

NO. 37677-6

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JERRY T. FLOWERS, APPELLANT

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

No. 07-1-03739-1

BRIEF OF RESPONDENT

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

1. Whether the trial court erred when it limited the cross examination of Ms. Runyan so as not to include an alleged history of domestic violence between her and her boyfriend.
2. Whether defendant's two assault charges constitute the same criminal conduct when each was committed with a different intent.
3. Whether the prosecutor's statement regarding the testimony of an officer during closing arguments was improper and could not have been cured by an instruction.

B. STATEMENT OF THE CASE.

1. Procedure

On February 6, 2008, the Pierce County Prosecutor's Office charged JERRY THEODORE FLOWERS, hereinafter "defendant," by amended information with one count of first degree assault with a firearm enhancement, two counts of second degree assault with firearm enhancements, one count of second degree malicious mischief with a firearm enhancement, two counts of unlawful possession of a firearm in the second degree, and one count of intimidating a witness with a firearm enhancement. CP 12-15.

The case proceeded to trial on February 19, 2008, in front of the Honorable James R. Orlando. RP 1. The jury found the defendant guilty on all counts except one count of unlawful possession of a firearm to which they could not reach a unanimous verdict. RP 460-62; CP 62-68. The jury answered yes to all the special verdict forms. RP 460-62; CP 69-73. A sentencing hearing was held on March 26, 2008. RP 470. Defendant was sentenced to a total confinement of 162 months with 18 to 36 months of community custody to follow. CP 74-87; RP 474.

A retrial on the second count of unlawful firearm possession was held on April 9, 2008 in front of the Honorable Sergio Armijo. RP 482. The jury found defendant guilty on April 14, 2008. RP 570; CP 117. On May 2, 2008 defendant was sentenced to 33 months to run consecutive to his other counts. CP 120-132; RP 580. Defendant filed a timely notice of appeal. CP 136, 119.

2. Facts

a. June 25, 2007

On June 25, 2007, Geneva Runyan came home to the Centennial Apartments where a neighbor told Ms. Runyan her car had been vandalized and stereo stolen. RP 178, 201. The neighbor believed the vandals were two young boys from the neighborhood known as Bangs and Focus. RP 179. The boys', 12 and 14, real names are Brandon and Austin Murphy. RP 179. Ms. Runyan's boyfriend, Brian Lehr went to talk to the

boys who were down in the alley while Ms. Runyan was crying about the car. RP 179-80.

Defendant was sitting in the front seat of a car in the alley while Brandon and Austin were in the back. RP 181. Defendant got out of the car and Mr. Lehr told Ms. Runyan to go upstairs. RP 182. The two other boys got out of the car and when Mr. Lehr was close enough in the parking lot they circled him. RP 187. Brandon hit Mr. Lehr multiple times. RP 274. Mr. Lehr was backing up and telling defendant “nevermind, just leave it alone” as defendant pointed his gun at Mr. Lehr. RP 186, 275.

Mr. Lehr ran and jumped over a chain link fence as Ms. Runyan came down to the area in an effort to stop the argument. RP 189. Defendant ran to Mr. Lehr’s truck, reached into the back, grabbed a tire iron and threw it through the side window. RP 278. Next, he grabbed a cinder block and threw it at the front window of the truck. RP 278. Ms. Runyan approached defendant and he grabbed her by the hair saying he would kill her, and then hit Ms. Runyan on the left side of her face with his fist. RP 190. Defendant grabbed Ms. Runyan’s hair again, pulled her down to his waist and hit her in the back of her head twice with his gun. RP 190-91.

Once defendant was done beating Ms. Runyan, he threatened her. Defendant took his gun, pointed it at her, and twice told her that he would kill her daughter if she called the police. RP 192. Mr. Lehr had run to a

neighbor's and while banging on the door called 911 on his cell phone.
RP 276.

Officer Jacob Martin was dispatched to the Centennial Apartment complex around 6:20 p.m. where he was told a fight was occurring, possibly involving vandalism and a handgun. RP 47-48. While crying, Ms. Runyan told Officer Jacob Martin that defendant and two other men were trying to fight her boyfriend. RP 50. Officer Jacob Martin also testified that she said defendant had made threats against her and her family while assaulting her with the handgun. RP 50, 52. She gave Officer Jacob Martin a description of the vehicle she had seen defendant leave in. RP 62-64.

