striking Geneva with a gun. That's a separate count. And the reason it's a separate count is because the State has to prove that he assaulted her by touching her in a harmful or offensive manner, and that he did so with a firearm.

We have one count for the broken nose and we have one count for the defendant striking with the firearm.

3RP 409.³

Next, the jury was never instructed that the assault with a deadly weapon charge was based on Flowers's creating a reasonable apprehension of fear in Runyan. In fact, the jury instructions were consistent with the prosecutor's argument. The jury was instructed that to convict Flowers on Count I it had to find he assaulted Runyan with a deadly weapon and to convict him on Count II it had to find he intentionally assaulted Runyan and thereby recklessly inflicted substantial bodily harm. CP 39-40. Using the definition of assault provided, the jury could convict Flowers of assault with a deadly weapon if it found he hit Runyan with the gun. CP 32, 38. The jury could also convict if it found Flowers used the gun to frighten Runyan, but contrary to the court's understanding at sentencing, no instruction was given specifying that means of committing the offense, and the prosecutor's argument specifically refuted such a finding.

³ By contrast, the prosecutor argued that Flowers was guilty of assaulting Lehr with a deadly weapon even though he did not strike him with the gun, because he created a reasonable apprehension of fear in Lehr by pointing the gun at him. 3RP 410-11.

The court's basis for determining that the two counts of assault did not encompass the same criminal conduct is not supported by the record and is therefore untenable. What the record does show is that the offenses occurred at the same time and place and involved the same victim and the same intent and therefore encompassed the same criminal conduct.

Offenses are to be treated as a single crime when "one criminal event is 'intimately related or connected to' the other." State v. Adame, 56 Wn. App. 803, 810, 785 P.2d 1144 (quoting State v. Dunaway, 109 Wn.2d 207, 214, 743 P.2d 1237 (1987)), review denied, 114 Wn.2d 1030 (1990). The only element disputed at sentencing was intent. "The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

The fact that separate crimes are committed simultaneously or in rapid succession is one indication that the objective criminal intent did not change from one crime to the next. Thus, in Tili, the court held three rapes committed against the same victim in quick succession were the same criminal conduct. The court explained,

Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame--approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it

unlikely that Tili formed an independent criminal intent between each separate penetration.

139 Wn.2d at 124.

Here, according to Runyan, Flowers committed the two assaults in rapid succession during the same brief encounter, for the same purpose of inflicting physical pain to fortify his threat. 2RP 190-92. The two assaults were intimately related, there was no substantial change in the nature of the criminal objective, and, viewed objectively, both furthered the crime of intimidating a witness. Since the crimes involved the same time, place, victim, and intent, the court abused its discretion in finding they did not encompass the same criminal conduct, and remand for resentencing is required. See Tili, 139 Wn.2d at 123-24.

3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED FLOWERS A FAIR TRIAL.

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. “It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is

supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. 1, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor in this case committed misconduct by arguing in rebuttal that in order to acquit Flowers, the jury had to find that Officer Martin was lying. It is flagrant misconduct for a prosecutor to argue that to acquit a defendant, the jury must find that the state's witnesses are either lying or mistaken. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), review denied, 118 Wn.2d 1007 (1991).

In Fleming, the prosecutor argued in closing that to find the defendants not guilty, the jury would need to find either that the state's witness had lied or that she was confused. Fleming, 83, Wn. App. at 213. The Court of Appeals pointed out that such arguments have long been recognized as misconduct because they misstate the law and misrepresent both the role of the jury and the burden of proof. Id. The jury would not have to find that the state's witness was lying or mistaken in order to acquit. Rather, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. If the jury was unsure whether she was telling the truth or whether she was able to recall events accurately, acquittal was required. In neither instance would the jury have to find that the witness was lying or mistaken. Id.

The prosecutor made a similar argument in this case. Defense counsel had argued in closing that there was reasonable doubt as to the allegations, because Officer Martin's identification of Flowers might have been mistaken. 6RP 565. The prosecutor responded,

Defense stated that it would be a mistake, it wouldn't be lying. But it would be lying for the officer to write in his report that the defendant was who he saw without a doubt, and it would be lying for him to come up on the stand, take an oath, and state that without a doubt the person he saw was the defendant.

6RP 568. This argument was intended to mislead the jury into thinking that in order to acquit Flowers, it had to find that Officer Martin was lying,

when, in fact, the jury was required to acquit unless it had an abiding conviction of the truth of the state's evidence.

As defense counsel pointed out, while Officer Martin testified he was able to identify Flowers because he had seen photographs of him that morning, the jury had not been shown those photographs. 6RP 565. If the jury was unsure about the accuracy of Martin's identification, given that the person Martin had seen drop the gun was not apprehended and the jury did not see the photographs on which the identification was based, then the jury would be required to acquit. Contrary to the state's argument, acquittal did not require the jury to conclude Martin was lying. The prosecutor's argument was therefore improper. See Fleming, 83 Wn. App. at 213.

Defense counsel's failure to object to the prosecutor's misconduct does not preclude review. Reversal is required, notwithstanding the lack of defense objection, if the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507. When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor's comments affected the verdict. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); Belgarde, 110 Wn.2d at 508. The

prosecutor's misconduct cannot be deemed harmless unless the record shows there would have been a conviction regardless of the misconduct. Charlton, 90 Wn.2d at 664.

A prosecutor is presumed to be aware of existing case law governing prosecutorial conduct, and a violation of such law is considered flagrant and ill-intentioned. Charlton, 90 Wn.2d at 661, 663-64; Fleming, 83 Wn. App. at 214. Because the prosecutor here employed tactics long held to be improper, the prosecutor's misconduct was flagrant and ill-intentioned. Accordingly, Flowers's challenge may be reviewed for the first time on appeal.

Moreover, the prejudice resulting from the misconduct could not have been remedied by a curative instruction. The state's case on this count rested solely on the accuracy of Officer Martin's identification, and the defense relied on the state's burden of proving its case beyond a reasonable doubt. The prosecutor's improper comments shifted jury's focus away from that burden, instead leading them to believe it could only acquit Flowers if Martin was lying. "[P]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215 (citation omitted).

The prosecutor's improper trial tactics presented the jury with a distorted view of its function, and it is unreasonable to believe the jurors would be able to ignore the prosecutor's misconduct, even given a curative instruction. See, e.g., State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell."), review denied, 118 Wn.2d 1013 (1992). There is a substantial likelihood the prosecutor's improper closing argument affected the jury's verdict and thus denied Flowers a fair trial. The Court should reverse and remand for a new trial.

D. CONCLUSION

By precluding cross examination of Runyan regarding her motive to lie, the trial court violated Flowers's right of confrontation, and reversal is required. Moreover, the court's failure to count the two assaults involving Runyan as a single offense requires remand for resentencing. In addition, prosecutorial misconduct at the second trial requires reversal of that count.

DATED this 6th day of October, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

State v. Jerry T. Flowers, Cause No. 37677-6-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
October 6, 2008

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