Officer Jacob Martin also spoke with Mr. Lehr who told him that the three men had used a tire iron and rock to smash the driver's window and front windshield of Mr. Lehr's truck. RP 54. Mr. Lehr also told Officer Jacob Martin that Ms. Runyan had been assaulted with a handgun. RP 69. Officer Jacob Martin spoke with a neighbor named Steven Stepro who confirmed Mr. Lehr and Ms. Runyan's account of events, but could not recall seeing a firearm. RP 55, 60-61, 119.

Ms. Runyan, crying and distressed, told paramedic Jacob Peery she was struck in the back of the head with a pistol and punched in the face with a closed fist. RP 37-38. Ms. Runyan was taken to the hospital where she was treated by physician assistant James Martin. RP 104, 193. She told Mr. Martin she had been hit and punched with a handgun and fists

and was experiencing pain on the left side of her nose and her face in general. RP 106-07. Mr. Martin also testified she had neck pain, a facial abrasion near her left eyebrow and a fracture in her nasal bone. RP 107. He testified she was tearful and worried about her family throughout the exam. RP 107-08.

Ms. Runyan said that she had known defendant for about a year and a half as he hung around the Centennial Apartments often. RP 174. Every time she saw him he carried a gun in his belt buckle and had shot it off in front of her. RP 176-77. At trial, Ms. Runyan identified Plaintiff's Exhibit 8 as the gun she saw defendant carry with him. RP 177-78. Ms. Runyan testified that the day after the incident she and her family had other people move them out of the apartment because they were in fear for their lives. RP 193-94. At trial, Ms. Runyan identified defendant as the man who assaulted and threatened her. RP 194.

Glenda Wheeler was a resident of the apartment complex and witnessed the events through her window with her boyfriend Mr. Steven Stepro. RP 122-26. Ms. Wheeler stated that she heard Ms. Runyan crying and looked out her window to see Ms. Runyan on the second floor crying hysterically. RP 122, 139. Ms. Wheeler testified she witnessed Mr. Lehr and defendant in an argument and running throughout the apartment complex after one another. RP 122-29, 139. She testified she saw defendant break the driver's window and windshield of Mr. Lehr's truck.

RP 128. Ms. Wheeler also testified to seeing defendant grab Ms. Runyan's hair and say "don't you say anything about me." RP 129.

Defendant's girlfriend, Lisa Bunta, testified during trial that she was in the car with defendant, Brandon, a man named Ryan, and his girlfriend Amanda during the incident. RP 312. Ms. Bunta stated that they were dropping Brandon off when Mr. Lehr and Brandon got into an argument in the parking lot. RP 314. They walked through a breezeway and were met by Austin coming out of his house. RP 315. She said that Mr. Lehr started the fight by trying to hit Brandon and after that, she left. RP 334. She testified she then saw Mr. Lehr run and jump over a fence. RP 316-17. She stated that she, defendant, Ryan, Ryan's girlfriend, and Brandon all left and went to Ryan's house. RP 339-40. Ms. Bunta stated she never saw defendant with a gun that day. RP 319.

A private investigator testified at trial that he spoke to Ms. Bunta. He stated that she told him that she had witnessed the whole incident and was pacing back and forth watching the whole time. RP 396-99. She also told him that she never saw her boyfriend break any of the windows on the truck or grab anyone's hair at any point. RP 400-01.

Ryan Dowell, a friend of defendant's, confirmed most of Ms. Bunta's account of events in his testimony. RP 347. He also stated he witnessed defendant throw the rock through the windows of Mr. Lehr's truck. RP 368. Ryan stated that he left the apartment building with his

girlfriend, defendant and Ms. Bunta only, not Brandon as Ms. Bunta stated. RP 382.

b. July 2, 2007

On July 2, 2007, Officer Christopher Martin was patrolling an area of Tacoma near the Centennial Apartments in his marked police car. RP 497-98, 511. Around 8:55 p.m. he saw defendant and two juveniles walking through an alley. RP 507-08, 510. Having remembered seeing a special bulletin about defendant sent out earlier that day, Officer C. Martin turned his car into the alley, stopped the vehicle and called for backup. RP 507-09. Officer C. Martin got out of the car and said something to defendant who was fiddling with something at his waist. RP 509. Defendant and the two other juveniles immediately took off running. RP 509. Officer C. Martin testified that he followed defendant on foot and yelled at him to stop. RP 511. Defendant continually reached at something near his waistband while running. RP 513-14. Officer C. Martin testified that he witnessed defendant stop at a garbage container at one point and lift the lid, trying to drop a black object inside, but it fell to the ground. RP 513-14. Officer C. Martin ran to the container and found a black semi-automatic handgun on the ground. RP 514.

After picking up the handgun and putting inside his cargo pant's pocket, Officer C. Martin continued to pursue defendant, eventually losing sight of him. RP 518. Although a canine dog was brought in to track

defendant, it was unsuccessful. RP 519. Later, Officer C. Martin determined the handgun was loaded. RP 516-17.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERROR IN LIMITING DEFENSE COUNSEL'S CROSS-EXAMINATION OF MS. RUNYAN BY NOT ALLOWING MENTION OF DOMESTIC VIOLENCE BETWEEN HER AND MR. LEHR.

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness' bias, prejudice, or interest. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Kilgore*, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Although a defendant is allowed to present evidence that someone else committed the charged crime, a proper foundation must be laid. *State v. Jones*, 26 Wn. App. 551, 555, 614 P.2d 190 (1980)(*citing State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933)). Establishing a proper foundation requires a sufficient nexus to the crime such as "a train of facts

or circumstances which tend clearly to point to someone other than the defendant as the guilty party.” *In re Stenson*, 142 Wn.2d 710, 751, 16 P.3d 1 (2001). Admission or refusal of such evidence is within the discretion of the court and is reviewed only for an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993).

In the present case, the court properly granted the State’s motion in limine to exclude inquiry during cross examination into any history of domestic violence or an abusive relationship between Ms. Runyan and Mr. Lehr. The court correctly reasoned that there was not a sufficient train of evidence to suggest that Mr. Lehr had committed the crime charged in this case. Although there was evidence that Ms. Runyan had in the past filed petitions for two restraining orders, neither resulted in an order from the court. RP 13. Furthermore, the defense did not have any witnesses that could testify that they saw Mr. Lehr hit Ms. Runyan, but instead could only testify that the two were arguing. RP 10. This minimal evidence does not result in an appropriate connection to the crime charged and therefore, the cross examination of Ms. Runyan was properly limited by the court.

Defendant’s comparison to *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), is founded upon an incorrect parallel. In *Davis*, the court held that a defendant’s Sixth Amendment rights of confrontation were violated when a key witness’ current state of juvenile

probation was excluded based on an Alaskan statute designed to uphold the secrecy of juvenile records. *Davis*, 415 U.S. at 315. The difference from the present case is in the relative connection of the evidence that was excluded to the crime charged. In *Davis*, there existed a formal record of the witness having a juvenile record and currently being on probation. *Davis*, 415 U.S. at 311. Being that this was a robbery case, the evidence of the witness being on probation established a sufficient nexus that could suggest the possibility that the witness was lying about committing the crime himself to protect himself with his probationary status. Because of this connection, the trial court should have allowed the evidence of the witness' probationary status to be presented to the jury.

However, in the present case, there was not a sufficient connection with the evidence to establish a foundation that Mr. Lehr hit Ms. Runyan. Unlike *Davis*, where there was a formal record that the witness was on probation, there was no evidence of a physical altercation between Mr. Lehr and Ms. Runyan on the day of the crime. RP 11-13. Without a sufficient connection of evidence to the crime charged, there is no reason to inquire into the relationship between Mr. Lehr and Ms. Runyan other than to paint the witnesses in a bad light. As such, although *Davis* was appropriately overturned because the probation status of the witness on the day of the crime established a sufficient connection to his motive to lie, here, there is no evidence on the day of the crime charged of a physical altercation between Ms. Runyan and Mr. Lehr thereby failing to create a

sufficient connection of Ms. Runyan's motive to lie to protect Mr. Lehr as defendant would like to suggest.

Defendant further improperly compares the present case to *State v. Whyde*, 30 Wn. App. 162, 632 P.2d 913 (1981). In *Whyde*, the court found the trial court erred when it limited the cross examination of a rape victim by not inquiring about alleged threats of suit. *Whyde*, 30 Wn. App. at 167. The defendant in that case was the manager of the victim's apartment building and the victim allegedly threatened to sue the owner of the building for liability related to the rape if he did not refund her security deposit. *Whyde*, 30 Wn. App. at 164. The court determined that it was an error to exclude this evidence as it was crucial to determining the credibility of the victim. *Whyde*, 30 Wn. App. at 167. But, unlike the present case, the alleged threat in *Whyde* occurred during the course of events following the crime. In the present case, the evidence the defendant is trying to bring in is unrelated to the actual events of the day as it involves the history of their relationship. There was no physical altercation between Ms. Runyan and Mr. Lehr on the day the charged crime occurred, and therefore, the exclusion of prior history of their relationship was proper.

If the court finds this limitation of cross examination was an error, it is subject to a harmless error analysis to determine if the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844, *affirmed*, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)

(citations omitted). Even if the court finds that the trial court erred in granting the motion and limiting cross examination of Ms. Runyan, the error is harmless as the defendant was able to adequately present his theory of the case regardless. By presenting evidence of Ms. Runyan's and Mr. Lehr's interactions that day, the defendant was able to present his theory to the jury and argue in closing that Mr. Lehr was the one who assaulted Ms. Runyan. Therefore, any error limiting the cross examination of Ms. Runyan to the events of that day was harmless as the defendant's theory of the case was adequately presented to the jury.

2. DEFENDANT'S TWO ASSAULTS DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT WHEN THE FIRST WAS COMMITTED WITH THE INTENT TO HARM AND THE SECOND WAS COMMITTED WITH THE INTENT TO INFLICT IN THE VICTIM A REASONABLE FEAR OF BEING SHOT.

Under RCW 9.94A.400(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. *State v. Lessley, supra*, 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).

In determining whether two offenses involve the same criminal intent, "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Garza-Villarreal*, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993)(quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). The analysis first calls for an objective viewing and comparison of each charge under the statutes, with a determination of whether the necessary intents are the same. *State v. Price*, 103 Wn. App. 845, 857, 14 P.3d 841 (2000). If the intents are the same, the facts must be objectively viewed to ascertain whether the necessary intents are the same with respect to each count. *Id.* When dealing with substantially sequential crimes, the inquiry can be resolved in part by determining whether one crime furthered another. *Id.* (citing *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)). One crime does not further the other if the first is completed independently of the second. See *State v. Lewis*, 115 Wn.2d 294, 797 P.2d 1141 (1990). Thus, even crimes with identical mental elements will not be considered the "same criminal conduct," if they were committed for different purposes. *State v. Haddock*, 141 Wn.2d 103, 110 3 P.3d 733 (2000).

In the present case, defendant was charged with two counts of second degree assault. CP 12-15. The first count, when defendant hit Ms. Runyan in the face, was charged under the portion of the statute that reads a person is guilty of second degree assault if he “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a). The second count, when defendant hit and threatened Ms. Runyan with the gun, was charged under the portion of the statute that reads a person is guilty of second degree assault if he “assaults another with a deadly weapon.” RCW 9A.36.021(1)(c).

In *State v. Lopez*, 142 Wn. App. 341, 174 P.3d 1216 (2007), the court considered whether these two offenses constituted the same criminal conduct. The court held that “the mens rea requirements are different for assault with a deadly weapon and assaulting another thereby recklessly inflicting substantial bodily harm.” *Lopez*, 142 Wn. App. at 352. Similarly, in the present case, defendant’s purpose in committing his two offenses varied for each thereby warranting a different count of second degree assault for each. Defendant’s purpose in the first count when he hit Ms. Runyan in the face and broke her nose was to inflict harm upon her. His purpose in the second count when he threatened and hit Ms. Runyan in the head with a gun was to inflict substantial fear in her or her daughter that he would kill her if she did not cooperate with his demands. The trial court agreed saying:

The second assault, while it may have been geared toward intimidation of a witness, was really done for a different purpose and that wasn't to cause physical injury to her necessarily, but to make her believe that she was at risk of being shot if she either went to the police and/or somehow harm would come to her daughter. I don't think that's the same course of conduct; I think they were done for different purposes. So I will find it is not the same course of conduct.

RP 473.

Furthermore, defendant's actions in assaulting Ms. Runyan constituted two separate and distinct crimes punishable as two counts of second degree assault. In *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), a rape case, the court distinguished the defendant's case from *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), where two actions were held as not constituting the same criminal conduct. The court in *Grantham* found that after completing an act of forced rape, the defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Grantham*, 84 Wn. App. at 859. Therefore, "[defendant] was able to form a new criminal intent before his second criminal act because his "crimes were sequential, not simultaneous or continuous." *Tili*, 139 Wn.2d 107 at 124 (citing *Grantham*, 84 Wn. App at 856-57, 859).

Similar to *Grantham*, defendant's two charges of assault in the present case were separated by a period of time at which defendant had the opportunity to cease his criminal activity. He initially hit Ms. Runyan in

the face with his fist when she first approached him. RP 190. Defendant grabbed Ms. Runyan by her hair and pulled her downward towards his waist. RP 190. Then defendant hit Ms. Runyan twice on the back of her head with his gun threatening that if she told anyone he would kill her daughter. RP 190-91. The period between defendant hitting Ms. Runyan in the face and threatening her with the gun was separated by an entire other set of actions in which defendant moved the position of Ms. Runyan. Similar to *Grantham*, it was then that defendant's first offense ended and he had the opportunity to stop his criminal actions. As such, defendant's actions were separate and appropriately charged as two counts of assault that do not constitute the same criminal conduct.

3. DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT THAT COULD NOT HAVE BEEN CURED BY AN INSTRUCTION TO THE JURY.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and his 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)). Before an appellate court reviews a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962);

State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they 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). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Dhaliwal*, 150 Wn.2d at 578, quoting *Pirtle*, 127 Wn.2d at 672; *accord Brown*, 132 Wn.2d at 561.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App. at 293-94. The absence of an objection by defense counsel “*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.” *State v. McKenzie*, 157 Wn. 2d 44, 53, 134 P.3d 221 (2006)(quoting *State v. Swan*, 114 Wn.2d 613,661, 790 P.2d 610(1990))(emphasis in original). 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.*

Allegedly improper comments are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). Remarks by the prosecutor, even if improper, should not be reversed if they were invited or provoked by defense counsel and are in reply to his or her acts or statements. *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

In the present case, defendant incorrectly contends that statements made by the prosecutor regarding Officer Martin’s testimony were improper. Responding to the defense counsel’s closing argument, the prosecutor stated:

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.

RP 568.

When put in context, it is clear that this argument is not an ultimatum given to the jury about the guilt of the defendant as defendant suggests. Rather, defense counsel had argued in his closing that Officer Martin

could have been mistaken in his testimony that he believed it was defendant who was running away from him. RP 565-66. The prosecutor's statement was merely a response to that argument in an effort to explain that if Officer Martin had any doubts about who he was chasing, he would not have gotten up on the witness stand and testified under oath it was the defendant. This is not the same as saying "that in order to acquit Flowers, the jury had to find that Officer Martin was lying." Brief of Appellant at 25. Furthermore, the fact that defense counsel chose not to object or request a curative instruction provides further support that the statements were within the appropriate context.

Defendant's analogy to *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), goes astray. In that case, at the beginning of the closing argument, the prosecutor stated:

for you [the jury] to find the defendants...not guilty of the crime...you would have to find either that [the witness] has lied about what occurred in that bedroom or that she was confused.

Fleming, at 213.

The court found that this statement shifted the burden of proof to the defendant obliging them to disprove the State's case because the jury would be "*required* to acquit *unless* it had an abiding conviction in the truth of [the witness'] testimony." *Id.* (emphasis in original). First, in the

present case, the prosecutor never makes the statement that in order to acquit, the jury must find Officer Martin was lying as the prosecutor in *Fleming* does. Second, the burden is not shifted on the defendant because the prosecutor is not telling the jury that they must believe Officer Martin or acquit; rather, the prosecutor is saying that Officer Martin believes what he saw and he would not get up on the stand and testify unless he was certain in his mind that it was the defendant he was chasing. This has nothing to do with the jury being required to believe Officer Martin is lying. It only has to do with Officer Martin's own beliefs about what occurred.

But even if the court finds the argument to be improper, any prejudice from the alleged misconduct could have been eliminated by a curative instruction that reminded the jurors that they are the sole judges of credibility as stated in the instructions they are given. Defendant's argument that this alleged misconduct is so egregious as to constitute reversal is meritless.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's sentence.

DATED: JANUARY 13, 2009.

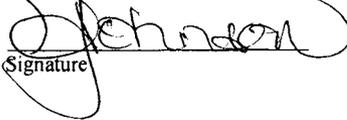
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Certificate of Service:

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.

1/13/09 
Date Signature

BY  IDENTITY
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COUNTY OF PIERCE